

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VICTOR ORTIZ,)
)
 Petitioner,)
)
 vs.)
) Case No. 03-0011RX
 DEPARTMENT OF HEALTH,)
 BOARD OF MEDICINE,)
)
 Respondent.)
 _____)

FINAL ORDER

This matter was scheduled to be heard on February 21, 2003. Prior to that date, the parties filed a Pre-Hearing Stipulation advising that there were no disputed facts and that the case could be resolved without need for a hearing. Pursuant to an order issued on February 13, 2003, the case proceeded in accordance with Section 120.57(1)(h), Florida Statutes, and Rule 28-106.204(4), Florida Administrative Code, for consideration before the Division of Administrative Hearings, by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: William E. Williams, Esquire
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& Williams, P.A.
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For Respondent: Edward A. Tellechea, Esquire
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STATEMENT OF THE ISSUE

Whether Rule 64B8-9.009(6)(b)1.a., Florida Administrative Code, is an invalid exercise of delegated legislative authority pursuant to Section 120.52(8), Florida Statutes.

PRELIMINARY STATEMENT

Petitioner, Victor Ortiz, filed a Petition for Administrative Determination of the Invalidity of Rule 64B8-9.009, Florida Administrative Code, with the Division of Administrative Hearings on January 6, 2003, and was assigned to the undersigned on January 8, 2003.

A Notice of Hearing was issued on January 9, 2003, scheduling a formal hearing for February 4, 2003. On January 27, 2003, the Respondent filed an unopposed Motion for Continuance. The motion was granted and the hearing was rescheduled for February 21, 2003.

On February 10, 2003, a telephonic case management conference took place during which the parties informed the undersigned that the parties desired to file motions for summary final order and that the case should proceed pursuant to Section 120.57(1)(h), Florida Statutes, and Rule 28-106.204(4), Florida Administrative Code.

Pursuant to the telephonic case management conference, the parties filed a joint Pre-Hearing Stipulation on February 12, 2003. An order was issued on February 13, 2003, canceling the February 21, 2003, hearing and setting a schedule for filing of motions for final summary order and any responses.

On February 21, 2003, the parties each filed a Motion for Summary Final Order asserting that there were no disputed issues of material fact.

The parties timely filed Proposed Final Orders which have been considered in the preparation of this Final Order. Petitioner also filed a Response in Opposition to Respondent's Motion for Summary Final Order on March 5, 2003.

FINDINGS OF FACT

Stipulated Facts

1. Section 458.331(1)(v), Florida Statutes, authorizes the Board to adopt rules establishing the standards of practice and care for particular physician practice settings.

2. The Board is the agency that adopted Rule 64B8-9.009, Florida Administrative Code, regarding standards of care for office surgery.

3. Petitioner, Victor Ortiz, is a Certified Registered Nurse Anesthetist (CRNA), and is licensed by the Board of Nursing pursuant to Chapter 464, Florida Statutes.

4. Mr. Ortiz is not a member of the Florida Association of Nurse Anesthetists or the Florida Nurses Association.

5. Mr. Ortiz provides anesthesia care to patients in various settings under the supervision of physicians licensed pursuant to Chapters 458 and 459, Florida Statutes. Among other functions, Mr. Ortiz orders preanesthetic medications; administers regional, spinal, and general anesthesia under protocol and the supervision of a physician; provides life support functions; and monitors patient condition during surgery and in the recovery room.

6. Prior to April 15, 2002, the effective date of Rule 64B8-9.009(6)(b)1.a., Florida Administrative Code (the Rule), Mr. Ortiz administered anesthesia under the supervision of operating physicians for all types of office surgeries, including surgical procedures classified by the Board of Medicine as "level III." Mr. Ortiz provided anesthesia services to patients in level III office surgeries under the supervision of M.D. or D.O. operating physicians four or five days per week on average.

7. The Rule requires that if the anesthesia provider is a CRNA, there must be a licensed M.D. or D.O. anesthesiologist, other than the surgeon, to provide direct supervision of the administration and maintenance of the anesthesia in level III office surgeries.

8. Since the adoption of the Rule, the physicians for whom Mr. Ortiz previously provided anesthesia services will no longer employ him for level III office surgeries because they believe that it is unnecessary and cost-prohibitive to pay Mr. Ortiz to provide the actual anesthesia services and an anesthesiologist to directly supervise him. Consequently, Mr. Ortiz' revenues have been reduced and his office practice has been substantially and adversely affected.

CONCLUSIONS OF LAW

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

Standing

10. The Board argues that Petitioner lacks standing because the facts in this case do not show that the rule directly regulates the professional conduct of CRNAs or that it has a direct effect on his right to earn a living. The Board also asserts that if the alleged injury is economic, the impact of the rule must be devastating or otherwise equally detrimental to legitimate business interests.

11. These arguments were squarely addressed by the First District Court of Appeal in Florida Board of Medicine v.

Florida Academy of Cosmetic Surgery, Inc., 808 So. 2d 243, at 251 (Fla. 1st DCA 2002):

The fact that the proposed rule would not directly regulate CRNA's is not fatal to a finding of standing. A challenger to a rule may be 'substantially affected' by a rule, and thus have standing to challenge it, even where the rule or promulgating statute does not regulate the challenger's profession per se. Ward v. Bd. Of Trs. Of Internal Improvement Trust Fund, 651 So.2d 1236,1238 (Fla. 4th DCA 1995). For instance, we have held that a challenger can be substantially affected by a rule which has a collateral financial impact on the challenger's business. See Televisual Communications, Inc. v. State Dep't of Labor & Employment Sec., 667 So. 2d 372 (Fla. 1st DCA 1995) Here, a number of physicians testified that they would not employ CRNA's in level III office surgeries if the presence of an anesthesiologist was required because it would be unnecessary and cost-prohibitive to pay two anesthesia providers to perform a single surgery. Although the Board and FSA argue that the proposed rule would not completely eliminate the opportunity for CRNA's to participate in office surgeries because it does not apply to level I and level II office surgeries, this merely goes to the scope of the injury, and not to whether it is real and sufficiently immediate.

12. Petitioner has proven that he has standing to challenge the Rule which is the subject of this dispute. The parties stipulated that since the adoption of the challenged rule, the physicians for whom he previously provided anesthesia services four or five days a week will no longer employ him for level III office surgeries because they believe

that it is unnecessary and cost-prohibitive to pay him to provide the actual anesthesia services and an anesthesiologist to directly supervise him. Consequently, Petitioner's revenues have been reduced and his office practice has been substantially and adversely affected. Petitioner is a person substantially affected by the Rule and entitled to bring a Rule challenge pursuant to Section 120.56(1) and (3), Florida Statutes.

Rule Challenge Analysis

13. The party attacking an existing agency rule has the burden to prove that the rule constitutes an invalid exercise of delegated legislative authority. Cortes v. State Board of Regents, 655 So. 2d 132 (Fla. 1st DCA 1995). The challenger's burden is a stringent one. Id.; Charity v. Florida State University, 680 So. 2d 463 (Fla. 1st DCA 1996).

14. The Petition for Administrative Determination of the Invalidity of Rule 64B8-9.009, Florida Administrative Code, alleges that the Rule is an invalid exercise of delegated legislative authority within the context of Section 120.52(8)(b) and (c), in that it exceeds Respondent's rulemaking authority, and modifies or contravenes the specific provisions of law implemented.¹⁷

Section 120.52(8)(b) and (c), Florida Statutes

15. Section 120.52(8), Florida Statutes, reads in pertinent part 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:

* * *

(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.;

16. Petitioner asserts that Rule 64B8-9.009, Florida Administrative Code, exceeds its grant of rulemaking authority in violation of Section 120.52(8)(b), Florida Statutes, because Section 458.303(2), Florida Statutes, strictly limits the Board's grant of rulemaking authority in Section 458.311, Florida Statutes. Petitioner also asserts that the rule modifies or contravenes Section 458.303, Florida Statutes, in violation of Section 120.52(8)(c), Florida Statutes, in that it requires supervision by a licensed anesthesiologist as opposed to any licensed physician.

17. "The authority to adopt an administrative rule must be based on an explicit power or duty identified in the

enabling statute . . . [T]he authority for an administrative rule is not a matter of degree. The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough." (Emphasis in original) Florida Board of Medicine, supra at 253, quoting Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000).

18. In this instance, the Board's grant of rulemaking authority is found in Section 458.331(1)(v), Florida Statutes, which reads in pertinent part as follows:

458.331 Grounds for disciplinary action;
action by the board and department.--

(1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):

* * *

v) Practicing or offering to practice beyond the scope permitted by law or accepting and performing professional responsibilities which the licensee knows or has reason to know that he or she is not competent to perform. The board may establish by rule standards of practice and standards of care for particular practice settings, including, but not limited to, education and training, equipment and supplies, medications including anesthetics, assistance of and delegation to other personnel, transfer agreements, sterilization, records, performance of complex or multiple procedures, informed

consent, and policy and procedure manuals.
(emphasis supplied)

19. Section 458.331(1)(v), Florida Statutes, gives the Board broad rulemaking authority regarding the establishment of standards of practice and standards of care for particular practice settings. Specifically, it grants authority to the Board to establish standards of practice and standards of care regarding medications including anesthetics and the assistance of and delegation to other personnel.

20. This provision of Rule 64B8-9.009 was challenged and upheld on different but related grounds in Florida Board of Medicine, supra. In its analysis of the Board's rulemaking authority, the court noted:

Section 458.331(1)(v) clearly gives broad, unqualified, rulemaking authority to the Board to establish 'standards of practice and standards of care for particular practice settings.' It does not specify what those standards should be, or how they should be established, leaving such matters to the discretion of the Board. It seems to us relatively clear that level III office surgery is a 'practice setting' . . .
. . .

808 So. 2d 243 at 254.

21. Petitioner argues that the rulemaking authority found in Section 458.331(1)(v) is strictly limited by the language of another statute, Section 458.303, Florida Statutes, which reads in pertinent part:

458.303 Provisions not applicable to other practitioners; exceptions, etc.--

(1) The provisions of ss. 458.301, 458.303, 458.305, 458.307, 458.309, 458.311, 458.313, 458.315, 458.317, 458.319, 458.321, 458.327, 458.329, 458.331, 458.337, 458.339, 458.341, 458.343, 458.345, and 458.347 shall have no application to:

(a) Other duly licensed health care practitioners acting within their scope of practice authorized by statute.

* * *

(2) Nothing in s. 458.301, s. 458.303, s. 458.305, s. 458.307, s. 458.309, s. 458.311, s. 458.313, s. 458.319, s. 458.321, s. 458.327, s. 458.329, s. 458.331, s. 458.337, s. 458.339, s. 458.341, s. 458.343, s. 458.345, or s. 458.347 shall be construed to prohibit any service rendered by a registered nurse or a licensed practical nurse, if such service is rendered under the direct supervision and control of a licensed physician who provides specific direction for any service to be performed and gives final approval to all services performed. Further, nothing in this or any other chapter shall be construed to prohibit any service rendered by a medical assistant in accordance with the provisions of s. 458.3485.
(emphasis supplied)

22. Further, Petitioner argues that Section 464.012, Florida Statutes, defines the scope of practice for certified registered nurse anesthetists and that Rule 64B8-9.009 improperly limits the scope of practice for CRNAs. Petitioner argues that under the language of Section 464.012, CRNAs are free to practice under the supervision of any licensed

physician regardless of a physician's specialty or area of practice. Section 464.012, Florida Statutes, reads in pertinent part as follows:

(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 .

. . .

* * *

(4) In addition to the general functions specified in subsection (3), an advanced registered nurse practitioner may perform the following acts within his or her specialty:

(a) The certified registered nurse anesthetist may, to the extent authorized by established protocol approved by the medical staff of the facility in which the anesthetic service is performed, perform any or all of the following:

1. Determine the health status of the patient as it relates to the risk factors and to the anesthetic management of the patient through the performance of the general functions.
2. Based on history, physical assessment, and supplemental laboratory results, determine, with the consent of the responsible physician, the appropriate type of anesthesia within the framework of the protocol.
3. Order under the protocol preanesthetic medication.

4. Perform under the protocol procedures commonly used to render the patient insensible to pain during the performance of surgical, obstetrical, therapeutic, or diagnostic clinical procedures. These procedures include ordering and administering regional, spinal, and general anesthesia; inhalation agents and techniques; intravenous agents and techniques; and techniques of hypnosis.

5. Order or perform monitoring procedures indicated as pertinent to the anesthetic health care management of the patient.

6. Support life functions during anesthesia health care, including induction and intubation procedures, the use of appropriate mechanical supportive devices, and the management of fluid, electrolyte, and blood component balances.

7. Recognize and take appropriate corrective action for abnormal patient responses to anesthesia, adjunctive medication, or other forms of therapy.

8. Recognize and treat a cardiac arrhythmia while the patient is under anesthetic care.

9. Participate in management of the patient while in the postanesthesia recovery area, including ordering the administration of fluids and drugs.

10. Place special peripheral and central venous and arterial lines for blood sampling and monitoring as appropriate.

23. Section 464.003(3), Florida Statutes, reads in pertinent part as follows:

(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. Each committee member appointed by a board shall be appointed to a term of 4 years unless a shorter term is required to establish or maintain staggered terms. 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. The department may, by rule, require that a copy of the protocol be filed with the department along with the notice required by s. 458.348. (emphasis supplied)

24. Petitioner's arguments are unpersuasive. Inherent in the medical and nursing statutes examined herein is the recognition of a hierarchy in medicine. That is, even the

nurses who obtain certification to become a CRNA perform their duties subject to medical supervision and established medical protocol. In delineating the various functions to be performed by a CRNA, Section 464.012(4), Florida Statutes, uses the term "may . . . perform" which denotes a permissive term. Brooks v. Anastasia Mosquito Control District, 148 So. 2d 64 (Fla. 1st DCA 1963). Moreover, nothing in the statutes cited by Petitioner grants a CRNA the right to perform services in a particular practice setting such as a level III office setting in the manner preferred by the CRNA. The court in Board of Medicine, supra, recognized level III office surgery as a "practice setting" as described in Rule 64B8-9.009, Florida Administrative Code. The court determined that the rule was within the authority specified in Section 458.331(1)(v), Florida Statutes, which gives the Board "broad, unqualified, rulemaking authority" regarding standards of care for particular practice settings. Id., at 254. The court's decision by extension controls the practice of CRNAs under the supervision of the physician specialist identified in Rule 64B8-9.009. That specialty is anesthesiology, not surgery. Accordingly, the Board has not exceeded its grant of rulemaking authority in enacting the provisions of Rule 64B8-9.009, Florida Administrative Code, relating to level III

office surgery as it pertains to the rights and opportunities of CRNAs in their practice.

25. Petitioner's argument that Rule 64B8-9.009(6)(b)1.a., violates Section 120.52(8)(c), Florida Statutes, in that it modifies or contravenes Section 458.303 by specifying that supervision must be by an anesthesiologist physician and not the surgeon is equally unpersuasive for the reasons enumerated herein.^{2/}

26. The language of Rule 64B8-9.009, Florida Administrative Code, does not modify or contravene the specific laws implemented as contemplated by Section 120.52(8)(c), Florida Statutes.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED:

The Petition for Administrative Determination of the Invalidity of Rule 64B8-9.009, Florida Administrative Code, is denied.

DONE AND ORDERED this 7th day of April, 2003, in
Tallahassee, Leon County, Florida.

BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of April, 2003.

ENDNOTES

1/ Section 120.52(8)(c), Florida Statutes, creates an opportunity to challenge a rule by alleging that it enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by Section 120.54(a)1., Florida Statutes. The specific provisions of law implemented are Sections 458.331(1)(g),(t),(w) and 458.351, Florida Statutes. The cited subsections of Section 458.331 deal with various grounds for disciplinary action. Section 458.351 deals with reporting requirements of adverse incidents regarding physicians or other licensee under chapter 458, Florida Statutes. Petitioner's challenge is not based on the specific provisions of law implemented but on Section 458.303, Florida Statutes.

2/ The court noted that the same provision of the rule in its proposed form "has no effect whatsoever on the ability of CRNA's to administer anesthesia in hospitals, ambulatory surgical centers, and level I and II office surgeries." Id., at 261.

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.