

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA MEDICAL ASSOCIATION;)	
FLORIDA OSTEOPATHIC MEDICAL)	
ASSOCIATION; FLORIDA ACADEMY OF)	
FAMILY PHYSICIANS; FLORIDA CHAPTER,)	
AMERICAN COLLEGE OF PHYSICIANS;)	
AMERICAN SOCIETY OF INTERNAL)	
MEDICINE; FLORIDA CHAPTER OF THE)	
AMERICAN COLLEGE OF SURGEONS;)	
FLORIDA SURGICAL SOCIETY; FLORIDA)	
PSYCHIATRIC SOCIETY; FLORIDA)	
ACADEMY OF PAIN MEDICINE; FLORIDA)	
SOCIETY OF ANESTHESIOLOGISTS;)	
FLORIDA SOCIETY OF OPHTHALMOLOGY;)	
FLORIDA OB-GYN SOCIETY; and FLORIDA)	
COLLEGE OF EMERGENCY PHYSICIANS,)	
)	
Petitioners,)	
)	
vs.)	Case No. 99-5337RP
)	
DEPARTMENT OF HEALTH,)	
BOARD OF NURSING,)	
)	
Respondent,)	
)	
and)	
)	
FLORIDA NURSES ASSOCIATION,)	
AND FLORIDA ASSOCIATION OF)	
NURSE ANESTHETISTS,)	
)	
Intervenors.)	
_____)	

FINAL ORDER

This case was scheduled for a hearing to be held on January 18, 2000. Before that date Petitioners and Respondent, the original parties, filed a Joint Motion for Cancellation of Hearing and Consideration of Stipulated Facts and Proposed Final Orders. This motion sought permission for the parties to present

the case on a stipulation of facts with attached exhibits. The joint motion was granted. The case has been considered on stipulated facts and Respondent's Exhibits A through D and F through H. The case was considered by Charles C. Adams, Administrative Law Judge.

APPEARANCES

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STATEMENT OF THE ISSUE

Is proposed rule 64B9-4.009 of the Board of Nursing an invalid exercise of delegated legislative authority? Section 120.52(8), Florida Statutes.

PRELIMINARY STATEMENT

On December 20, 1999, Petitioner, Florida Medical Association, et al. (FMA), pursuant to Section 120.56, Florida Statutes, filed a petition to determine the validity of proposed rule 64B9-4.009 (the proposed rule). As grounds for its challenge FMA alleged that the Board of Nursing (the Board) had exceeded its grant of rule-making authority in the attempt to promulgate the proposed rule; that the proposed rule is arbitrary and capricious; and that the proposed rule is not supported by competent substantial evidence.

On December 22, 1999, Sharyn L. Smith, Chief Judge, Division of Administrative Hearings, assigned the case to Charles C. Adams, Administrative Law Judge, with the Division of Administrative Hearings, for conduct of a formal hearing, having determined, upon review, that the petition challenging the proposed rule was in compliance with the requirements of Section 120.56(2), Florida Statutes.

As stated, the final hearing scheduled for January 18, 2000, was cancelled in lieu of the presentation of the case upon stipulated facts, with supporting exhibits.

Florida Nurses Association (FNA) and Florida Association of Nurse Anesthetists (FANA) petitioned to intervene. FNA and FANA were allowed to intervene subject to the stipulation of facts by FMA and the Board as supported by the Board's exhibits. FNA and FANA intervened in support of the proposed rule.

All parties were allowed to file proposed final orders on or before February 4, 2000. FMA, the Board, and FANA met that deadline. FNA submitted a proposed final order on February 7, 2000. Nonetheless, all proposed final orders have been considered in preparing the final order.

FINDINGS OF FACT

The Stipulated Facts

1. The Joint Practice Committee (the Committee) was created by Section 464.003(3)(c), Florida Statutes. The statute charges the Committee to approve those acts of medical diagnosis and treatment, prescription, and operation that may be performed by Advance Registered Nurse Practitioners (ARNPs) under the general supervision of a practitioner licensed under Chapters 458, 459 or 466, Florida Statutes, within the framework of standing protocols.

2. On October 24, 1998, the Committee met to consider whether prescription of controlled substances was an appropriate medical act to be approved for ARNPs under proper protocol. [See minutes of meeting, Exhibit A.] The Committee was asked to review the report by the Statewide Task Force Committee (a separate committee) mandated by the 1996 legislature. Members of the Committee requested additional information before voting on the issues, including the following:

- (1) A summary of votes taken at the Statewide Task Force meetings

(2) Testimony by physician members of the Task Force Committee on the safety of prescription of controlled substances by ARNPs.

(3) ARNPs protocols, including samples from practicing Florida ARNPs and protocol requirements from other states.

(4) National information on ARNP prescriptive practice for controlled substances, including the annual report from the Nurse Practitioner Journal, information on prescriptive practice from the National

Council of State Boards of Nursing, and a state-by-state summary of prescriptive practices.

(5) Pharmacology syllabi from medical schools and ARNP programs.

(6) National Practitioner Data Bank information on safe practice.

(7) Copy of correspondence from the state pharmacy association.

(8) DEA Handbook for Mid-Level Providers.

3. On December 8, 1998, the Committee met to consider the prescriptive authority and to review information requested at the October 24, 1998 meeting. [See Exhibit C, minutes of the December 8, 1998 meeting and Composite Exhibit D, materials provided to the Committee]. The Committee also took testimony from persons attending the Committee meeting. After review of the material and consideration of the testimony, the Committee voted as follows:

(1) To request the Department of Health to seek a written opinion from the Attorney General on the question: Can the prescribing of controlled substances by Nurse

Practitioners under protocol be authorized by rule or must there be a legislative change.

(2) To authorize prescription of schedule II-V controlled substances by ARNPs under protocol.

(3) To require continuing education on prescribing, record-keeping, discouraging diversion of dangerous drugs approved by the Board of Nursing prior to prescribing controlled substances under protocol.

4. On January 25, 1999, the Department of Health requested an opinion from the Attorney General on the following questions:

(1) Whether the Board may adopt a rule pursuant to section 464.003(3), Florida Statutes, authorizing the prescription of controlled substances by Advanced Registered Nurse Practitioners without conflicting with the prescribing requirements found in chapter 893, Florida Statutes.

(2) Whether it is necessary to obtain a legislative change to add Advanced Registered Nurse Practitioners to the list of 'practitioners' authorized to prescribe controlled substances under chapter 893, Florida Statutes, prior to adoption of a rule that would allow prescriptions of controlled substances by Advanced Registered Nurse Practitioners?

5. At its regularly scheduled Board meeting on April 14, 1999, the Board voted to proceed with promulgation of a rule to implement the decision by the Committee.

6. On May 17, 1999, the Attorney General's Office responded to the Department of Health by stating that a formal opinion would not be given.

7. In Volume 25, Number 21 of the Florida Administrative Weekly, which was issued May 28, 1999, the Board published its

notice of development of proposed rule 64B9-4.009. No rule development hearing was requested.

8. The Board set a rule workshop for June 26, 1999, to discuss changes to Chapter 64B9-4, Florida Administrative Code. At the rule workshop, the Board received a letter dated June 14, 1999, from the FMA, presented to the Board, containing written objections to proposed rule 64B9-4.009.

9. On June 25, 1999, the Secretary for the Department of Health advised the Board that the Department's General Counsel would be preparing a legal opinion on whether current law would allow the rule to be adopted.

10. On July 23, 1999, General Counsel for the Department of Health issued his legal opinion to the Secretary that absent amendment to Chapter 893, Florida Statutes, neither the Joint Practice Committee nor the Board of Nursing can authorize ARNPs to prescribe controlled substances.

11. In Volume 25, Number 29 of the Florida Administrative Weekly, which was issued July 23, 1999, the Board published its notice of proposed rule 64B9-4.009. The rule hearing was set for October 12, 1999. As voted by the Committee, the rule provides that an ARNPs' prescriptive authority includes the prescription of Schedule II, III, IV, and V controlled substances after appropriate continuing education.

12. On August 17, 1999, the Joint Administrative Procedures Committee issued a letter to the attorney for the Board

commenting that the proposed rule appears to contravene Section 893.05, Florida Statutes.

13. On September 25, 1999, the Committee held a telephone conference. (See Exhibit F, Joint Committee Minutes, Conference call September 25, 1999.) The Committee declined to reconsider the decisions made at the December 1998 meeting.

14. On October 12, 1999, a public hearing requested by FMA was held, at which the Board accepted written and oral testimony. (See Exhibit G, the transcript of the public hearing and Composite Exhibit H, the written comments provided on or before the date of the public hearing including a letter dated October 11, 1999, from the FMA and numerous specialty medical societies presenting written objections to the rule.)

15. On December 8, 1999, the Board held an additional public hearing to consider the transcript of rule hearing on the proposed rule. The Board voted to proceed with promulgation of the proposed rule.

Other Facts Agreed Upon

16. The Board admits for purposes of consideration of this case that FMA et al. have standing to bring this rule challenge.

17. The only state agency affected is the Board, 4080 Woodcock Drive, Suite 202, Jacksonville, Florida 32207. The Board is responsible for the administration of Chapter 464, Florida Statutes, and has implemented its provisions, in part,

through the adoption of rules set forth in Chapter 64B9, Florida Administrative Code.

Facts Related to Standing

18. The respective parties have not contested the veracity of the factual statements pled concerning standing of the respective parties. Therefore, it is accepted that the factual information concerning the organizations and their purposes, as pled, are accurate for fact-finding purposes. Those facts as pled are as follows:

A. The only state agency affected is Respondent, State of Florida, Department of Health, Florida Board of Nursing ("the Board"), 4080 Woodcock Drive, Suite 202, Jacksonville, Florida 32207. The Department and the Board are responsible for the administration of Chapter 464, and have implemented its provisions in part through the adoption of rules set forth in Chapter 64B9, Florida Administrative Code.

B. The address of the Florida Medical Association (FMA) is 113 East College Avenue, Tallahassee, Florida 32301. The FMA is organized and maintained for the benefit of the approximately 16,000 licensed Florida physicians who comprise its membership. One of the primary purposes of the FMA is to act on behalf of its members by representing their common interests before the various governmental entities of the State of Florida, including the Department of Health and its Boards.

C. The address of the Florida Osteopathic Medical Association (FOMA) is 2007 Apalachee Parkway, Tallahassee, Florida. The FOMA is organized and maintained for the benefit of the approximately 1,800 licensed Florida osteopathic physicians who comprise its membership. One of the primary purposes of the FOMA is to act on behalf of its members

by representing their common interests before the various governmental entities of the State of Florida, including the Department of Health and its Boards.

D. The address of the Florida Academy of Family Physicians (FAFP) is 6720 Atlantic Boulevard, Jacksonville, Florida 32211. FAFP is organized and maintained for the benefit of the approximately 3,800 licensed Florida family physicians who comprise its membership. One of the primary purposes of the FAFP is to act on behalf of its members by representing their common interests before the various governmental entities of the State of Florida, including the Department of Health and its Boards.

E. The address of the Florida Chapter, American College of Physicians - American Society of Internal Medicine (FCACP-ASIM) is 2589 Park Street, Jacksonville, Florida 32204. FCACP-ASIM is organized and maintained for the benefit of the approximately 4,500 licensed Florida internists who comprise its membership. One of the primary purposes of the FCACP-ASIM is to act on behalf of its members by representing their common interests before the various governmental entities of the State of Florida, including the Department of Health and its Boards.

F. The address of the Florida Chapter, American College of Surgeons (FC-ACS) is 2589 Park Street, Jacksonville, Florida 32204. FC-ACS is organized and maintained for the benefit of the approximately 1,000 licensed Florida surgeons who comprise its membership. One of the primary purposes of the FC-ACS is to act on behalf of its members by representing their common interests before the various governmental entities of the State of Florida, including the Department of Health and its Boards.

G. The address of the Florida Surgical Society (FSS) is Post Office Box 536544, Orlando, Florida 32853. FSS is organized and maintained for the benefit of the

approximately 200 licensed Florida surgeons who comprise its membership. One of the primary purposes of the FSS is to act on behalf of its members by representing their common interests before the various governmental entities of the State of Florida, including the Department of Health and its Boards.

H. The address of the Florida Psychiatric Society (FPS) is 524 East Park Avenue, Tallahassee, Florida 32301. The FPS is organized and maintained for the benefit of the approximately 800 licensed Florida psychiatrists who comprise its membership. One of the primary purposes of the FPS is to act on behalf of its members by representing their common interests before the various governmental entities of the State of Florida, including the Department of Health and its Boards.

I. The address of the Florida Academy of Pain Medicine (FAPM) is 335 Beard Street, Tallahassee, Florida 32303. The FAPM is organized and maintained for the benefit of the approximately 100 licensed Florida pain management physicians who comprise its membership. One of the primary purposes of the FAPM is to act on behalf of its members by representing their common interests before the various governmental entities of the State of Florida, including the Department of Health and its Boards.

J. The address of the Florida Society of Anesthesiologists (FSA) is 355 Beard Street, Tallahassee, Florida 32301. The FSA is organized and maintained for the benefit of the approximately 1,800 licensed Florida anesthesiologists who comprise its membership. One of the primary purposes of the FSA is to act on behalf of its members by representing their common interests before the various governmental entities of the State of Florida, including the Department of Health and its Boards.

K. The address of the Florida Society of Ophthalmology (FSO) is 1133 West Morse Boulevard, Suite 201, Winter Park, Florida

32789. The FSO is organized and maintained for the benefit of the approximately 400 licensed Florida ophthalmologists who comprise its membership. One of the primary purposes of the FPS is to act on behalf of its members by representing their common interests before the various governmental entities of the State of Florida, including the Department of Health and its Boards.

L. The address of the Florida Ob-Gyn Society (FOGS) is 355 Beard Street, Tallahassee, Florida 32303. The FOGS is organized and maintained for the benefit of the approximately 700 licensed Florida ob-gyns who comprise its membership. One of the primary purposes of the FOGS is to act on behalf of its members by representing their common interests before the various governmental entities of the State of Florida, including the Department of Health and its Boards.

M. The address of the Florida College of Emergency Physicians (FCEP) is 3717 South Conway Road, Orlando, Florida 32812. The FCEP is organized and maintained for the benefit of the approximately 800 licensed Florida emergency medicine physicians who comprise its membership. One of the primary purposes of the FCEP is to act on behalf of its members by representing their common interests before the various governmental entities of the State of Florida, including the Department of Health and its Boards.

N. Intervenor, Florida Nurses Association (FNA), is a professional association located at 1235 East Concord Street, Orlando, Florida 32803-5403 representing over 7,000 Registered nurses (RNs) licensed by the State of Florida, of which more than 1,000 are certified as Advanced Registered Nurse Practitioners (ARNPs).

O. FNA's members are directly regulated by the Respondent and substantially affected by proposed rule 64B9-4.009, which grants additional prescriptive authority to certain

ARNPs under protocol with licensed physicians.

P. On behalf of its members, FNA serves as a professional advocate before several governmental bodies, including the Board, and actively participated in support of the rule-making process which produced proposed rule 64B9-4009.

Q. Intervenor, Florida Association of Nurse Anesthetists, is a Florida nonprofit corporation and professional organization representing the legal, legislative, and professional practice interests of more than 1500 Certified Registered Nurse Anesthetists (CRNAs) practicing throughout Florida, all of whom are Advanced Registered Nurse Practitioners (ARNPs). The address of the Florida Association of Nurse Anesthetists is Post Office Box 150127, Altamonte Springs, Florida 32715-0127.

R. CRNAs are expressly authorized by Florida law to order and administer anesthetic agents. Nearly all the anesthetic agents utilized by CRNAs are controlled substances.

S. Under current law, Florida CRNAs cannot prescribe controlled substances, and are unable to obtain a registration number from the United States Drug Enforcement Administration (DEA). A DEA registration number is a prerequisite to prescribing controlled substances. The proposed rule would permit Florida CRNAs to prescribe controlled substances, and obtain a DEA registration number. The ability to prescribe controlled substances would have a

direct impact on the practice of Florida CRNAs, in that it would allow CRNAs to prescribe anesthetic agents and post-operative medications for patients.

The Proposed Rule

64B9-4.009 Functions of the Advanced Registered Nurse.

(1) All categories of Advanced Registered Nurse Practitioner may perform functions listed in Section 464.012(3), Florida Statutes. The scope of practice for all categories of ARNPs shall include those functions which the ARNP has been educated to perform including the monitoring and altering of drug therapies, and initiation of appropriate therapies, according to the established protocol and consistent with the practice settings.

(2) Advanced Registered Nurse Practitioners' prescriptive authority includes the prescription of Schedule II, III, IV and V controlled substances under appropriate protocol. Advanced Registered Nurse Practitioners may prescribe controlled substances only after the Advanced Registered Nurse Practitioner demonstrates completion of a Board-approved course in prescribing controlled substances. The Board approves 'Clinical, Legal, & Ethical Issues in Prescribing Abusable Drugs,' sponsored by the University of South Florida College of Medicine, Courses meeting the following criteria will also be approved:

(a) The course must consist of 22 contact hours of formal classroom instruction;

(b) The course must include the following education objectives;

1. understand basic pharmacokinetic principles relating to pharmacological agents.

2. describe basic pharmacology of drugs subject to abuse, including opiates, sedative-hypnotics, psychotropic agents, steroids and stimulants.

3. assess the need for and proper use of drugs subject to abuse in managing both acute and/or chronic pain or mood disorders.

4. achieve an improved understanding of drug abuse, drug dependence and addiction.

5. identify the legal basis of ration and state drug control policies.

6. discuss record keeping, enforcement agency practices and problem avoidance.

Specific Authority 464.003, 464.006, 464.012, Florida Statutes. Law implemented 464.003, 464.012, Florida Statutes.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the subject matter and parties in this proceeding pursuant to Sections 120.52, 120.56, 120.569 and 120.57, Florida Statutes. Authority for determining the alleged invalidity of proposed rule 64B9-4.009 is provided in Section 120.56(1) and (2), Florida Statutes.

21. As anticipated in Section 120.56(2)(a), Florida Statutes, the petition challenging the proposed rule states with particularity the objections to the proposed rule and the reasons why the proposed rule is alleged to be an invalid exercise of delegated legislative authority.

22. The grounds for challenge are in accordance with Section 120.52(8)(b),(e) and (f), Florida Statutes, which state in pertinent part:

* * *

(b) The agency has exceeded its grant of rule making authority, citation to which is required by s. 120.54(3)(a)1.

* * *

(e) The rule is arbitrary or capricious;

(f) The rule is not supported by competent substantial evidence . . .

23. By virtue of the prehearing stipulation entered into between the FMA and the Board, which binds FNA and FANA on the presentation of stipulated facts, FMA has borne the burden of going forward with the proof. Likewise, the presentation of the case through the prehearing stipulation with stipulated facts and attached exhibits constitutes the attempt by the Board to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised in the petition. Section 120.56(2)(a), Florida Statutes.

FMA et al.'s Standing

24. Although FMA, et al. and the Board had agreed not to contest FMA, et al.'s standing to challenge the proposed rule, this did not preclude consideration of that standing as a matter of law. FANA through its proposed final order has questioned FMA, et al.'s standing to challenge the promulgation of the proposed rule. FANA asserts that the Petitioners are not substantially affected persons who may seek the administrative determination of the invalidity of the proposed rule. In support, FANA cites to Board of Optometry v. Society of Ophthalmology, 538 So. 2d 878 (Fla. 1st DCA 1989). In that case the Society of Ophthalmology (the Society) had petitioned in a rule challenge case against the actions of the Board of Optometry as being inconsistent with the expectations in Sections 463.0055,

Florida Statutes (1987). A determination had been made in the final hearing that the Society had sufficient standing to challenge the rule-making process of the Board of Optometry, as substantially affected by that process. The statute and rule-making process engaged in by the Board of Optometry involved the opportunities for certain optometrists licensed in Florida to gain certification to administer topical ocular drugs in the diagnosis and treatment of the human eye. In the final order it was determined that the Society gained standing by virtue of the manner in which the Board of Optometry had conducted rule-making in contravening the enabling legislation found at Section 463.0055, Florida Statutes (1987). On appeal in Board of Optometry, supra, the court determined that the Society lacked standing to bring the rule challenge in that Section 463.0055, Florida Statutes (1987). created an opportunity for licensed and certified optometrists to independently administer topical ocular drugs in the diagnosis and treatment of the human eye, a practice previously reserved to allopathic and osteopathic physicians practicing ophthalmic medicine. The court in denying standing rejected the notion that the allopathic and osteopathic physicians who practiced a similar form of health care in relation to the use of topical ocular drugs had any stake in the outcome of the Board of Optometry's rule-making decisions pertaining to its licensees, practicing optometrists. Having determined that the allopathic and osteopathic physicians did not

have requisite standing to challenge the Board of Optometry in its rule-making as a threshold matter, it was unavailable to the challengers to support their claim of standing by specific proof designed to convince the fact-finder in the rule challenge case below, that the Board of Optometry had acted ultra vires in the rule promulgation process.

25. Here both Sections 464.003(3)(c) and 464.012(3), Florida Statutes (1999), recognize the role which physicians licensed in accordance with Chapters 458 and 459, Florida Statutes, play in the supervision of ARNPs in the framework of standing protocols where drugs are prescribed by the ARNPs. Unlike the optometrists in Board of Optometry, supra, ARNPs do not have exclusive authority in providing health care in the process of prescribing medications. The proposed rule contemplates a role by the physicians which is both real and immediate. Physicians are affected by the proposed rule. That affect is substantial. The opportunity to participate or to decline participation with ARNPs in practices for prescribing controlled substances does not alter the fact that those physicians who would participate are substantially affected by the proposed rule. For them the consequences of the proposed rule are not a matter of speculation or conjecture. By comparison to the physicians involved in ophthalmologic medicine described in Board of Optometry, supra, the physicians contemplated by the proposed rule have a vital role to play in

the process wherein ARNPs are allowed to prescribe medications. The physicians practicing ophthalmologic medicine under terms described in Board of Optometry, supra, had no part to play in the certification of optometrists to administer topical ocular drugs and the subsequent practice by the optometrists in diagnosing and treating patients by the use of topical ocular drugs. FMA et al. have established their standing to challenge the promulgation of the proposed rule as substantially affected persons.

Statutory Construction as a Means to Determine the Limits of Rule-Making Authority

26. Among its challenges, FMA claims that the Board exceeded its grant of rule-making authority in promulgating the proposed rule. Sections 120.52(8)(b) and 120.536(1), Florida Statutes (1999). In determining the limits of rule-making authority granted the Board, it is appropriate to engage in statutory construction, specifically, it is appropriate to compare the language in Sections 464.003(3)(c) and 464.012(3), Florida Statutes, to that found in Chapter 893, Florida Statutes. Sections 893.02(18) and 893.03 through 893.05, Florida Statutes, discuss those disciplines which have the opportunity to prescribe Schedule II through V controlled substances. The dispute concerns the ability of ARNPs to prescribe control substances under Schedules II through V. FMA claims that ARNPs are prohibited from prescribing controlled substances by Chapter 893, Florida Statutes, effectively denying ARNPs the opportunities to

prescribe Schedule II through V controlled substances under authority set forth in Chapter 464, Florida Statutes.

27. The statutes at issue state in pertinent part:

464.003(3)(c)

'Advanced or specialized nursing practice' means, in addition to the practice of professional nursing, the performance of advanced-level nursing acts approved by the board which, by virtue of postbasic specialized education, training, and experience, are proper to be performed by an advanced registered nurse practitioner. Within the context of advanced or specialized nursing practice, the advanced registered nurse practitioner may perform acts of nursing diagnosis and nursing treatment of alterations of the health status. The advanced registered nurse practitioner may also perform acts of medical diagnosis and treatment, prescription, and operation which are identified and approved by a joint committee composed of three members appointed by the Board of Nursing, two of whom shall be advanced registered nurse practitioners; three members appointed by the Board of Medicine, two of whom shall have had work experience with advanced registered nurse practitioners; and the secretary of the department or the secretary's designee.

. . . The Board of Nursing shall adopt rules authorizing the performance of any such acts approved by the joint committee. Unless otherwise specified by the joint committee, such acts shall be performed under the general supervision of a practitioner licensed under chapter 458, chapter 459, or chapter 466 within the framework of standing protocols which identify the medical acts to be performed and the conditions for their performance.

(Emphasis added.)

464.006

Authority to Make Rules.--The Board of Nursing has authority to adopt rules pursuant

to ss. 120.536(1) and 120.54 to implement the provisions of this chapter conferring duties upon it.

464.012(3)

An advanced registered nurse practitioner shall perform those functions authorized in this section within the framework of an established protocol. A practitioner currently licensed under chapter 458, chapter 459 or chapter 466 shall maintain supervision for directing the specific course of medical treatment. Within the established framework, an advanced registered nurse practitioner may:

(a) Monitor and alter drug therapies.

* * *

(c) Perform additional functions as may be determined by rule in accordance with s. 464.003(3)(c).

* * *

893.02(18)

'Practitioner' means a physician licensed pursuant to chapter 458, a dentist licensed pursuant to chapter 466, a veterinarian licensed pursuant to chapter 474, an osteopathic physician licensed pursuant to chapter 459, a naturopath licensed pursuant to chapter 462, or a podiatric physician licensed pursuant to chapter 461, provided such practitioner holds a valid federal controlled substance registry number.

893.04(1)

A pharmacist, in good faith and in the course of professional practice only, may dispense controlled substances upon a written or oral prescription of a practitioner, under the following conditions:

* * *

893.05(1)

A practitioner, in good faith and in the course of his or her professional practice only, may prescribe, administer, dispense, mix, or otherwise prepare a controlled substance, or the practitioner may cause the same to be administered by a licensed nurse or an intern practitioner under his or her discretion and supervision only. . . .

29. Section 893.03, Florida Statutes, identifies the propriety of using Schedule II through V controlled substances for medical purposes in the treatment of patients.

30. It is clear from a reading of the provisions within Chapter 893, Florida Statutes, that ARNPs are not among the practitioners who have the authority to prescribe Schedule II through V controlled substances. They may only administer those controlled substances.

31. Chapter 464, Florida Statutes, in the relevant sections makes no reference to controlled substances in discussing the opportunities ARNPs have to prescribe drugs.

32. While both statutes are designed to identify those practitioners who may prescribe drugs, Chapter 893 addresses a specific class of drugs, controlled substances, and Chapter 464 generally addresses prescribing without delineating the drugs which ARNPs may prescribe under general supervision and pursuant to established protocols. Although found in different statutes, the laws have the same basic purpose. That purpose is to identify opportunities which licensed health care professionals have for prescribing drugs. To counter the argument by FMA concerning the perceived limiting effect of Chapter 893 on ARNPs'

rights to prescribe, the Board, FNA, and FANA argue that Chapter 464, a more recent statute, would allow ARNPs to prescribe controlled substances as the proposed rule contemplates.

33. In construing Chapters 464 and 893, Florida Statutes, attention has been paid to the primary duty to give effect to legislative intent even at the expense of a literal interpretation, should that interpretation lead to an unreasonable result. See Radio Tel. Communications. Inc. v. Southeastern Tel. Co., 170 So. 2d 577 (Fla. 1964). In pursuing the appropriate interpretation to be given Chapters 464 and 893, Florida Statutes, attention has been devoted to determining the purpose of the legislature in passing those acts. See Tyson v. Lanier, 156 So. 2d 833, (Fla. 1963).

34. In construing Chapters 464 and 893, an attempt has been made to harmonize the statutes in a manner that gives effect to both, presuming that the legislature passed Chapter 464 with the knowledge of the prior existence of Chapter 893. In construing the two statutes, it is in recognition that courts disfavor a construction that would cause Chapter 464 to be read in a manner which repeals by implication the limits Chapter 893 places on the class of practitioners allowed to prescribe controlled substances, unless no other reasonable construction can be given than to perceive Chapter 464 as constituting a repeal of those limitations. In construing Chapters 464 and 893, it is in recognition that Chapter 893 is more specific in describing the

class of drugs under discussion, controlled substances, when compared to Chapter 464, which speaks of the act of prescribing without designating the class of drugs. It is a general reference to drugs. Absent the ability to reconcile the expectations in Chapters 464 and 893, the more specific reference in Chapter 893 to controlled substances and who may prescribe them would be favored in opposition to the description of prescribing found in Chapter 464. See Palm Harbor Special Fire Control District v. Kelly, 516 So. 2d 249 (Fla. 1987).

35. In construing Chapters 464 and 893, it is in recognition that the effectiveness of Chapter 893, a far more specific act, is retained unless the subsequent general act in relation to prescribing of unidentified classes of drugs found in Chapter 464 is intended as an overall restatement of the law on the same subject. See Floyd v. Bentley, 496 So. 2d 862 (Fla. 2nd DCA 1986), review denied, 504 So. 2d 766 (Fla. 1987). Chapter 464 is not seen as an overall restatement of Chapter 893 on the subject of what groups of practitioners would be allowed to prescribe controlled substances.

36. Finally, in examining the pertinent provisions within Chapters 464 and 893, an attempt has been made to avoid a construction that leads to an absurd result. See Carowan v. State, 515 So. 2d 161 (Fla. 1987).

37. Chapters 464 and 893 are reconciled in their meaning, to the extent that ARNPs may prescribe under general supervision

and pursuant to standing protocols for drugs that are not controlled substances. As a consequence, the proposed rule is an invalid exercise of delegated legislative authority in that the Board of Nursing has exceeded its grant of rule-making authority by allowing ARNPs to prescribe controlled substances. Section 120.52(8)(b), Florida Statutes.

38. With this outcome it is not necessary to consider whether the rule is arbitrary or capricious or unsupported by competent substantial evidence. Section 120.52(8)(e) and (f), Florida Statutes. 1/

Upon consideration, it is

ORDERED:

Proposed rule 64B9-4.009 in the language and numbering scheme added to the preexisting Rule 64B9-4.009, Florida Administrative Code, is an invalid exercise of delegated legislative authority.

DONE AND ORDERED this 13th day of March, 2000, in Tallahassee, Leon County, Florida.

CHARLES C. ADAMS
Administrative Law Judge
Division of Administrative Hearings
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1230 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of March, 2000.

ENDNOTE

1/ In its petition challenging the validity of proposed rule 64B9-4.009 FMA concluded by asking that it be entitled to "such other relief as may be deemed just and proper." It is unclear whether this reference was intended to apply to Section 120.595(2), Florida Statutes, pertaining to the award of reasonable costs and reasonable attorney's fees should FMA prevail in its challenge. The prehearing stipulation did not mention Section 120.595(2), Florida Statutes. Therefore, the decision in this case has been reached without considering the opportunities described in Section 120.595(2), Florida Statutes.

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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 one copy of a notice of appeal with the Clerk of the Division of Administrative Hearings and a second 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.