

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROB TURNER, AS HILLSBOROUGH)
COUNTY PROPERTY APPRAISER,)
)
Petitioner,)
)
and)
)
ROGER A. SUGGS, AS CLAY COUNTY)
PROPERTY APPRAISER, FLORIDA)
ASSOCIATION OF PROPERTY)
APPRAISERS, ET AL.,)
)
Intervenors,)
)
vs.)
)
DEPARTMENT OF REVENUE,)
)
Respondent,)
)
and)
)
FLORIDA UNTIED TAX MANAGERS)
ASSOCIATION (FUTMA) AND SARA E.)
CUCCHI,)
)
Intervenors.)
)
_____)

Case No. 11-0677RU

ED CRAPO, AS PROPERTY APPRAISER)	
OF ALACHUA COUNTY, FLORIDA,)	
ERVIN A. HIGGS, AS PROPERTY)	
APPRAISER OF MONROE COUNTY,)	
FLORIDA, ET AL.,)	
)	
Petitioners,)	
)	
vs.)	Case No. 11-1080RU
)	
LISA ECHEVERRI, EXECUTIVE)	
DIRECTOR OF THE FLORIDA)	
DEPARTMENT OF REVENUE,)	
)	
Respondent,)	
)	
and)	
)	
FLORIDA UNTIED TAX MANAGERS)	
ASSOCIATION (FUTMA) AND SARA E.)	
CUCCHI,)	
)	
Intervenors.)	
_____)	

SUMMARY FINAL ORDER

Pursuant to notice, an oral argument was held in this case on May 11, 2011, before Edward T. Bauer, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner Rob Turner:

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STATEMENT OF THE ISSUES

The issues in this case are: (1) whether portions of Florida Administrative Code Rules 12D-9.020 and 12D-9.025 constitute invalid exercises of delegated legislative authority; (2) whether sections of Modules Four and Six of the 2010 Value Adjustment Board Training are unpromulgated rules; and (3)

whether Property Tax Oversight Bulletin 11-01 is an unpromulgated rule.

PRELIMINARY STATEMENT

On February 9, 2011, Petitioner Rob Turner ("Turner"), as Hillsborough County Property Appraiser, filed a Petition with the Division of Administrative Hearings ("DOAH") pursuant to section 120.56, Florida Statutes. The Petition, which contains two counts, was assigned DOAH Case Number 11-0677RU and forwarded to the undersigned for further proceedings on February 10, 2011. In Count I of the Petition, Turner alleges that portions of Florida Administrative Code Rules 12D-9.020 and 12D-9.025 constitute invalid exercises of delegated legislative authority. Turner further contends, in Count II of the Petition, that portions of Modules Four and Six of the Department of Revenue's 2010 Value Adjustment Board Training material ("VAB Training") constitute agency statements defined as rules pursuant to section 120.52(16), Florida Statutes, but not adopted by rulemaking, contrary to section 120.54, Florida Statutes.

The undersigned subsequently held a telephone conference on February 14, 2011, during which the parties requested until March 1, 2011, to decide upon an appropriate date for a final hearing. On the same date, the undersigned entered an Order

setting a telephone conference for March 2, 2011, and directing the parties to file a status report by March 1, 2011.

The parties timely filed a status report on March 1, 2011, and a telephone conference was held the following day. During the conference, the parties agreed to a final hearing date of May 11, 2011, and requested leave to file memoranda of law prior to the hearing. In accordance with the parties' agreement during the telephone conference, the undersigned entered an Order Establishing Briefing Schedule on March 4, 2011, which authorized the parties to file memoranda of law on or before April 20, 2011, as well as reply memoranda no later than May 4, 2011.

On March 9, 2011, DOAH Case Number 11-1080RU, which was originally assigned to Administrative Law Judge Lawrence P. Stevenson, was transferred to the undersigned and consolidated with DOAH Case Number 11-0677RU. DOAH Case Number 11-1080RU involved a Petition filed pursuant to section 120.56, Florida Statutes, by Ed Crapo, as Alachua County Property Appraiser, Ervin A. Higgs, as Monroe County Property Appraiser, and Timothy "Pete" Smith, as Okaloosa County Property Appraiser ("Petitioners Crapo, Higgs, and Smith"), which challenges portions of Modules Four and Six of the VAB Training as unpromulgated rules.

The undersigned held a final pre-hearing telephone conference on April 12, 2011, during which the parties advised that no material facts were in dispute, the instant matter could be resolved by summary final order, and that the stipulated factual record would consist of several deposition transcripts and various documents. As such, the parties orally moved to modify the briefing schedule to the extent that motions for summary final order, and pleadings in opposition thereto, be filed on or before April 27, 2011. Finally, the parties requested, and the undersigned agreed, that the May 11, 2011, final hearing would be utilized for the presentation of oral argument.

On April 18, 2011, Petitioner Turner filed a Motion to Amend Petition, which the undersigned granted. Petitioner Turner filed an Amendment to Petition on April 21, 2011, which added a third count alleging that Property Tax Oversight Bulletin 11-01 ("PTO Bulletin 11-01") constitutes an unpromulgated rule.

Prior to the final hearing, the undersigned entered a series of orders that granted leave for various parties to intervene. Aligned with Petitioners as Intervenors are: Roger A. Suggs, as Clay County Property Appraiser ("Suggs"); Gary R. Nikolitis, as Palm Beach County Property Appraiser ("Nikolitis"); The Property Appraisers' Association of Florida

("PAAF"); and the Florida Association of Property Appraisers ("FAPA"). Intervenors aligned with Respondent Department of Revenue are: The Florida United Tax Managers Association ("FUTMA"); and Sara E. Cucchi, a taxpayer ("Cucchi"). The undersigned also entered an order authorizing Pedro J. Garcia, as Miami-Dade County Property Appraiser, to appear as Amicus Curiae on behalf of Petitioners.

On April 27, 2011, the following pleadings were timely submitted: Petitioner Turner's "Motion for Final Summary Judgment and Memorandum in Support Thereof," which the undersigned has treated as a motion for summary final order; "Trial Brief," filed by Petitioners Crapo, Higgs, and Smith; Motion for Summary Final Order, filed by Intervenor FAPA; Motion for Summary Final Order, filed by Intervenor PAAF; Memorandum of Law in Support of Petition, filed by Intervenor Nikolitis; "Amicus Curiae Pedro J. Garcia's Memorandum of Law in Support of Petitioners Turner, Et. Al. Motions for Summary Judgment"; Respondent Florida Department of Revenue's Motion for Summary Final Order and Memorandum of Law; Brief in Support of Respondent's Motion for Summary Final Order, filed by Intervenor FUTMA; and "Memorandum of Intervenor Sara Cucchi in Support of Department of Revenue's Motion for Final Summary Judgment."

A four-hour oral argument was conducted on May 11, 2011. At the outset of the argument, Respondent DOR filed a Motion for

Official Recognition, which the undersigned granted. In addition, the parties submitted a Joint Pre-Hearing Stipulation, which memorialized the parties' previous agreement that for "purposes of the final hearing on the Motion for Summary Final Order, the parties have agreed not to call any witnesses at the final hearing and have agreed to limit the witness testimony to the transcripts of the trial depositions taken of Tim Wilmath and Stephen Keller." The Joint Pre-Hearing stipulation further acknowledged that the following exhibits could be considered in ruling on the Motion for Summary Final Order: (1) Petitioner Turner's Response to Request for Production of Documents; (2) Petitioner Turner's Response to First Set of Written Interrogatories; (3) the deposition transcript of Tim Wilmath, along with the accompanying exhibits; (4) the deposition transcript of Stephen Keller and related exhibits; (5) recommended decisions of the Nassau County Value Adjustment Board related to Petitions 2010-00058, 2010-00193, and 2010-00551; (6) advisement from Stephen Keller to Catherine Teti; (7) March 7, 2011, e-mail from Stephen Keller; (8) April 11, 2011, e-mail from Lisa Vickers; and (9) Charlotte County Property Appraiser Real Property Report Card 2008.

Prior to the conclusion of the May 11, 2011, oral argument, the parties jointly suggested, and the undersigned agreed, to a deadline of May 25, 2011, for the filing of proposed final

orders, and a final order deadline of June 24, 2011. The transcript of the oral argument was filed with the Division of Administrative Hearings on May 16, 2011.

On May 25, 2011, proposed final orders were filed by Intervenor PAAF, Intervenor FAPA, Respondent Department of Revenue, and Intervenor FUTMA. The following day, Intervenor Suggs filed a pleading adopting the proposed final orders submitted by Intervenors PAAF and FAPA.

Unless otherwise indicated, all rule and statutory references are to the 2010 versions.

FINDINGS OF FACT

A. The Parties

1. Petitioner Turner is the Property Appraiser for Hillsborough County, Florida. Petitioners Crapo, Higgs, and Smith are the Property Appraisers for Alachua, Monroe, and Okaloosa Counties, respectively.

2. Respondent, the Department of Revenue ("DOR"), is an agency of the State of Florida that has general supervision over the property tax process, which consists primarily of "aiding and assisting county officers in the assessing and collection functions." § 195.002(1), Fla. Stat. DOR is also required to prescribe "reasonable rules and regulations for the assessing and collecting of taxes . . . [to] be followed by the property

appraisers, tax collectors . . . and value adjustment boards."
§ 195.027(1).

3. Petitioner-Intervenor Roger A. Suggs is the Clay County Property Appraiser. Petitioner-Intervenor Gary R. Nikolitis is the Palm Beach County Property Appraiser. Petitioner-Intervenor PAAF is a statewide nonprofit professional association consisting of 35 property appraisers in various counties throughout Florida. Petitioner-Intervenor FAPA is a statewide nonprofit professional organization of Florida property appraisers.

4. Respondent-Intervenor FUTMA is a statewide nonprofit association consisting of 46 of the largest property taxpayers in Florida. Ms. Cucchi, the second Respondent-Intervenor, is a property owner and taxpayer in Hillsborough County.

B. Background of Florida's Property Tax System

5. Article VII, Section Four of the Florida Constitution mandates that all property be assessed at "just value," and further requires that the Legislature prescribe, by general law, regulations that "shall secure a just valuation of all property for ad valorem taxation."

6. Pursuant to chapters 192 through 196 of the Florida Statutes, locally elected property appraisers in each of Florida's 67 counties develop and report property assessment rolls.

7. The assessment rolls—which property appraisers prepare each year and submit to DOR by July 1—contain information such as the names and addresses of the property owners, as well as the just, assessed, and taxable values of the properties within each appraiser's respective county. DOR is responsible for reviewing and ultimately approving or disapproving the assessment rolls. § 193.1142, Fla. Stat.

8. Once DOR approves the assessment rolls, the property appraiser mails a "Notice of Proposed Property Taxes and Non-ad Valorem Assessments" (known as a "TRIM" notice) to each property owner. § 200.069, Fla. Stat. The notices advise each owner of his property's assessment for that year, the millage (tax) rate set by the taxing authorities, and the dates of the budget hearing for those authorities.

9. After receiving a TRIM notice, a property owner may request an informal conference with the property appraiser's office to discuss the assessment of his or her property. Alternatively, or in addition to the informal conference, a property owner may challenge the assessment by filing a petition with the county value adjustment board or by bringing a legal action in circuit court. § 194.011(3), Fla. Stat.; § 194.171, Fla. Stat.

C. Value Adjustment Boards

10. Pursuant to section 194.015(1), Florida Statutes, each of Florida's 67 value adjustment boards is composed of two members of the county commission, one member of the school board, and two citizen members.¹ Of particular import to the instant case, section 194.015(1) requires value adjustment boards to retain private counsel to provide advice regarding legal issues that may arise during value adjustment hearings.²

11. In counties with populations greater than 75,000, the value adjustment board must appoint special magistrates³ to conduct hearings and issue recommended decisions. § 194.035(1), Fla. Stat. Hearings in counties with 75,000 citizens or fewer may be conducted by either magistrates or the value adjustment board itself. Id. DOR has no involvement in the appointment or removal of board attorneys, magistrates, or the members of value adjustment boards.

12. Should a property owner choose to contest an assessment through the value adjustment board process, the board's clerk schedules an administrative hearing and sends a notice of hearing to the property owner and the property appraiser. § 194.032(2), Fla. Stat. At the hearing, the determinative issue is whether the assessment of the particular property at issue exceeds just value.

13. In the event that a property owner is dissatisfied with the outcome of a value adjustment hearing, an appeal may be taken to the circuit court, where a de novo hearing will be conducted. § 194.036(2) & (3), Fla. Stat. Under certain conditions, the property appraiser may likewise appeal an adverse value adjustment board decision to the circuit court. § 194.036(1).⁴

D. 2008 Legislative Reforms

14. Prior to 2008, DOR was not charged with the responsibility of training value adjustment boards or their magistrates. However, pursuant to chapter 2008-197, Laws of Florida, the Legislature enacted a series of changes to the VAB process, including a new requirement that DOR "provide and conduct training for special magistrates at least once each state fiscal year." See § 194.035(3), Fla. Stat. Immediately after enactment of the law, DOR initiated rulemaking and developed 2008 interim training for value adjustment boards and special magistrates. Persons required to take the training include all special magistrates, as well as value adjustment board members or value adjustment board attorneys in counties that do not use special magistrates. § 194.035(1) & (3), Fla. Stat.

15. In addition to the new training requirement, chapter 2008-197 mandated that DOR develop a Uniform Policies and

Procedures Manual for use by value adjustment boards and magistrates.

16. The Uniform Policies and Procedures Manual ("The Manual"), which is posted on DOR's website and is separate and distinct from DOR's training materials for value adjustment boards, consists of relevant statutes, administrative rules, provisions of the Florida Constitution, as well as forms. The Manual is also accompanied by two sets of separate documents, which are likewise available on DOR's web page: (1) "Other Legal Resources Including Statutory Criteria; and (2) "Reference Materials Including Guidelines," consisting of guidelines and links to other reference materials, including DOR's value adjustment board training materials, bulletins, and advisements. The introduction to the "Reference Materials Including Guidelines" reads in relevant part as follows:

The set of documents titled "Reference Materials Including Guidelines," contains the following items:

1. Taxpayer brochure
2. General description and internet links to the Department's training for value adjustment boards and special magistrates;
3. Recommended worksheets for lawful decisions;
4. The Florida Real Property Appraisal Guidelines;

* * *

7. Internet links to Florida Attorney General Opinions, Government in the Sunshine Manual, PTO Bulletins and Advertisements, and other reference materials.

These reference materials are for consideration, where appropriate, by value adjustment boards and special magistrates in conjunction with the Uniform Policies and Procedures Manual and with the Other Legal Resources Including Statutory Criteria. The items listed above do not have the force or effect of law as do provisions of the constitution, statutes, and duly adopted administrative rules.

E. Revisions to Value Adjustment Board Procedural Rules

17. Pursuant to section 194.011, Florida Statutes, the Legislature charged DOR with the responsibility to prescribe, by rule, uniform procedures—consistent with the procedures enumerated in section 194.034, Florida Statutes—for hearings before value adjustment boards, as well as procedures for the exchange of evidence between taxpayers and property appraisers prior to value adjustment hearings.

18. On February 24, 2010, following a 12-month period of public meetings, workshops, and hearings, the Governor and Cabinet approved the adoption of chapter 12D-9, Florida Administrative Code, which is titled, "Requirements for Value Adjustment Board in Administrative Reviews; Uniform Rules of Procedure for Hearings Before Value Adjustment Boards."

19. As discussed in greater detail in the Conclusions of Law of this Order, Petitioner Turner contends that portions of Florida Administrative Code Rule 12D-9.020, which delineate the procedures for the exchange of evidence between property appraisers and taxpayers, contravene section 194.011. Petitioner Turner further alleges that section 194.011 is contravened by parts of Florida Administrative Code Rule 12D-9.025, which governs the procedures for conducting a value adjustment hearing and the presentation of evidence.

F. 2010 Value Adjustment Training Materials

20. In 2010, following the adoption of Rule Chapter 12D-9, DOR substantially revised the value adjustment board training materials. After the solicitation and receipt of public comments, the 2010 VAB Training was made available in late June 2010 on DOR's website.

21. The 2010 VAB Training is posted on DOR's website in such a manner that an interested person must first navigate past a bold-font description which explains that the training is not a rule:

This training is provided to comply with section 194.035, Florida Statutes. It is intended to highlight areas of procedure for hearings, consideration of evidence, development of conclusions and production of written decisions. This training is not a rule. It sets forth general information of which boards, board attorneys, special magistrates and petitioners / taxpayers

should be aware in order to comply with Florida law.

(Emphasis in original).

22. The 2010 VAB Training consists of eleven sections, or "modules," portions of two of which Petitioners allege constitute unadopted rules: Module 4, titled "Procedures During the Hearing"; and Module 6, titled "Administrative Reviews of Real Property Just Valuations." While words and phrases such as "must," "should," and "should not" appear occasionally within the materials, such verbiage is unavoidable—and indeed necessary—in carrying out DOR's statutory charge of disseminating its understanding of the law to magistrates and value adjustment board members.

23. Although DOR is required to create and disseminate training materials pursuant to section 194.035, the evidence demonstrates that the legal concepts contained within the 2010 VAB Training are not binding. Specifically, there is no provision of law that authorizes DOR to base enforcement or other action on the 2010 VAB Training, nor is there a statutory provision that provides a penalty in situations where a value adjustment board or special magistrate deviates from a legal principle enumerated in the materials. Further, the evidence demonstrates DOR has no authority to pursue any action against a

value adjustment board or magistrate that chooses not to adhere to the legal concepts contained within the training.

G. PTO Bulletin 11-01

24. On January 21, 2011, DOR issued Property Tax Oversight Bulletin 11-01, titled "Value Adjustment Board Petitions and the Eighth Criterion," to the value adjustment board attorneys for all 67 counties. DOR also disseminated courtesy copies of the bulletin by e-mail to over 800 interested parties.

25. The bulletin, the full text of which is reproduced in the Conclusions of Law section of this Summary Final Order, consisted of a non-binding advisement regarding the use of the eighth just valuation criterion (codified in section 193.011(8), Florida Statutes⁵) in administrative reviews. The bulletin advised, in relevant part, that the eighth just value criterion: "must be properly considered in administrative reviews"; "is not limited to a sales comparison valuation approach"; and "must be properly considered in the income capitalization and cost less depreciation approaches" to valuation. The bulletin further advised that when "justified by sufficiently relevant and credible evidence, the Board or special magistrate should make an eighth criterion adjustment in any of the three valuation approaches."

26. Although certain interested parties (i.e., a special magistrate in Nassau County, the director of valuation for the

Hillsborough County Property Appraiser's Office, and legal counsel for the Broward County value adjustment board) perceived the bulletin to be mandatory, the evidence demonstrates that value adjustment boards and magistrates were not required to abide by the bulletin's contents. As with the training materials, DOR possesses no statutory authority to base enforcement action on the bulletin, nor could any form of penalty be lawfully imposed against a magistrate or value adjustment board that deviates from the legal advice contained within the document. Further, there is no evidence that DOR has taken (or intends to take) any agency action in an attempt to mandate compliance with the bulletin.

CONCLUSIONS OF LAW

I. Challenge to Existing Rules

A. Jurisdiction

27. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to section 120.56(1) and (3), Florida Statutes.

B. Standing

28. Only "substantially affected persons" may challenge the facial validity of existing rules pursuant to section 120.56(1) and (3).⁶ In order to prove that he is "substantially affected" by the challenged portions of Florida Administrative

Code Rules 12D-9.020 and 12D-9.025, Petitioner Turner was required to specifically prove: (a) a real and sufficiently immediate injury in fact; and (b) that his alleged interest is arguably within the "zone of interest" to be protected or regulated. See Ward v. Bd. of Trs. of Int. Imp. Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995).

29. In paragraph seven of his Petition, Turner asserts the following factual basis for standing in this case:

The rules challenged herein directly impact Turner's defense of property tax appraisals at the VAB level in that they contradict established law and create an unfair and improper burden at VAB hearings, resulting in a financial and administrative burden on Turner's office.

These allegations, which are sufficient to establish that Petitioner Turner is "substantially affected," have been proven by the facts to which the parties have stipulated and the record evidence. Accordingly, Petitioner Turner has standing to bring the instant challenge.

C. Burden of Proof

30. Petitioner Turner must demonstrate the invalidity of the challenged rules by a preponderance of the evidence. Dep't of Health v. Merritt, 919 So. 2d 561, 564 (Fla. 1st DCA 2006); § 120.56(3)(a).

D. Petitioner's Challenge

31. The starting point for determining whether an existing rule is invalid is section 120.52(8), Florida Statutes, in which the legislature has defined the term "invalid exercise of legislative authority." In this definition, "the legislature created a catalog of the salient defects which distinguish rules that exceed an agency's delegated powers, functions, and duties." Home Delivery Incontinent Supplies Co., Inc., v. Ag. for Health Care Admin., Case No. 07-4167RX, 2008 Fla. Div. Adm. Hear. LEXIS 205 (Fla. DOAH Apr. 18, 2008). Relevant to the instant case are the following statutory provisions:

A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

* * *

(c) The rule enlarges, modifies, or contravenes the specific provision of law implemented, citation to which is required by s. 120.54(3)(a)1;

* * *

(e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational

§ 120.52(8), Fla. Stat.

32. In Count I of his Petition, the relevant portions of which are quoted below, Turner contends that portions of Florida

Administrative Code Rules 12D-9.020 and 12D-9.025 run afoul of section 120.52(8):

9. Florida Statute 194.011(4) (a) sets forth the procedures for the exchange of evidence between parties to a VAB petition

10. In spite of the mandatory evidence exchange contemplated in Florida Statute 194.011(4) (a), the Florida Department of Revenue promulgated Rule 12D-9.020 which makes the evidence exchange optional The language making an evidence exchange optional is repeated in Subsections (2) (a), (2) (b) and Rule 12D-9.025(2) (c) [sic⁷] and 12D-9.025(4) (a).

11. Rule 12D-9.020 directly conflicts with Florida Statute 194.011(4) (a) and is arbitrary and capricious.

* * *

13. Although the rule states that a county property appraiser such as Turner may request in writing any evidence a petitioner is planning to submit [See 12D-9.020(8)], this provision then requires Turner to expend monies and resources mailing each petitioner correspondence requesting such evidence. This requirement to make a written request is also not contemplated by Florida Statute 194.011(4) (a).

14. Finally, Rule 12D-9.020(8) allows a petitioner to present "rebuttal evidence" at a hearing without providing it in advance to the county property appraiser. This also contradicts Florida Statute 194.011(4) (a).

E. Analysis of sections 194.011 and 194.034

33. Prior to addressing Petitioner's claims, the undersigned will begin with an analysis of the relevant portions sections 194.011 and 194.034, Florida Statutes, which provide:

194.011 Assessment notice; objections to assessments.—

(1) Each taxpayer whose property is subject to real or tangible personal ad valorem taxes shall be notified of the assessment of each taxable item of such property, as provided in s. 200.069.

* * *

(4) (a) At least 15 days before the hearing the petitioner [i.e., taxpayer] shall provide to the property appraiser a list of evidence to be presented at the hearing, together with copies of all documentation to be considered by the value adjustment board and a summary of evidence to be presented by witnesses.

(b) No later than 7 days before the hearing, if the petitioner has provided the information required under paragraph (a), and if requested in writing by the petitioner, the property appraiser shall provide to the petitioner a list of evidence to be presented at the hearing, together with copies of all documentation to be considered by the value adjustment board and a summary of evidence to be presented by witnesses. The evidence list must contain the property record card if provided by the clerk. Failure of the property appraiser to timely comply with the requirements of this paragraph shall result in a rescheduling of the hearing.

* * *

194.034 Hearing procedures; rules.-

(1) (a) Petitioners before the board may be represented by an attorney or agent and present testimony and other evidence. The property appraiser or his or her authorized representatives may be represented by an attorney in defending the property appraiser's assessment or opposing an exemption and may present testimony and other evidence. The property appraiser, each petitioner, and all witnesses shall be required, upon the request of either party, to testify under oath as administered by the chairperson of the board. Hearings shall be conducted in the manner prescribed by rules of the department, which rules shall include the right of cross-examination of any witness.

* * *

(d) Notwithstanding the provisions of this subsection, no petitioner may present for consideration, nor may a board or special magistrate accept for consideration, testimony or other evidentiary materials that were requested of the petitioner in writing by the property appraiser of which the petitioner had knowledge and denied to the property appraiser.

(Emphasis in original).

34. The first point of contention between the parties concerns whether a taxpayer is obligated, pursuant to section 194.011(4) (a), to provide the property appraiser with "a list of evidence to be presented at the hearing . . . copies of all documentation to be considered . . . and a summary of evidence to be presented by witnesses," in situations where a property

appraiser has not submitted a written request to the taxpayer for such materials.

35. Petitioner Turner asserts that the Legislature's use of the word "shall" in section 194.011(4) (a) requires a taxpayer—regardless of whether the property appraiser has submitted a written request to the taxpayer—to disclose the evidence list, copies of documentation, and witness summary to the property appraiser.

36. In contrast, Respondent contends that in the absence of a written request from the property appraiser, a taxpayer's compliance with section 194.011(4) (a) is entirely optional. In support of this argument, Respondent notes that the statutory provision that prescribes value adjustment board hearing procedures—section 194.034—requires the exclusion of a taxpayer's evidence only where the materials were "requested of the petitioner [taxpayer] in writing by the property appraiser of which the petitioner had knowledge and denied to the property appraiser," and contains no "penalty" in situations where the taxpayer does not provide the evidence and no written request for evidence was sent by the property appraiser. In other words, Respondent argues that because section 194.034 does not explicitly mandate exclusion of a taxpayer's undisclosed evidence in cases where the property appraiser did not propound a written request for evidence upon the taxpayer, the taxpayer

has the "option" of choosing whether to comply with section 194.011(4) (a).

37. While the undersigned is mindful that an agency is afforded broad discretion and deference in the interpretation of statutes that it administers, see Florida Department of Education v. Cooper, 858 So. 2d 394, 396 (Fla. 1st DCA 2003), adherence to the agency's view "is not demanded when it is contrary to the statute's plain meaning." PAC for Equal. v. Dep't of State, Fla. Elec. Comm'n, 542 So. 2d 459, 460 (Fla. 2d DCA 1989); Kessler v. Dep't of Mgmt. Servs., 17 So. 3d 759, 762 (Fla. 1st DCA 2009); Creative Choice XXV, Ltd. v. Fla. Hous. Fin. Corp., 991 So. 2d 899, 902 (Fla. 1st DCA 2008); Sullivan v. Dep't of Env'tl. Prot., 890 So. 2d 417, 420 (Fla. 1st DCA 2004) Werner v. Dep't of Ins. & Treasurer, 689 So. 2d 1211, 1214 (Fla. 1st DCA 1997).

38. It is well-settled that the word "shall" should "ordinarily be construed as mandatory according to its plain meaning." State v. Goode, 830 So. 2d 817, 824 (Fla. 2002); S.R. v. State, 346 So. 2d 1018, 1019 (Fla. 1977) (noting that shall "is normally meant to be mandatory in nature"); Kinder v. State, 779 So. 2d 512, 514-15 (Fla. 2d DCA 2000). Although exceptions to this general rule can be found, e.g., Schneider v. Gustafson Industries, Inc., 139 So. 2d 423, 424 (Fla. 1962), such cases involved situations—unlike the instant cause—where the

statutory language "was related to some immaterial matter in which compliance was a matter of convenience, or because constitutional requirements required such an interpretation." Goode, 830 So. 2d at 824; Kinder, 779 So. 2d at 514.

39. Applying the ordinary meaning of "shall," the undersigned concludes that section 194.011(1)(a) is mandatory,⁸ rather than directory, and obligates a taxpayer to provide the list of evidence and other enumerated materials to the property appraiser at least 15 days prior to the value adjustment board hearing.⁹

40. The undersigned further concludes that a taxpayer is required to disclose such evidence even in the absence of a written request from the property appraiser. Consider again the language of section 194.011:

(4) (a) At least 15 days before the hearing the [taxpayer] shall provide to the property appraiser a list of evidence to be presented at the hearing, together with copies of . . .

(b) No later than 7 days before the hearing, if the [taxpayer] has provided the information required under paragraph (a), and if requested in writing by the petitioner, the property appraiser shall provide to the [taxpayer] a list of evidence to be presented at the hearing, together with copies of all documentation to be considered by the value adjustment board and a summary of evidence to be presented by witnesses. The evidence list must contain the property record card if provided by the clerk. Failure of the property appraiser to

timely comply with the requirements of this paragraph shall result in a rescheduling of the hearing.

(Emphasis added).

41. Significantly, section 194.011(4) (a) contains no language providing that the taxpayer's obligation to disclose evidence is conditioned upon a written request from the property appraiser. On the other hand, section 194.011(4) (b) specifically contemplates that the property appraiser is only required to disclose its evidence "if requested in writing by the [taxpayer]," after the taxpayer has complied with section 194.011(4) (a). § 194.011(4) (b), Fla. Stat. (Emphasis added). To accept the Respondent's interpretation of the statute, it would be necessary, contrary to settled authority, to read the phrase "if requested in writing" into section 194.011(1) (a). See Leisure Resorts, Inc., v. Frank J. Rooney, Inc., 654 So. 2d 911, 914 (Fla. 1995) ("When the legislature has used a term, as it has here, in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded"); Sunshine Towing, Inc., v. Fonseca, 933 So. 2d 594, 595 (Fla. 1st DCA 2006) ("Where the legislature has used a term in one section of a statute but omitted the term in another section, the court will not read the term into the sections where it was omitted"); see also Brown & Brown, Inc., v. Edenfield, 36 So. 3d 889, 892 (Fla. 1st DCA 2010) ("Had the

Legislature intended for the provisions of section 626.9201 to not apply when the insurer intended to renew the policy, it could have easily done so as it did elsewhere in the Florida Insurance Code. . . . The absence of similar language in section 626.9201 supports our conclusion that the statute applies notwithstanding the insurer's intent to renew the policy"). As section 194.011(4) (a) does not expressly condition a taxpayer's disclosure obligation upon a request in writing, the undersigned will not read such language into the statute.

42. While it is true, as Respondent notes, that section 194.034 does not expressly authorize the ultimate penalty (i.e., exclusion of the taxpayer's evidence) in situations where the taxpayer fails to disclose evidence and no written request for such evidence was sent by the property appraiser, such a fact does not permit the undersigned to ignore the plain, mandatory language of section 194.011(4) (a). See State v. Goode, 830 So. 2d 817, 824 (Fla. 2002) (holding that use of the word "shall" in section 394.916(1), Florida Statutes, imposes a mandatory obligation upon circuit courts to hold Jimmy Ryce trials within 30 days after probable cause is determined; "The absence of explicit language detailing a 'consequence' for not holding trial, however, does not allow us to ignore the plain mandatory language the Legislature has provided") (emphasis added).

43. Even assuming, arguendo, that the presence or absence of a "penalty" is relevant in determining whether the term "shall" in section 194.011(4) (a) is mandatory or directory, section 194.011(4) actually does impose a consequence in situations where a taxpayer fails to disclose his evidence and no written request for such evidence was sent by the property appraiser: the taxpayer forfeits the right to obtain the property appraiser's evidence in advance of the hearing.

§ 194.011(4) (b), Fla. Stat. ("If the [taxpayer] has provided the information required under paragraph (a), and if requested in writing by the [taxpayer], the property appraiser shall provide to the [taxpayer] a list of evidence to be presented at the hearing, together with copies of all documentation to be considered by the value adjustment board and a summary of evidence to be presented by witnesses") (emphasis added).

44. Before proceeding further, it may be helpful to review the undersigned's conclusions regarding the interplay between sections 194.011 and 194.034: (1) a taxpayer is required to comply with section 194.011(4) (a), notwithstanding the absence of a written request for evidence sent by the property appraiser; (2) if a taxpayer fails to comply with section 194.011(4) (a) and the property appraiser submitted a written request for evidence, section 194.034(1) (d) prohibits the taxpayer from presenting evidence during the VAB proceeding that

was knowingly withheld; and (3) irrespective of a written request for evidence from the property appraiser, a taxpayer's noncompliance with section 194.011(4) (a) results in the loss of the taxpayer's right to request the property appraiser's evidence.

45. A sticky point of contention remains, however: in situations where the property appraiser does not send a written request for evidence, does a taxpayer's failure to comply with section 194.011(4) (a) authorize consequences beyond the loss of the right to request the property appraiser's evidence—namely, can the value adjustment board or magistrate exclude the taxpayer's evidence? While Petitioner asserts in the affirmative, Respondent DOR contends that the penalty of exclusion cannot be applied under such circumstances, since section 194.034(1) (d) expressly authorizes exclusion only where the evidence was requested in writing by the property appraiser.

46. If, as Petitioner suggests, a failure to comply with section 194.011(4) (a), standing alone, obligates the exclusion of a taxpayer's evidence, regardless of a written request for evidence, then section 194.034(1) (d)—which mandates exclusion of a taxpayer's evidence that was requested in writing and knowingly withheld—would be rendered meaningless. Thus, Petitioner's interpretation of sections 194.011 and 194.034 violates a basic rule of statutory construction that the

Legislature does not intend to enact useless provisions, and that readings should be avoided that render part of a statute meaningless. Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 456 (Fla. 1992) ("It is a cardinal rule of statutory interpretation that courts should avoid readings that would render part of a statute meaningless"). Therefore, the undersigned agrees with Respondent that in the absence of a written request for evidence from the property appraiser, a taxpayer's noncompliance with section 194.011(4)(a) does not authorize a value adjustment board or magistrate to exclude the taxpayer's evidence.¹⁰

F. Rules 12D-9.020 and 12D-9.025

47. With the foregoing principles in mind, the undersigned will turn to Petitioner's contention that portions of Florida Administrative Code Rules 12D-9.020 and 12D-9.025 constitute an invalid exercise of delegated legislative authority. Rules 12D-9.020 and 12D-9.025 read in pertinent part as follows, with the challenged sections underlined for emphasis:

12D-9.020 Exchange of Evidence.

(1) The petitioner has the option of participating in an exchange of evidence with the property appraiser. If the petitioner chooses not to participate in the evidence exchange, the petitioner may still present evidence for consideration by the board or the special magistrate. However, as described in this section, if the property appraiser asks in writing for

specific evidence before the hearing in connection with a filed petition, and the petitioner has this evidence and knowingly refuses to provide it to the property appraiser a reasonable time before the hearing, the evidence cannot be presented by the petitioner or accepted for consideration by the board or special magistrate. Reasonableness shall be determined by whether the material can be reviewed, investigated, and responded to or rebutted in the time frame remaining before the hearing. These requirements are more specifically described in subsection (8) of this rule and in paragraphs 12D-9.025(4)(a) and (f), F.A.C.

(2) (a) If the petitioner chooses to participate in an exchange of evidence with the property appraiser, at least fifteen (15) days before the hearing, the petitioner shall provide the property appraiser with a list and summary of evidence to be presented at the hearing accompanied by copies of documentation to be presented at the hearing. To calculate the fifteen (15) days, the petitioner shall use calendar days and shall not include the day of the hearing in the calculation, and shall count backwards from the day of the hearing.

(b) If the petitioner chooses to participate in an exchange of evidence with the property appraiser and he or she shows good cause to the board clerk for not being able to meet the fifteen (15) day requirement and the property appraiser is unwilling to agree to a different timing of the exchange, the board clerk is authorized to reschedule the hearing to allow for the exchange of evidence to occur.

(c) No later than seven (7) days before the hearing, if the property appraiser receives the petitioner's documentation and if requested in writing by the petitioner, the property appraiser shall provide the

petitioner with a list and summary of evidence to be presented at the hearing accompanied by copies of documentation to be presented by the property appraiser at the hearing. The evidence list must contain the property record card if provided by the board clerk. To calculate the seven (7) days, the property appraiser shall use calendar days and shall not include the day of the hearing in the calculation, and shall count backwards from the day of the hearing.

(d) The last day of the period so computed shall be included unless it is a Saturday, Sunday, or legal holiday, in which event the period shall run until the end of the next previous day which is neither a Saturday, Sunday, or legal holiday.

(3) (a) If the petitioner does not provide the information to the property appraiser at least fifteen (15) days prior to the hearing pursuant to paragraph (2) (a), the property appraiser need not provide the information to the petitioner pursuant to paragraph (2) (c).

(b) If the property appraiser does not provide the information within the time required by paragraph (2) (c), the hearing shall be rescheduled to allow the petitioner additional time to review the property appraiser's evidence.

* * *

(6) Hearing procedures: Neither the board nor the special magistrate shall take any general action regarding compliance with this section, but any action on each petition shall be considered on a case by case basis. Any action shall be based on a consideration of whether there has been a substantial noncompliance with this section, and shall be taken at a scheduled hearing and based on evidence presented at such hearing. "General action" means a prearranged

course of conduct not based on evidence received in a specific case at a scheduled hearing on a petition.

(7) A property appraiser shall not use at a hearing evidence that was not supplied to the petitioner as required. The remedy for such noncompliance shall be a rescheduling of the hearing to allow the petitioner an opportunity to review the information of the property appraiser.

(8) No petitioner may present for consideration, nor may a board or special magistrate accept for consideration, testimony or other evidentiary materials that were specifically requested of the petitioner in writing by the property appraiser in connection with a filed petition, of which the petitioner had knowledge and denied to the property appraiser. Such evidentiary materials shall be considered timely if provided to the property appraiser no later than fifteen (15) days before the hearing in accordance with the exchange of evidence rules in this section. If provided to the property appraiser less than fifteen (15) days before the hearing, such materials shall be considered timely if the board or special magistrate determines they were provided a reasonable time before the hearing, as described in paragraph 12D-9.025(4)(f), F.A.C. A petitioner's ability to introduce the evidence, requested of the petitioner in writing by the property appraiser, is lost if not provided to the property appraiser as described in this paragraph. This provision does not preclude rebuttal evidence that was not specifically requested of the petitioner by the property appraiser.

(9) As the trier of fact, the board or special magistrate may independently rule on the admissibility and use of evidence. If the board or special magistrate has any questions relating to the admissibility and

use of evidence, the board or special magistrate should consult with the board legal counsel. The basis for any ruling on admissibility of evidence must be reflected in the record.

Rulemaking Authority 194.011(5), 194.034(1), 195.027(1), 213.06(1) FS. Law Implemented 193.074, 194.011, 194.015, 194.032, 194.034, 194.035, 195.022, 195.084, 200.069, 213.05 FS. History-New 3-30-10.

* * *

12D-9.025 Procedures for Conducting a Hearing; Presentation of Evidence; Testimony of Witnesses.

(1) As part of administrative reviews, the board or special magistrate must:

* * *

(4) (a) No evidence shall be considered by the board or special magistrate except when presented and admitted during the time scheduled for the petitioner's hearing, or at a time when the petitioner has been given reasonable notice. The petitioner may still present evidence if he or she does not participate in the evidence exchange. However, if the property appraiser asks in writing for specific evidence before the hearing in connection with a filed petition, and the petitioner has this evidence and refuses to provide it to the property appraiser, the evidence cannot be presented by the petitioner or accepted for consideration by the board or special magistrate. These requirements are more specifically described in paragraph (f) below.

* * *

Rulemaking Authority 194.011(5), 194.034(1), 195.027(1), 213.06(1) FS. Law Implemented

193.092, 194.011, 194.032, 194.034, 195.022,
195.084, 213.05 FS. History-New 3-30-10.

(Underline added; all other emphasis in original).

48. Petitioner Turner's first argument is that subsection (1) of rule 12D-9.020, which provides that a taxpayer has the "option of participating in an exchange of evidence with the property appraiser," and subsections (2) (a) and (2) (b), which read, "If the Petitioner chooses to participate in an exchange of evidence," are inconsistent with the mandatory obligation imposed by section 194.011(4) (a) to disclose evidence. The undersigned agrees that in contravention of the plain statutory language of section 194.011(4) (a)—i.e., a taxpayer "shall provide"—the words "option" and "chooses" impermissibly prescribe that a taxpayer's compliance with section 194.011(4) (a) is entirely voluntary.¹¹ Accordingly, to the extent that rule 12D-9.020(1), (2) (a), and (2) (b) provides that taxpayers are under no obligation to disclose their evidence to property appraisers in advance of VAB hearings, the rule constitutes an invalid exercise of delegated legislative authority pursuant to section 120.52(8) (c), Florida Statutes.¹² See, e.g., Johnson v. Dep't of High Saf. & Motor Veh., 709 So. 2d 623, 624 (Fla. 4th DCA 1998) ("An administrative agency is not permitted to enlarge, modify, or contravene the provisions of a

statute. Where an agency adopts a rule that conflicts with a statute, the statute prevails").

49. Next, Petitioner Turner contends:

Although [Rule 12D-9.020(8)] states that a county property appraiser such as Turner may request any evidence a petitioner is planning to submit . . . this provision then requires Turner to expend monies and resources mailing each petitioner correspondence requesting such evidence. This requirement to make a written request is also not contemplated by Florida Statutes 194.011(4) (a).

Turner Petition at ¶ 13.

50. The undersigned is not persuaded that rule 12D-9.020(8) contravenes the enabling statutes by referencing a written request for evidence. As quoted previously, section 194.034(1) (d) provides that no taxpayer, "may present for consideration, nor may a board or special magistrate accept for consideration, testimony or other evidentiary materials that were requested of the [taxpayer] in writing by the property appraiser of which the [taxpayer] had knowledge and denied to the property appraiser." In turn, rule 12D-9.020(8) reads, in relevant part:

No [taxpayer] may present for consideration, nor may a board or special magistrate accept for consideration, testimony or other evidentiary materials that were specifically requested of the [taxpayer] in writing by the property appraiser in connection with a filed petition, of which [the taxpayer] had knowledge and denied to the property

appraiser. Such evidentiary materials shall be considered timely if provided to the property appraiser no later than fifteen (15) days before the hearing in accordance with the exchange of evidence rules in this section A [taxpayer's] ability to introduce the evidence, requested of the [taxpayer] in writing by the property appraiser, is lost if not provided to the property appraiser as described in this paragraph. This paragraph does not preclude rebuttal evidence that was not specifically requested of the [taxpayer] by the property appraiser.

51. As demonstrated by the foregoing language, rule 12D-9.020(8) is consistent with the framework established by sections 194.011 and 194.034. That is, a property appraiser may, but is not required, to request a taxpayer's evidence in writing. If a property appraiser chooses not to do so, a taxpayer's failure comply with section 194.011(4)(a) will not result in the exclusion of the taxpayer's evidence, but will forfeit the taxpayer's right to obtain the property appraiser's evidence in advance of the hearing. On the other hand, should a property appraiser elect to make a written request for a taxpayer's evidence, materials knowingly withheld by the taxpayer cannot be admitted into evidence by a VAB or magistrate.

52. Finally, Petitioner Turner contends that the last sentence of rule 12D-9.020(8), which provides that "this paragraph does not preclude rebuttal evidence that was not

specifically requested of the [taxpayer] by the property appraiser," contradicts section 194.011(4) (a) because it allows taxpayers to present rebuttal evidence at a hearing without providing it in advance to the property appraiser.

53. At first blush, it appears that rule 12D-9.020(8)—by specifically referencing rebuttal evidence in the final sentence—contemplates that rebuttal items be treated differently than non-rebuttal evidence. Upon closer inspection, however, rule 12D-9.020(8) handles the admissibility of rebuttal evidence in a manner identical to non-rebuttal evidence. That is, if a taxpayer fails to disclose rebuttal evidence that the property appraiser requested in writing, such materials cannot be admitted—the same procedure for non-rebuttal evidence. Further, as with non-rebuttal evidence, in the event the property appraiser did not submit a written request, a taxpayer's undisclosed rebuttal evidence is not inadmissible under rule 12D-9.020(8). Accordingly, Petitioner Turner has failed to demonstrate that the final sentence of rule 12D-9.020(8) contravenes section 194.011(4) (a).

54. Having determined that a portion of Florida Administrative Code Rule 12D-9.020 is invalid, the undersigned is required, pursuant to section 120.595(3), Florida Statutes, to award Petitioner Turner reasonable costs and attorney's fees, unless DOR "demonstrates that its actions were substantially

justified or special circumstances exist which would make the award unjust." If Turner timely requests such relief, the undersigned will conduct further proceedings to determine whether such an award must be made, and if so in what amount.

II. Unpromulgated Rule Challenge - 2010 VAB Training

A. Jurisdiction

55. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to section 120.56(1) and (4), Florida Statutes.

B. Petitioners' Challenge - A Framework

56. Petitioners Turner, Crapo, Higgs, and Smith have challenged portions of the 2010 VAB Training pursuant to section 120.56(4), Florida Statutes, which provides, in relevant part:

(4) CHALLENGING AGENCY STATEMENTS DEFINED AS RULES; SPECIAL PROVISIONS.—

(a) Any person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state with particularity facts sufficient to show that the statement constitutes a rule under s. 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54.

(b) The administrative law judge may extend the hearing date beyond 30 days after assignment of the case for good cause. Upon notification to the administrative law judge

provided before the final hearing that the agency has published a notice of rulemaking under s. 120.54(3), such notice shall automatically operate as a stay of proceedings pending adoption of the statement as a rule. The administrative law judge may vacate the stay for good cause shown. A stay of proceedings pending rulemaking shall remain in effect so long as the agency is proceeding expeditiously and in good faith to adopt the statement as a rule. If a hearing is held and the petitioner proves the allegations of the petition, the agency shall have the burden of proving that rulemaking is not feasible or not practicable under s. 120.54(1)(a).

(c) The administrative law judge may determine whether all or part of a statement violates s. 120.54(1)(a). The decision of the administrative law judge shall constitute a final order. The division shall transmit a copy of the final order to the Department of State and the committee. The Department of State shall publish notice of the final order in the first available issue of the Florida Administrative Weekly.

(d) If an administrative law judge enters a final order that all or part of an agency statement violates s. 120.54(1)(a), the agency must immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.

(e) If proposed rules addressing the challenged statement are determined to be an invalid exercise of delegated legislative authority as defined in s. 120.52(8)(b)-(f), the agency must immediately discontinue reliance on the statement and any substantially similar statement until rules addressing the subject are properly adopted, and the administrative law judge shall enter a final order to that effect.

57. As reflected by the foregoing language, the issues to be resolved are: (1) whether Petitioners are "substantially affected" by an agency statement; (2) do the challenged provisions of the 2010 VAB Training constitute agency statements; and (3) whether the agency statements are "rules" pursuant to section 120.52(16), Florida Statutes. Should Petitioners prevail as to the first three issues, the undersigned will be required to determine if rulemaking was feasible and practicable under section 120.54(1)(a).

C. Burden of Proof

58. Petitioners have the burden of establishing by a preponderance of the evidence that the challenged agency statements constitute unpromulgated rules. § 120.56(1)(e) & (4)(b), Fla. Stat.; Southwest Fla. Water Mgmt. Dist. v. Charlotte Cnty., 774 So. 2d 903, 908 (Fla. 2d DCA 2001) (noting that the burden of persuasion is on the challenger in a section 120.56(4) proceeding).

D. Standing

59. The undersigned concludes, and Respondents have correctly stipulated, that the principal Petitioners have demonstrated that they are "substantially affected" by the challenged statements and, therefore, have standing to maintain this action. See Ward v. Bd. of Trs. of Int. Imp. Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995) (holding that to

demonstrate standing in a rule challenge proceeding, a petitioner must prove that: (a) the challenged agency statement causes a real and sufficiently immediate injury in fact; and (b) petitioner's alleged interest is within the "zone of interest" to be protected or regulated).

E. The Challenged Statements

60. As discussed previously, Petitioners contend that sections of the 2010 VAB Training—specifically, certain statements within Modules Four and Six—constitute agency statements that have not been properly adopted as rules. The challenged portions of the materials read as follows:

Module 4: Procedures During the Hearing

* * *

The Florida appellate court case of Higgs v. Good, 813 So. 2d 178 (Fla. 3d DCA 2002) is not incorporated into the Department's rules for value adjustment boards.

The Higgs v. Good case involved a property appraiser's request for information from the taxpayer in April of the tax year under Section 195.027(3), F.S., for the purpose of assessment roll development. This request for information from the taxpayer was not made in connection with a filed petition.

In that case, when the taxpayer filed a lawsuit in circuit court and the circuit court decision was appealed, the appellate court held that the requested information could not be used as evidence in court because it had not been provided to the property appraiser as requested during assessment roll development.

Rule 12D-1.005, F.A.C., relates to the property appraiser's access to financial records during assessment roll development, not during value adjustment board proceedings.

Neither this case nor the statute (Section 195.027(3), F.S.) nor this rule (Rule 12D-1.005, F.A.C.) operates to exclude evidence in a value adjustment board proceeding under Rule Chapter 12D-9, F.A.C., and Chapter 194, Part 1, F.S.

The case of Higgs v. Good does not apply to proceedings of the value adjustment board.

* * *

Module 6: Administrative Reviews of Real Property Just Valuations

* * *

Since its enactment and amendments, this eighth just valuation criterion has functioned to create, in effect, a net just value that is less than fair market value.

* * *

The property appraiser is required to consider, but is not required to use, all three approaches to value. See Mastroianni v. Barnett Banks, Inc., 664 So.2d 284 (Fla. 1st DCA 1995) review denied 673 So.2d 29 (Fla. 1996).

* * *

The property appraiser's valuation methodology must comply with the criteria in Section 193.011, F.S., and professionally accepted appraisal practices. See Section 194.301, F.S., as amended by Chapter 2009-121, Laws of Florida (House Bill 521), and Section 193.011, F.S.

* * *

The petitioner is not required to provide an opinion or estimate of just value.

No provision of law requires the petition to present an opinion or estimate of value.

The Board or special magistrate is not authorized to require a petitioner to provide an opinion or estimate of just value.

* * *

The Eighth Criterion in Real Property Administrative Reviews

* * *

Example of When to Review a Just Value Based on the Eighth Criterion

1. The Board or special magistrate determines from the accepted form DR-493 that the property appraiser has reported and the Department has accepted a certain percentage adjustment for the eighth criterion for all property within the use code group that contains the use code of the petitioned property.
2. The Board or special magistrate determines from the admitted evidence that the property appraiser has not made an eighth criterion adjustment for the petitioned property.
3. The Board of special magistrate should make, to the just value of the petitioned property, the same eighth criterion adjustment reported by the property appraiser on Form DR-493 and accepted by the Department.

(Emphasis in original).¹³

61. Clearly, the challenged portions of the 2010 VAB Training constitute "agency statements" as contemplated by section 120.56(4) (a). Respondents do not contest this issue.

62. However, the parties sharply dispute whether the agency statements at issue constitute "rules," as the term "rule" is defined in section 120.52(16), Florida Statutes:

"Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. The term does not include:

(a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.

(b) Legal memoranda or opinions issued to an agency by the Attorney General or agency legal opinions prior to their use in connection with an agency action.

(c) The preparation or modification of:

1. Agency budgets.

2. Statements, memoranda, or instructions to state agencies issued by the Chief Financial Officer or Comptroller as chief fiscal officer of the state and relating or pertaining to claims for payment submitted by state agencies to the Chief Financial Officer or Comptroller.

3. Contractual provisions reached as a result of collective bargaining.

4. Memoranda issued by the Executive Office of the Governor relating to information resources management.

63. As reflected by the above-quoted language, only agency statements of "general applicability" that are intended by their own effect to create or adversely affect rights, to require compliance, or to otherwise have the direct and consistent effect of law fall within the definition of section 120.52(16). Dep't of High. Saf. & Motor Veh. v. Schluter, 705 So. 2d 81, 82 (Fla. 1st DCA 1997) ("We agree with appellant that the first three of the six polices do not constitute rules. They cannot be considered statements of general applicability The Department's first three declarations cannot be said to have been intended by their own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law") (internal quotations omitted); see also Fla. Dep't of Fin. Servs. v. Cap. Collateral Reg'l Counsel, 969 So. 2d 527, 530 (Fla. 1st DCA 2007) ("When deciding whether a challenged action constitutes a rule, a court analyzes the action's general applicability, requirement of compliance, or direct and consistent effect of law").

64. In support of their argument that the challenged sections of the training materials constitute rules, Petitioners

contend that the effect of the training materials must be considered, and rely heavily upon Department of Revenue v. Vanjaria Enterprises, Inc., 675 So. 2d 252 (Fla. 5th DCA 1996). In Vanjaria, a corporation that leased a multiple use commercial property—which consisted of a motel, ice cream shop, convenience store, and restaurant—was audited by DOR in regard to the sales tax paid on the lease over a three year period. Id. at 253-54. Utilizing DOR's "sales and use tax training manual," agency auditors determined that the corporation had over-allocated portions of the rent payments to the motel, thereby exempting too much of the property from taxation. Id. at 254. Shortly thereafter, DOR issued a notice of intent to make sales and use tax audit changes, which assessed the corporation over \$44,000 for additional sales tax, interest, and penalties. Id. The assessment was challenged during a non-jury trial, at the conclusion of which the circuit judge entered a final judgment determining that DOR's procedure for assessing taxes on multiple use properties, as proscribed in the training manual, constituted an unpromulgated rule. Id. at 254.

65. On appeal, the Fifth District affirmed, concluding that the tax assessment procedure delimitated in the training manual constituted an illicit rule. Id. at 255-256. In particular, the court held:

In determining whether the tax assessment

procedure in DOR's Training Manual is an illicit rule we must consider its effect, rather than DOR's characterization of the procedure A review of the effect of the tax assessment procedure in the instant case reveals that the procedure is a rule in that it is a "statement of general applicability that implements, interprets, or prescribes law or policy." Furthermore, the tax assessment procedure creates DOR's entitlement to taxes while adversely affecting property owners. The Training Manual was created to be used as the sole guide for auditors in their assessment of multiple-use properties. In determining exempt versus nonexempt uses of multiple-use properties, DOR's auditor's strictly comply with the procedure set forth in the Training Manual for all audits performed. Moreover, DOR's auditors are not afforded any discretion to take action outside the scope of the Training Manual Therefore, DOR's tax assessment procedure is an illicit rule, and not enforceable absent promulgation in accordance with section 120.54.

Id. at 255-56. (Internal citations omitted).

66. Subsequent to Vanjaria, the Fifth District decided Kerper v. Department of Environmental Protection, 894 So. 2d 1006 (Fla. 5th DCA 2005), which Petitioners cite in support of their argument that the training materials constitute rules because of certain language (e.g., "should" and "must") that occasionally appears therein. In Kerper, the Department of Environmental Protection filed a notice of violation against the owner of an auto salvage business, which eight counts of various environmental regulations. Id. at 1007. The matter proceeded

to a formal administrative proceeding before an administrative law judge, who ultimately issued a final order finding the business owner guilty of failing to respond to used oil discharges. Id. at 1007-08. The final order also directed—relying upon a Department of Environmental Protection document titled, "Corrective Actions for Contaminated Site Case" ("CASC")—that in the event that further remediation was needed, the owner would be liable for the completion of the required actions. Id. at 1009.

67. On appeal, the Fifth District reversed, concluding that the State presented insufficient evidence demonstrating that the business owner was responsible for the oil spill. Id. at 1008. The court further held, citing Vanjaria, that the CASC constituted an unpromulgated rule:

This Court has stated that, "[a]n agency statement that either requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law is a rule." Department of Revenue of State of Fla. v. Vanjaria Enterprises, Inc., 675 So. 2d 252, 255 (Fla. 5th DCA 1996).

Under either construction, the CASC is a rule. It is a "statement of general applicability" insofar as it applies to all contamination site cases. It "prescribes policy" and "describes the procedure or practice requirements of an agency." For example, it sets the procedure for a violator to (1) initiate site sampling and analysis; (2) propose interim remedial actions; (3) file contamination assessment

and risk assessment plans; (4) submit written progress reports; and many other procedures. The CACSC "requires compliance" with these policies, using mandatory terms, such as "shall." Accordingly, the CACSC should be adopted through formal rulemaking procedures.

Id. at 1009.

68. While there is no doubt that Vanjaria and Kerper were soundly decided, both decisions are factually distinguishable. In contrast to Vanjaria, where the auditors were strictly required in every case to follow the training manual in calculating sales tax underpayments, and Kerper, where the agency utilized the CACSC in dealing with all contamination cases, the evidence in the instant case demonstrates that the statements contained within the 2010 VAB Training are not binding upon value adjustment boards or their magistrates in adjudicating legal disputes that arise during VAB proceedings. The undersigned's conclusion regarding the non-binding nature of the materials is based not upon DOR's characterization, but is instead informed by the statutory framework of Chapter 194. As discussed previously, value adjustment boards and their magistrates are required by section 194.015, Florida Statutes, to retain and seek legal advice from private counsel, not DOR. Further, any legal error committed by a value adjustment board or a magistrate is reviewed not by DOR, but rather by the circuit court in a de novo proceeding between the taxpayer and

the property appraiser. § 194.036, Fla. Stat. As DOR correctly points out, it has never attempted—for the obvious reason that it lacks enforcement authority over the VAB process—to mandate that value adjustment boards apply the legal principles enunciated in the training materials.

69. Respondents contend that several recent decisions of the First District Court of Appeal—specifically, Florida Department of Financial Services v. Capital Collateral Regional Counsel, 969 So. 2d 527 (Fla. 1st DCA 2007), and Coventry First, LLC v. State of Florida, Office of Insurance Regulation, 38 So. 3d 200 (Fla. 1st DCA 2010)—compel the conclusion that the training materials do not constitute rules. For the reasons detailed below, the undersigned agrees.

70. In Capital Collateral, the Florida Department of Financial Services received several "whistleblower" complaints regarding improper spending practices (in particular, using state funds to retain lobbyists) by the heads of Florida's two regional offices of capital collateral counsel ("CCRC"). 969 So. 2d at 528. Following an investigation, the agency issued a document titled "the Horn Report," which determined that the CCRC offices were legislative (as opposed to executive) agencies, and were therefore prohibited by section 11.062, Florida Statutes, from using state funds to lobby the Legislature. Id. at 529. The Horn Report further recommended

that Office of Financial Services legal staff initiate action against the CCRC offices to recover the funds that were inappropriately paid to lobbyists. Id. The CCRC for the Middle Region subsequently filed an unpromulgated rule challenge pursuant to section 120.56(4), which culminated with the administrative law judge concluding that the agency's report constituted a rule because the "agency statement of general applicability interprets and implements section 11.062." Id.

71. On appeal, the First District recited the well-settled principle that when "deciding whether a challenged action constitutes a rule, a court analyzes the action's general applicability, requirement of compliance, or direct and consistent effect of law." Id. at 530. Emphasizing that the statements contained within the Horn Report were not self-executing and that the agency had taken no action against the CCRC, the court held that the administrative law judge erred in concluding that the report was a rule:

The statements contained in the Horn report do not amount to a rule. The statements were never self-executing or capable of granting or taking away rights of any person by its own terms. The Horn report merely represents a recommendation by OFI staff that legal action be instituted to collect funds spent in violation of section 11.062. A recommendation which, standing alone, does not "require compliance, create certain rights while adversely affecting others, or otherwise have the direct and consistent effect of law," does not constitute a rule.

Neither the opinion of OFI that CCRC-M is an executive branch agency, nor the recommendation that action be taken . . . to recover funds used in violation of the anti-lobbying statute, affected any substantive rights of CCRC-M or Mr. Jennings. As noted, no action was taken against either CCRC-M or Mr. Jennings, based upon the Department's alleged "rule" that CCRC-M constituted an executive agency. The Department has not issued an Administrative Complaint or a Notice of Intended Agency Action seeking reimbursement for funds expended for the lobbyist.

Id. at 530-31. (Emphasis added) (internal citations omitted).

72. Subsequently, in Coventry First, LLC v. State of Florida, Office of Insurance Regulation, 38 So. 3d 200 (Fla. 1st DCA 2010), the First District addressed whether the policies, procedures, and manual used by the Office of Insurance Regulation in its examination of licensed viatical settlements provides constituted unpromulgated rules. In affirming the decision of the administrative law judge that the materials did not constitute rules, the court concluded, at the outset, that the items were internal management memoranda and therefore were not required to be promulgated by rule.¹⁴ Id. at 204. Significantly, as an alternative basis for affirmance, the court further held—based upon the testimony of the agency employees—that manual and other materials were not binding, and therefore did not constitute statements of general applicability:

Contrary to Coventry's arguments, we find there is competent substantial evidence that those documents . . . are not statements of general applicability

* * *

In determining whether an agency statement is an unpromulgated rule, the effect of the statement must also be taken into consideration Unlike the manual in *Vanjaria*, evidence here supports that OIR's policies, procedures, and manual are not rigid guides for examinations. Testimony in this case demonstrates that the documents at issue are applied on a case-by-case basis, and examiners have discretion to deviate from the documents. In addition, where, as here, a manual merely informs of a process or procedure without mentioning a penalty for noncompliance, it is not the equivalent of a rule.

Id. at 204-05. (Emphasis added).

73. Similar to the manual and policies in Coventry First and the Horn report in Capital Collateral, the evidence in the instant matter indicates that the statements contained within the 2010 VAB Training constitute nothing more than non-binding recommendations concerning DOR's understanding of the law. As a result, value adjustment boards and their magistrates are not required to apply—and therefore possess the discretion to deviate from—the legal principles enunciated within the materials when conducting VAB hearings. This conclusion is supported by the absence of any provision of law that authorizes DOR to base enforcement action on the VAB Training, the paucity of evidence that DOR has ever attempted any action to require

that the contents of the materials be applied during VAB proceedings, and the absence of language within the materials mentioning a penalty for noncompliance. Accordingly, the training materials do not amount to rules, as they do not constitute statements of general applicability, nor were they "intended by their own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law." Dep't of High. Saf. & Motor Veh. v. Schluter, 705 So. 2d 81, 82 (Fla. 1st DCA 1997).

74. For these reasons, the undersigned concludes that the challenged portions of the 2010 VAB Training do not constitute unpromulgated rules.

III. Unpromulgated Rule Challenge - PTO Bulletin 11-01

A. Jurisdiction and Burden of Proof

75. As indicated in Section II of this Summary Final Order, DOAH has jurisdiction pursuant to section 120.56(1) and (4), Florida Statutes. The burden is on Petitioners to demonstrate that PTO Bulletin 11-01 constitutes an unpromulgated rule.

B. Standing

76. The undersigned concludes, and Respondents concede, that Petitioner Turner has demonstrated that he is "substantially affected" by Property Tax Bulletin 11-01 and, therefore, has standing to maintain this action. See Ward v.

Bd. of Trs. of Int. Imp. Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995) (holding that to demonstrate standing in a rule challenge proceeding, a petitioner must prove that: (a) the challenged agency statement causes a real and sufficiently immediate injury in fact; and (b) petitioner's alleged interest is within the "zone of interest" to be protected or regulated).

C. Challenge to PTO Bulletin 11-01

77. On January 21, 2011, DOR issued Property Tax Oversight Bulletin 11-01, titled "Value Adjustment Board Petitions and the Eighth Criterion," to all value adjustment board attorneys and approximately 800 interested parties. The Bulletin reads in its entirety as follows:

FLORIDA DEPARTMENT OF REVENUE PROPERTY TAX
INFORMATIONAL BULLETIN

Value Adjustment Board Petitions and the
Eighth Criterion

This advisement addresses issues regarding the eighth just value criterion in subsection 193.011(8), F.S., which must be properly considered in administrative reviews. The Department's value adjustment board training contains more information on the eighth criterion. This bulletin must be used in conjunction with the training and consistent with law.

Advisement

1. The Department's value adjustment board training and this bulletin supersede prior Department letters OPN 90-0039 (dated August 20, 1990) and OPN 95-0002 (dated January 9, 1995).

2. In accordance with Florida Statutes and applicable case law, applicability of the eighth criterion in subsection 193.011(8), F.S., is not limited to a sales comparison valuation approach or to property that was sold. This bulletin addresses the proper consideration of the eighth criterion in administrative reviews involving the income capitalization and cost less depreciation approaches to valuation of real property.

3. The eighth criterion must be properly considered in the income capitalization and cost less depreciation approaches. This requires proper consideration of an adjustment for both costs of sale and personal property where appropriate. See subsection 193.011(8), F.S.

4. When justified by sufficiently relevant and credible evidence, the Board or special magistrate should make an eighth criterion adjustment to a value indication developed by the income capitalization or cost less depreciation approach to arrive at just valuation. This adjustment must include any adjustment necessary to exclude the just value of personal property from just valuations of real property.

Analysis

In long-established and accepted practice, Florida property appraisers routinely apply across-the-board eighth criterion adjustments in just valuations of real property, without regard to the valuation approach used or whether the property was sold. See Forms DR-493 reported annually by property appraisers, and Southern Bell Telephone and Telegraph Co. v. Broward County, 665 So. 2d 272 (Fla. 4th DCA 1995) review denied 673 So. 2d 30 (Fla. 1996). Also, see Louisville and National Railroad Co. v. Department of Revenue, State of Fla., 736 F.2d 1495 (11th Cir. (Fla.) July 24,

1984). An eighth criterion adjustment made in the just valuation of a single parcel was approved in Roden v. GAC Liquidating Trust, 462 So. 2d 92 (Fla. 2d DCA 1985). When an actual sale of the property has not occurred, the appraiser must, in arriving at just valuation, place himself or herself in the position of the parties to a hypothetical sale. See Southern Bell Telephone and Telegraph Co. v. Dade County, 275 So. 2d 4 (Fla. 1973) and Turner v. Tokai Financial Services, Inc., 767 So. 2d 494 (Fla. 2d DCA 2000) review denied 780 So. 2d 916 (Fla. 2001). The just valuation standards of section 193.011, F.S., which include the eighth criterion, must be properly considered regardless of the valuation approach used and whether the property was sold.

The case of Bystrom v. Equitable Life Assurance Society, 416 So. 2d 1133 (Fla. 3d DCA 1982) reviewed a 1978 assessment based on 1977 statutes. Later, in 1979, the eighth criterion was amended to add a personal property component. See Chapter 79-334, Laws of Florida. The law on which the long-established operation of the eighth criterion is based has changed substantially since the assessment date in Bystrom.

Conclusion

The eighth criterion must be properly considered in each of the three approaches to valuation. When justified by sufficiently relevant and credible evidence, the Board or special magistrate should make an eighth criterion adjustment in any of the three valuation approaches.

Board attorneys should ensure that all Board members and special magistrates receive a copy of this bulletin. Questions on this bulletin can be sent by e-mail to VAB@dor.state.fl.us.

78. Petitioners advance the following points in support of their assertion that PTO Bulletin 11-01 constitutes an unpromulgated rule: (1) the bulletin represents a change in agency policy that carries with it a requirement to implement the change through rulemaking; (2) the presence of mandatory-sounding language such as "should" and "must" within the bulletin; and (3) certain interested parties perceived or understood the bulletin to be mandatory. Each argument is discussed separately below.

79. As noted above, Petitioners first contend that DOR was required to promulgate PTO Bulletin 11-01 as a rule because the bulletin—which supersedes previous DOR opinion letters regarding the applicability of the section 193.011(8), Florida Statutes, to the "income capitalization and cost less depreciation" approaches to value—constitutes a change in DOR's non-rule based legal interpretation. In support of this argument, Petitioners cite three decisions of the First District Court of Appeal, all of which involved the Agency for Health Care Administration: Courts v. Agency for Health Care Administration, 965 So. 2d 154, 159-60 (Fla. 1st DCA 2007) (reversing final order that eliminated previously awarded companion care to Medicaid recipient, where evidence demonstrated that AHCA, in the absence of rulemaking or explication in the record, modified non-rule policy by modifying

its interpretation of "companion services"; "Since it is clear that the AHCA policy change was made as to appellant without rule-making or an explication of the new policy during the hearing process, the change is contrary to law"); Exclusive Investment Management & Consultants, Inc., v. Agency for Health Care Administration, 699 So. 2d 311, 312-13 (Fla. 1st DCA 1997) (reversing final order canceling appellant's Medicaid provider number where agency, without explication, abruptly changed its interpretation of section 409.906, Florida Statutes, which thereby imposed a new requirement that mental health services providers have an annual contract with the Department of Health and Rehabilitative Services; remanding for agency to explain its incipient policy); and Cleveland Clinic Florida Hospital v. Agency for Health Care Administration, 679 So. 2d 1237, 1239-41 (Fla. 1st DCA 1996) (holding AHCA's determination that certificate of need applicant, who sought to relocate and rebuild its acute care facility, was not entitled to an expedited review, but rather a comparative review, constituted a "radical turnabout" from AHCA's prior application of Rule 59C-1.004(2)(f); AHCA's failure to implement change in policy through rulemaking required remand for an expedited, non-comparative review).

80. Contrary to Petitioners' suggestion, Courts, Exclusive Investment, and Cleveland Clinic do not hold that an agency must

engage in rulemaking on every occasion in which an agency "changes its mind." Instead, those decisions collectively stand for the proposition that an agency may not suddenly modify a particular interpretation or policy and apply it against a party unless the agency either: (a) engages in rulemaking, which would be necessary in situations where the agency is departing from a previous application of an existing rule (e.g., Cleveland Clinic), or where the new interpretation or policy would fall within the statutory definition of a rule; or (b) provides an explication of the new policy at the time the party's substantial interests are being determined (e.g., Exclusive Investment Management).

81. Petitioners have also overlooked the fact that the outcomes in Courts and Exclusive Investment were not driven by the inquiry presented here: is the agency statement at issue a "rule," as defined by section 120.52(16), Florida Statutes? Indeed, the First District in Courts held that AHCA had acted unlawfully, notwithstanding its conclusion that the agency interpretation did not constitute a rule. Courts, 965 So. 2d at 159 ("While AHCA's decision with respect to appellant's plan . . . is not 'an agency statement of general policy,' and thus not a 'rule' as defined in section [120.52(16)] . . . in interpreting the definition of 'companion services' under the waiver application . . . AHCA was applying an agency policy").

Stated differently, Courts and Executive Investment are distinguishable because those cases, in contrast to the instant matter, were unconcerned with determining if a particular agency statement fell within the definition of an unpromulgated rule. Cleveland Clinic is likewise distinguishable, as the agency in that case abruptly changed the manner in which it had consistently applied one of its existing, promulgated rules (an action that would obviously require rulemaking), whereas the present matter involves an agency's retraction of several opinion letters.

82. As Respondents correctly argue, Courts, Exclusive Investment, and Cleveland Clinic are further distinguishable because those cases, unlike the instant cause, involved agency action (i.e., substantial interest determinations) by AHCA in connection with programs that AHCA directly administered. In contrast, and as discussed previously in this Final Order, DOR does not directly administer the local property tax process that is the subject of PTO Bulletin 11-01, and this is not a situation where the agency is applying the bulletin in determining a party's substantial interests. For these reasons, the undersigned concludes that the cases cited by Petitioners are not controlling.

83. Next, Petitioners contend that PTO Bulletin 11-01 constitutes an unpromulgated rule due to the presence of words

such as "must" and "should." For the same reasons that the use of similar language within the 2010 VAB Training did not compel a finding that the materials constituted unpromulgated rules, the undersigned likewise concludes that the bulletin is not a statement of general applicability that is intended "to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law." Dep't of High. Saf. & Motor Veh. v. Schluter, 705 So. 2d 81, 82 (Fla. 1st DCA 1997). In particular, the evidence demonstrates that the bulletin, identical to the 2010 VAB Training, constitutes a non-binding recommendation regarding DOR's understanding of the application of the "eighth criterion." Accordingly, value adjustment boards and magistrates, in adjudicating disputes between taxpayers and property appraisers, possess the discretion to seek advice from their independent legal counsel and deviate from the bulletin. This conclusion is supported by the absence of any provision of law that authorizes DOR to base enforcement action on the bulletin, as well as the lack of evidence that DOR has ever attempted any action to mandate that the contents of the bulletin be applied during VAB proceedings. Although the bulletin contains words such as "shall" and "must," the use of such language is integral to accomplishing DOR's statutory charge of disseminating its understanding of the law to magistrates and value adjustment board members.

84. Finally, citing Department of Revenue v. Vanjaria Enterprises, Inc., 675 So. 2d 252, 255 (Fla. 5th DCA 1996) ("In determining whether the tax assessment procedure in DOR's Training Manual is an illicit rule we must consider its effect") and State v. Harvey, 356 So. 2d 323 (Fla. 1st DCA 1977) ("Whether an agency statement is a rule turns on the effect of the statement"), Petitioners argue that the PTO Bulletin 11-01 constitutes an unpromulgated rule because certain interested persons perceived or understood the bulletin to be mandatory in nature. While the bulletin's effect must no doubt be considered, the undersigned does not read Vanjaria and Harvey so expansively that "effect" should properly encompass how the agency statement is subjectively perceived by a particular individual. Indeed, in Vanjaria and Harvey there was no occasion to examine the manner in which the unpromulgated rules were perceived, as the evidence in both cases clearly demonstrated that the agency statements—the Training Manual in Vanjaria and the "minimum training and experience requirements" in Harvey—were in fact generally applicable and binding.

85. As Respondent DOR points out in its Proposed Final Order, the First District Court of Appeal has addressed the issue of whether perception or understanding is determinative in an unpromulgated rule challenge. Specifically, in Florida Department of Financial Services v. Capital Collateral Regional

Counsel, 969 So. 2d 527 (Fla. 1st DCA 2007), the administrative law judge found the existence of an invalid, unpromulgated rule, based in part upon the testimony of agency employees regarding their understanding of the statutory provision at issue. In reversing the ALJ's final order, the court observed:

The ALJ also found other evidence of the Department's rule, including an "agency addressed memo" reminding state agencies not to use state funds for lobbying purposes, a letter from the Department . . . and testimony from members of the Department as to their longstanding understanding of section 11.062. For the same reasons the Horn Report and the legal memorandum do not demonstrate the existence of a rule, we find that the other items do not demonstrate the existence of an unpromulgated, Department rule.

(Emphasis added).¹⁵

86. For these reasons, Petitioners have failed to demonstrate that PTO Bulletin 11-01 constitutes an unpromulgated rule.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED:

1. To the extent that Florida Administrative Code Rule 12D-9.020 provides that taxpayers are under no obligation to disclose their evidence to property appraisers in advance of value adjustment board hearings, the rule contravenes section 194.011(4)(a), Florida Statutes, and therefore constitutes an

invalid exercise of delegated legislative authority. All other challenges to Florida Administrative Code Rules 12D-9.020 and 12D-9.025 are rejected.

2. The 2010 Value Adjustment Board Training does not constitute an invalid, unpromulgated rule.

3. Property Tax Oversight Bulletin 11-01 does not constitute an invalid, unpromulgated rule.

4. Petitioner Turner shall have 30 days from the date of this Final Order within which to file a motion for attorney's fees and costs, to which motion (if filed) Turner shall attach appropriate affidavits (e.g. attesting to the reasonableness of the fees) and essential documentation in support of the claim, such as time sheets, bills, and receipts.

DONE AND ORDERED this 22nd day of June, 2011, in Tallahassee, Leon County, Florida.



EDWARD T. BAUER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of June, 2011.

ENDNOTES

¹ With respect to the composition of value adjustment boards and the selection of its members, section 194.015 provides in relevant part as follows:

There is hereby created a value adjustment board for each county, which shall consist of two members of the governing body of the county as elected from the membership of the board of said governing body, one of whom shall be elected chairperson, and one member of the school board as elected from the membership of the school board, and two citizen members, one of whom shall be appointed by the governing body of the county and must own homestead property within the county and one of whom must be appointed by the school board and must own a business occupying commercial space located within the school district. A citizen member may not be a member or an employee of any taxing authority, and may not be a person who represents property owners in any administrative or judicial review of property taxes.

² In particular, section 194.015 provides that the value adjustment board "shall appoint private counsel who has practiced law for over 5 years and who shall receive such compensation as may be established by the board. The private counsel may not represent the property appraiser, the tax collector, any taxing authority, or any property owner in any administrative or judicial review of property taxes."

³ Pursuant to section 194.035(1), "special magistrates may not be elected or appointed officials or employees of the county but shall be selected from a list of those qualified individuals who are willing to serve as special magistrates. . . . The value adjustment board shall ensure that the selection of special magistrates is based solely upon the experience and

qualifications of the special magistrate and is not influenced by the property appraiser."

⁴ Specifically, section 194.036(1) provides that the property appraiser may appeal an adverse decision to the circuit court if one or more of the criteria are met:

(a) The property appraiser determines and affirmatively asserts in any legal proceeding that there is a specific constitutional or statutory violation, or a specific violation of administrative rules, in the decision of the board, except that nothing herein shall authorize the property appraiser to institute any suit to challenge the validity of any portion of the constitution or of any duly enacted legislative act of this state;

(b) There is a variance from the property appraiser's assessed value in excess of the following: 15 percent variance from any assessment of \$50,000 or less; 10 percent variance from any assessment in excess of \$50,000 but not in excess of \$500,000; 7.5 percent variance from any assessment in excess of \$500,000 but not in excess of \$1 million; or 5 percent variance from any assessment in excess of \$1 million; or

(c) There is an assertion by the property appraiser to the Department of Revenue that there exists a consistent and continuous violation of the intent of the law or administrative rules by the value adjustment board in its decisions. The property appraiser shall notify the department of those portions of the tax roll for which the assertion is made. The department shall thereupon notify the clerk of the board who shall, within 15 days of the notification by the department, send the written decisions of the board to the department. Within 30 days of the receipt of the decisions by the department, the department shall notify the property appraiser of its decision relative

to further judicial proceedings. If the department finds upon investigation that a consistent and continuous violation of the intent of the law or administrative rules by the board has occurred, it shall so inform the property appraiser, who may thereupon bring suit in circuit court against the value adjustment board for injunctive relief to prohibit continuation of the violation of the law or administrative rules and for a mandatory injunction to restore the tax roll to its just value in such amount as determined by judicial proceeding. However, when a final judicial decision is rendered as a result of an appeal filed pursuant to this paragraph which alters or changes an assessment of a parcel of property of any taxpayer not a party to such procedure, such taxpayer shall have 60 days from the date of the final judicial decision to file an action to contest such altered or changed assessment pursuant to s. 194.171(1), and the provisions of s. 194.171(2) shall not bar such action.

⁵ Section 193.011 enumerates eight factors that a property appraiser "shall take into consideration" in arriving at just valuation. Pursuant to section 193.011(8)—"the eighth criterion"—the property appraiser is required to take into consideration:

The net proceeds of the sale of the property, as received by the seller, after deduction of all of the usual and reasonable fees and costs of the sale, including the costs and expenses of financing, and allowance for unconventional or atypical terms of financing arrangements. When the net proceeds of the sale of any property are utilized, directly or indirectly, in the determination of just valuation of realty of the sold parcel or any other parcel under the provisions of this section, the property appraiser, for the purposes of such determination, shall exclude any portion of such net proceeds attributable to payments

for household furnishings or other items of personal property.

⁶ Although Respondents concede that Petitioner Turner has standing to bring the instant challenge, see Joint Prehearing Stipulation, it is well-settled that "standing in the administrative context is a matter of subject matter jurisdiction and cannot be conferred by the parties." Abbott Labs. v. Mylan Pharms., Inc., 15 So. 3d 642, 651 n.2 (Fla. 1st DCA 2009).

⁷ Petitioner's reference to rule 12D-9.025(2)(c) appears to be a typographical error, as that rule provision does not reference an optional evidence exchange.

⁸ In its Proposed Final Order, Respondent DOR contends that in Robbins v. Department of Revenue, Case No. 03-1364RP (Fla. DOAH Mar. 1, 2004), the "Administrative Law Judge Held that the evidence exchange was optional." The undersigned disagrees with Respondent's reading of Robbins, as the issues in that case were limited to a challenge of proposed rules that would require the property appraiser to provide evidence "at least five calendar days before the hearing" to the taxpayer by regular or certified U.S. Mail. While it is true that the ALJ in Robbins observed that if "the exchange of evidence requirement is timely triggered by the taxpayer, Section 194.011(4)(b), Florida Statutes, requires the property appraiser to provide his or her evidence to the taxpayer . . . ," the undersigned does not read this language as a determination that a taxpayer's compliance with section 194.011(4)(a) is optional. Instead, the ALJ was simply observing (correctly) that the property appraiser is not required to comply with section 194.011(4)(b) unless the taxpayer first complies with section 194.011(4)(a).

⁹ The undersigned's conclusion in this regard is supported by the legislative history of subsection (4), which was added pursuant to Chapter 2002-18, Laws of Florida. In particular, the Senate Staff Analysis and Economic Impact Statement reads:

This section also creates subsection (4) to establish a timeline for the reciprocal exchange of information between petitioners At least 10 days before the hearing, the petitioner is required to provide the property appraiser a list of evidence to be presented at the hearing, together with copies of all documentation to be considered

by the VAB and a summary of evidence to be presented by witnesses, and to mail a copy of this information to the VAB.

The property appraiser then has 5 days after the petitioner provides this information to the VAB to reciprocate by giving to the petitioner a list of evidence to be presented at the hearing

Fla. S. Committee on Cmty. Affairs, CS for SB 1360 (2002) Staff Analysis at 4 (Feb. 13, 2002) (emphasis added).

Pursuant to Chapter 2004-349, Laws of Florida, section 194.011(4) (a) was subsequently amended to require petitioners to disclose evidence at least 15 days prior to the hearing (replacing the previous requirement of 10 days). In addition, section 194.011(4) (b) was modified as follows:

(b) No later than 7 ~~5~~ days before the hearing, if ~~after~~ the petitioner has provided ~~provides~~ the information required under paragraph (a), and if requested in writing by the petitioner, the property appraiser shall provide to the petitioner a list of evidence to be presented at the hearing, together with copies of all documentation to be considered by the value adjustment board and a summary of evidence to be presented by witnesses. The evidence list must contain the property record card if provided by the clerk. Failure of the property appraiser to timely comply with the requirements of this paragraph shall result in a rescheduling of the hearing.

(New language underlined; deleted language indicated by strikethrough).

Although Respondents argue that the modifications quoted above—deleting "after" and adding "if"—suggest that the legislature did not intend for section 194.011(4) (a) to impose a mandatory obligation upon the taxpayer, the undersigned can discern no such intent from the 2004 amendment. Instead, it appears more likely that the grammatical change of "after" to "if" was made in recognition of the fact that some taxpayers may fail to

comply with section 194.011(4) (a). Had the legislature intended to communicate a non-mandatory meaning of "shall" in the 2004 amendments, it could have easily and clearly done so by replacing "shall" with "may" in section 194.011(4) (a).

¹⁰ An argument could be made that even though section 194.034(1) (d) expressly requires the exclusion of a taxpayer's evidence that was requested in writing and knowingly withheld, it does not necessarily follow—because the statute is otherwise silent regarding exclusion for nondisclosure—that a VAB or magistrate is absolutely prohibited from excluding a taxpayer's evidence for noncompliance with section 194.011 in situations where no written request for evidence was submitted. However, DOR's interpretation—that exclusion of a taxpayer's evidence for nondisclosure is only permitted under the circumstances delineated in section 194.034(1) (d)—is reasonable and should be afforded deference. Associated Mortg. Investors v. Dep't of Bus. Reg., 503 So. 2d 379, 380 (Fla. 1st DCA 1987) ("Such interpretation, made by the agency charged with enforcing a statute, should be accorded great deference unless there is clear error or conflict with the intent of the statute").

¹¹ The Oxford Dictionary defines "optional," the adjectival form of "option," as "available to be chosen but not compulsory." Oxford American Dictionary & Thesaurus 905 (2d ed. 2009). Similarly, Merriam-Webster defines "optional" as "involving an option: not compulsory." Merriam-Webster's Dictionary & Thesaurus 569 (1st ed. 2007).

¹² Having concluded that portions of Florida Administrative Code Rule 12D-9.020 contravene section 194.011(4) (a) by prescribing that a taxpayer is not obligated to provide evidence to the property appraiser, it is unnecessary for the undersigned to address Petitioner's alternative argument that the rule is arbitrary or capricious.

¹³ Although Petitioners argue vigorously that the quoted portions of Modules Four and Six constitute misstatements of the law, the sole issue for the undersigned's determination in this proceeding is whether the agency statements constitute rules-by-definition and, if so, whether their existence violates section 120.54(1) (a), Florida Statutes. Fla. Ass'n of Med. Equip. Servs. v. Ag. for Health Care Admin., Case No. 02-1314RU (Fla. DOAH Oct. 25, 2002) (Order on Motions for Summary Final Order) ("In a section 120.56(4) proceeding which has not been consolidated with a proceeding pursuant to section 120.57(1) (e), the issue whether a rule-by-definition is substantively invalid

for reasons set forth in section 120.52(8)(b)-(g), Florida Statutes, should not be reached. That being so, the ultimate issues in this case are whether the alleged agency statements are rules-by-definition and, if so, whether their existence violates section 120.54(1)(a)"); Johnson v. Ag. for Health Care Admin., Case No. 98-3419RU, 1999 Fla. Div. Adm. Hear. LEXIS 5180 (Fla. DOAH May 18, 1999) ("It is apparent from a reading of subsection (4) of section 120.56, Florida Statutes, that the only issue to be decided by the administrative law judge under this subsection is 'whether all or part of [the agency] statement [in question] violates s. 120.54(1)(a),' Florida Statutes"); see also Southwest Fla. Water Mgmt. Dist. v. Charlotte Cnty., 774 So. 2d 903, 908-09 (Fla. 2d DCA 2001) ("The basis for a challenge to an agency statement under this section [section 120.54(4), Florida Statutes] is that the agency statement constitutes a rule as defined by section [120.52(16), Florida Statutes] but that it has not been adopted by the rule-making procedure mandated by section 120.54. In the present case, the challenges to the existing and proposed agency statement on the grounds that they represent an invalid delegation of legislative authority are distinct from a section 120.56(4) challenge that the agency statements are functioning as unpromulgated rules").

¹⁴ This portion of the court's holding is inapplicable to the instant matter, as Respondents do not contend that the 2010 VAB Training falls under internal management memorandum exception.

¹⁵ Even assuming that perception is a relevant consideration in determining the existence of an unpromulgated rule, Petitioners' evidence regarding this issue is too limited to allow the undersigned to draw any meaningful conclusions. Indeed, with respect to value adjustment board members, magistrates, and value adjustment board attorneys, the record merely demonstrates that one Nassau County magistrate and one value adjustment board attorney (Broward County) perceived the bulletin to be mandatory.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.