

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BINK F. WILLIAMS,)	
)	
Petitioner,)	
)	
vs.)	Case No. 00-0364RP
)	
DEPARTMENT OF HEALTH,)	
)	
Respondent.)	
_____)	

FINAL ORDER

Pursuant to notice, a final hearing was held in this case on March 20, 2000, at Tallahassee, Florida, before Claude B. Arrington, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner:	Bink F. Williams, <u>pro se</u> 5163 Velda Dairy Road Tallahassee, Florida 32308
For Respondent:	Richard P. McNelis, Esquire Department of Health Bin A02 2020 Capital Circle, Southeast Tallahassee, Florida 32399-1703

STATEMENT OF THE ISSUE

Whether Respondent exceeded its statutory authority by requiring use of disposable sterile medical gloves during body-piercing procedures. 1/ The rule at issue is Rule 64E-19.006(2), Florida Administrative Code.

PRELIMINARY STATEMENT

Prior to the beginning of the final hearing, the parties stipulated to certain facts, which have been adopted by the undersigned in the findings of fact portion of this Final Order. Some of those stipulated facts have been adopted verbatim while others have been reworded.

Petitioner argued his position in this matter and cross-examined the witnesses called by Respondent, but he did not testify or present any exhibits.

Respondent called as witnesses Leslie Harris and Dr. Landis Crockett, both of whom are employed by Respondent. Mr. Harris coordinated the drafting of the rule at issue in this proceeding. Dr. Crockett is a medical doctor who was allowed to express opinions within the scope of his expertise. Respondent offered five exhibits, each of which was admitted into evidence. Petitioner stipulated to the admissibility of each of these exhibits.

No transcript of the proceedings has been filed. Respondent filed a Proposed Final Order, which has been duly-considered by the undersigned in the preparation of this Final Order. Petitioner did not file a post-hearing submittal.

FINDINGS OF FACT

1. Chapter 99-176, Laws of Florida, created Section 381.0075, Florida Statutes, to regulate body-piercing. Section 381.0075(1), Florida Statutes, provides as follows:

(1) Legislative intent.--It is the intent of the Legislature to protect the health, safety, and welfare of the public from the spread of infectious diseases from practices that prick, pierce, or scar the skin and therefore, to that end, to regulate body-piercing salons.

2. Respondent is the agency of the State of Florida charged with licensing and regulating body-piercing pursuant to Section 381.0075, Florida Statutes.

3. Section 381.0075(2), Florida Statutes, provides certain definitions, including the following:

(j) "Sanitization" means the effective bactericidal treatment of surfaces of equipment and devices by a product registered by the United States Environmental Protection Agency which provides a sufficient concentration of chemicals and enough time to reduce the bacterial count, including pathogens, to a safe level.

(k) "Sterilization" means the use of procedures that destroy all microbial life, including viruses, on the equipment or device. . . .

4. Section 381.0075(11), Florida Statutes, sets forth requirements for the operation of body-piercing salons, including the following:

(11) Body-piercing salons; specific requirements.--

(a) A body-piercing salon must:

1. Properly sterilize all instruments that pierce the skin, directly aid in piercing the skin, or may come in contact with instruments that pierce the skin, through such means as storage in trays with other instruments or contact with forceps, in accordance with the sterilization procedures in this section.

2. Sanitize all equipment indirectly used in body piercing, including any beds, tables, headrests, armrests, legrests, or handrails.

3. Use protective infection barriers such as gloves and masks when serving a customer. If the protective barriers are contaminated, they must be properly disposed of immediately. Protective barriers may only be used once and only for one customer.

4. To the degree possible, thoroughly cleanse the area to be pierced with an antiseptic solution before and after the piercing. . . .

5. Section 381.0075(10), Florida Statutes, authorizes

Respondent to enact rules, in pertinent part, as follows:

(10) Rules.--The department has authority to adopt rules to implement this section. Such rules may include sanitation practices, sterilization requirements and procedures. . . .

6. In reliance on the specific authority provided by Section 381.0075(10), Florida Statutes, Respondent engaged in rulemaking activities consistent with Chapter 120, Florida Statutes, and prepared proposed Rule 64E-19, Florida Administrative Code. This rule was filed with the Department of

State on January 4, 2000, and became effective on January 24, 2000.

7. On January 24, 2000, the Department received the instant Petition challenging Rule 64E-19.006(2), Florida Administrative Code. The only portion of the subject rule challenged by Petitioner requires body-piercers to wear disposable sterile medical gloves when performing body-piercing procedures. Petitioner does not challenge the requirement that body-piercers use disposable medical gloves, but he does challenge the requirement in the rule that the gloves be "sterile."

8. The parties stipulated that disposable sterile medical gloves are significantly more expensive than non-sterile disposable medical exam gloves. It is common practice among body-piercers to use several pairs of gloves during the course of a single body-piercing procedure.

9. Section 381.0075, Florida Statutes, does not explicitly require that a body-piercer use sterile gloves when performing body-piercing procedures.

10. Rule 64E-19.006(1), Florida Administrative Code, requires that body-piercers use aseptic techniques and sterile instruments.

11. The purpose of medical exam gloves is to protect the wearer, whereas the purpose of sterile medical gloves is to

protect the patient. Medical exam gloves are typically left in an open box, which exposes those gloves to airborne contamination.

12. Gloves are likely to come in contact with either sterile instruments or the piercing site, as contemplated by Section 381.0075(11)(a)1., Florida Statutes. When compared to non-sterile medical exam gloves, sterile gloves provide better protection against the risk of infection to the person whose body is being pierced.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction of the parties to and the subject of this proceeding. Section 120.57(1), Florida Statutes.

14. Section 120.52(8), Florida Statutes, defines the term invalid exercise of delegated legislative authority as follows:

(8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

(a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;

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

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required

by s. 120.54(3)(a)1.;

(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

(e) The rule is arbitrary or capricious;

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

(g) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

15. The Legislative intent in enacting Section 381.0075, Florida Statutes, was clearly expressed in Section 381.0075(1), Florida Statutes.

16. The grant of rulemaking authority was also clearly expressed by the Legislature. Section 381.0075(10), Florida

Statutes, clearly authorizes Respondent to enact rules setting sanitation practices and sterilization requirements and procedures. That is sufficient authority for Respondent to adopt the challenged rule.

17. Sterile gloves provide better protection to the patient, which is consistent with the express legislative intent to protect the health, safety, and welfare of the public from the spread of infectious diseases during body-piercing procedures.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law it is ORDERED that subject challenge to Rule 64E-19, Florida Administrative Code, is DENIED.

DONE AND ORDERED this 19th day of April, 2000, in Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of April, 2000.

ENDNOTE

1/ This phrasing of the issue is based on a stipulation of the parties. The rule is not being challenged on any other basis.

COPIES FURNISHED:

Bink F. Williams
5163 Velda Dairy Road
Tallahassee, Florida 32308

Richard P. McNelis, Esquire
Department of Health
Bin A02
2020 Capital Circle, Southeast
Tallahassee, Florida 32399-1701

Angela T. Hall, Agency Clerk
Department of Health
Bin A02
2020 Capital Circle, Southeast
Tallahassee, Florida 32399-1701

William Large, General Counsel
Department of Health
Bin A02
2020 Capital Circle, Southeast
Tallahassee, Florida 32399-1701

Liz Cloud, Chief
Bureau of Administrative Code
The Elliott Building
Tallahassee, Florida 32399-0250

Carroll Webb
Executive Director and General Counsel
Joint Administrative Procedures Committee
Holland Building, Room 120
Tallahassee, Florida 32399-1300

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 agency 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.