

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MOHAMED IBRAHIM ABDEL-AZIZ,)
M.D.,)
)
Petitioner,)
)
vs.) Case No. 03-0295RU
)
DEPARTMENT OF HEALTH, BOARD OF)
MEDICINE,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on February 28, 2003, by video teleconference in Tallahassee and Tampa, Florida, before Susan B. Kirkland, a designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUE

Whether various statements or policies attributed to the Department of Health (Department) and the Board of Medicine (Board) in connection with the assessment of costs related to the investigation and prosecution of disciplinary cases coming before the Board are unpromulgated rules in violation of Section 120.54(1)(a), Florida Statutes.¹

PRELIMINARY STATEMENT

On January 27, 2003, Petitioner Mohamed Ibrahim Abdel-Aziz filed a Petition to Determine the Invalidity of Existing Non-Rule Agency Policy, challenging the validity of 11 agency statements concerning the assessment of the costs related to investigation and prosecution pursuant to Section 456.072(4), Florida Statutes. On January 29, 2003, Petitioner filed Petitioner's Motion to Consolidate Case with Division of Administrative Hearings Case Number 02-4429PL. Case No. 02-4429PL was a disciplinary action against Petitioner's medical license, and the final hearing on that case was held on January 28 and 29, 2003. The motion to consolidate was denied.

On February 27, 2003, Petitioner filed Petitioner's Motion to Amend the Petition to Determine the Invalidity of Existing Non-Rule Agency Policy, requesting that two statements be added to the petition. The motion was granted at the beginning of the final hearing.

At the final hearing, Petitioner's Exhibits 1 through 4, 6, 12 through 15, 17, 19, 21, 22, 27 through 35, 40, 41A, 41B, and 46 through 50 were admitted; portions of Petitioner's Exhibits 5, 7, 16, 18, 20, 37, 44A, 44B, 44C, 44E, and 51 were admitted; Petitioner's Exhibits 8 through 11, 42, and 43 were proffered; portions of Petitioner's Exhibits 7, 37, 44B, 44F were proffered; and Petitioner's Exhibit 45 was withdrawn. Respondent Department's Exhibit 1 was admitted. Respondent Board submitted no exhibits.

On March 20, 2003, Petitioner filed Petitioner's Motion to Reopen the Record and Allow the Late Filing of Petitioner's Exhibit 52. On April 2, 2003, an Order on Petitioner's Exhibit 52 was issued allowing Petitioner's Exhibit 52 to be late-filed. There being no objection to the admission of the exhibit, Petitioner's Exhibit 52 is admitted.

At the final hearing, Petitioner called the following witnesses: James D. Hentz, Charlene Willoughby, Diane Orcutt, Larry G. McPherson, and Ephriam Duran Livingston. No witnesses were called by either the Department or the Board.

The one-volume Transcript of the proceeding was filed on March 21, 2003. The parties had agreed to file their proposed final orders within ten days of the filing of the Transcript. Two extensions of time for filing proposed final orders were granted. The parties timely filed their Proposed Final Orders on April 14, 2003.

FINDINGS OF FACT

1. Petitioner is a Florida licensed physician, who received his Florida medical license numbered ME 46054 in 1985. He currently practices medicine at 620 Eichenfeld Drive in Brandon, Florida. Petitioner is currently the subject of a pending disciplinary action initiated by the Department against his medical license. The disciplinary case is styled Department of Health vs. Mohamed I. Abdel-Aziz, Department of Health Case No. 2000-07849, DOAH Case No. 02-4429PL.

2. On June 2, 2003, a Recommended Order was issued in DOAH Case No. 02-4429PL, finding that Petitioner violated Subsection 458.331(1)(t), Florida Statutes. Petitioner is subject to the assessment of the costs related to the investigation and prosecution of his case pursuant to Section 456.072(4), Florida Statutes, should the Board adopt the finding of a violation.

3. Neither the Department nor the Board has promulgated a rule defining "costs related to the investigation and prosecution of the case."

4. Petitioner has challenged the validity of the following statements, which he attributes to Respondents.

a. Complaint Cost Summary.

b. Costs of the investigation and prosecution that are incurred as a part of a license disciplinary case include the costs of the time (salary and benefits) spent by employees of the Department of Health Prosecution Services Unit.

c. Costs of the investigation and prosecution that are incurred as a part of a license disciplinary case include the "overhead expense" of the Prosecution Services Unit.

d. Costs of the investigation and prosecution that are incurred as a part of a license disciplinary case include the "OPS expense" attributable to the Prosecution Services Unit.

e. Costs of the investigation and prosecution that are incurred as a part of a license disciplinary case include the salary and benefits paid by the Department of Health on behalf of employees who have no time keeping responsibility with respect to the time tracking maintenance system of the Department of Health.

f. Costs of the investigation and prosecution that are incurred as a part of a license disciplinary case include the salary and benefits of the attorneys who have been assigned responsibility for and/or who have provided services in connection [sic] a license disciplinary case.

g. Costs of the investigation and prosecution that are incurred as a part of a license disciplinary case include the "expense" of the individual components of the Prosecutions Services Unit.

h. Time Tracking Report.

i. Methodology for Calculating Rate for Billable Hours (pre-January 13, 2003) assessed as costs of the investigation and prosecution.

j. The Department of Health, Board of Medicine procedure for the assessment of costs of the investigation and prosecution of a licenses [sic] found to have violated the disciplinary provisions of Chapters 456 and 458, Florida Statutes, as set forth in the Notice of Voluntary Dismissal of Paragraph (G) of the Prayer for Relief of the Administrative Complaint.

k. Methodology for Calculating Rate for Billable Hours (effective January 24, 2003) assessed as costs of the investigation and prosecution.

l. Notice Regarding Assessment of Costs which stated:

Respondent is placed on notice that Petitioner has incurred costs related to the investigation and prosecution of this matter. Pursuant to Section 456.074(4), Florida Statutes, the Board shall assess costs related to the investigation and prosecution of a disciplinary matter, which may include attorney hours and costs, on the Respondent in addition to other discipline imposed.

5. The Department and its predecessor agencies, the Agency for Health Care Administration and the Department of Business

and Professional Regulation, have been keeping data of direct and indirect expenses incurred by the Department since at least 1988. Historically, the reason this cost data has been kept is for use in billing the various boards for the amount spent in investigating and prosecuting each board's cases.

6. Section 456.025(8), Florida Statutes, and its predecessors Sections 455.220 and 455.587, Florida Statutes, require that the Department maintain an accounting, by profession, of the expenses incurred by the Department to regulate those professions. These expenses are then, to the maximum extent possible, charged back to the accounts of each regulated profession. Direct expenses include, but are not limited to, costs for investigations, examination, and legal services. For indirect expenses, the Department is to proportionally allocate to the boards the expenses incurred by the Department in the performance of its duties with respect to the regulation of each of the professions. The Department is required to maintain sufficient records to support its allocation of agency expenses and to provide each board an annual report of revenues and direct and allocated expenses related to the operation of that profession.

7. The Department or its predecessors have been keeping data of the costs related to the investigation and prosecution of professional license disciplinary cases. The collection of

data includes determining an hourly rate for those persons whose activities are directly attributable to individual and specific cases and an hourly overhead rate for administrative costs and indirect costs. The overhead rate includes salaries plus benefits of clerical staff, rent, office supplies, OPS expense, telephone services, utilities, copier maintenance fees, and other similar expenses.

8. From 1994 until January 13, 2003, the methodology for calculating the overhead hourly rate, called "Methodology for Calculating Rate for Billable Hours," provided as follows:

1. Determine the number of timekeepers and non-timekeepers.
2. Determine the rate for non-timekeepers (annual rate plus + benefits [27.5%]) ÷ number of timekeepers ÷ 2080 hours = hourly rate.
3. Determine the rate for expenses (budget expenses and OPS) from operating budget ÷ number of timekeepers ÷ 2080 = hourly rate.
4. Add results of steps 2 & 3, for total hourly rate per timekeeper.

9. All employees of the Department's Medical Quality Assurance (MQA) Enforcement Program, which consists of the Consumer Services Unit, the Investigative Services Unit, and the Prosecution Services Unit, are designated either as timekeepers or non-timekeepers. Timekeepers are those employees who perform activities directly related to specific cases. All other employees are considered to be non-timekeepers, and their salary

and benefits are part of the costs that are apportioned within the overheard rate calculation.

10. The hourly rate for a timekeeper is calculated by dividing that timekeeper's salary plus benefits by the total annual hours. Under the pre-January 13, 2003, methodology, the total number of hours used was 2080. Benefits were determined based on 27.5 percent of the timekeeper's annual salary.

11. In October or November 2002, James D. Hentz, the Financial Manager for the trust fund of the MQA section of the Department saw this methodology for the first time. He believed that the use of 2080 hours in the methodology was flawed because it included holidays, annual leave, sick leave, and non-billable administrative time, thereby, precluding any possibility of recovering all the costs.

12. Mr. Hentz believed that using 1720 hours better represented the number of hours available to be worked and billed to specific cases, and he proposed that the methodology be adjusted by using 1720 hours instead of 2080 hours. The adjusted methodology proposed by Mr. Hentz was disseminated to the enforcement program units of the Department by Charlene G. Willoughby to be effective January 13, 2003. The methodology, also entitled "Methodology for Calculating Rate for Billable Hours" provided as follows:

1. Determine the number of timekeepers and non-timekeepers.
2. There are 1720 billable hours per year (2080 possible hours worked minus average annual, sick and holiday leave).
3. Determine the rate for non-timekeepers (annual rate + benefits [28%]) ÷ number of timekeepers ÷ 1720 hours = hourly rate).
4. Determine the rate for expenses (budget expenses, including OPS) from operating budget ÷ number of timekeepers ÷ 1720 hours = hourly rate
5. Add results of steps 3 & 4 for total hourly overhead rate per timekeeper.
6. Add overhead rate to hourly salary + benefits of each timekeeper for individual timekeeper rate.

13. This methodology proposed by Mr. Hentz differed from the previous methodology by the use of 1720 hours instead of 2080 hours and the use of 28 percent of the annual salary to calculate benefits rather than 27.5 percent. These changes resulted in an increase in both the overhead hourly rate and the timekeepers' hourly rate, thereby, increasing the total hourly rate per timekeeper, which is also known as staff rate.

14. The methodology that was disseminated on January 13, 2003, was not implemented by the Investigative Services Unit or the Prosecution Services Unit at the Department. On January 24, 2003, Mr. Hentz sent out another methodology for use in computing overhead and timekeepers' hourly rates. He drafted the methodology in a narrative form, which Ms. Willoughby converted to a format similar to the previous formulas. The January 24, 2003, methodology provides as follows:

1. Determine the number of timekeepers and the non-timekeepers.
2. There are 1720 billable hours per year (2080 possible hours worked minus average annual, sick and holiday leave).
3. Determine the rate for non-timekeepers (annual rate + benefits [as reflected in the COPES Report] ÷ number of timekeepers ÷ 1720 hours = hourly rate.
4. Determine the rate for expenses (budget expenses, including OPS) from operating budget ÷ number of timekeepers ÷ 1720 hours = hourly rate.
5. Add results of steps 3 & 4 for total hourly rate per timekeeper.
6. Add overhead rate to hourly salary + benefits of each timekeeper for individual timekeeper rate.

15. The salary plus benefits associated with each individual position number for each employee is reported on the COPES Report. In calculating the timekeepers' hourly rate and the overhead hourly rate, the January 24 methodology uses the actual salary plus benefits from the COPES Report instead of calculating benefits by using a percentage of salary as was done in previous methodologies.

16. Timekeepers maintain and submit a daily activity report (DAR) which identifies the cases on which they worked, the activities they performed, and the amount of time they spent in six-minute increments. The DARs are entered into a data system called the Time Track System, where that data is kept by timekeeper identification number, case number, activity, and time spent on each activity. The total hourly rate is also

entered into the Time Track System so that the rate can be applied to the time spent on a case by each timekeeper. The total hourly rate is updated at least annually when the new spending plan or budget is issued. It is also reviewed quarterly to make adjustments for salary or benefit changes.

17. The compilations of data from the Time Track System at issue are the Time Tracking Report and the Complaint Cost Summary. The Time Tracking Report is a detailed time accounting report and has two components, the Itemized Cost by Complaint and the Itemized Expense by Complaint. The Itemized Cost by Complaint itemizes the specific activities that have been performed on a specific case by activity code and description, the date of those activities, the timekeeper who performed the activities, the amount of time spent on those activities, and a staff rate for each timekeeper who worked on a specific case. The Itemized Cost by Complaint contains a column that reports "Cost," which is the time spent by a timekeeper for a particular activity multiplied by the staff rate. The Itemized Cost by Complaint is subtotaled by each unit in the MQA Enforcement Program and is finally totaled for all the time spent on a particular case to the date that the report is printed.

18. The Itemized Expense by Complaint itemizes the expenses directly attributable to the specific case. Typical direct expenses would include expert witness fees, travel, and

court reporting services. These expenses are ones for which an invoice has been received and paid for a specific expense on a specific case.

19. The Complaint Cost Summary is a summary of the accounting information contained in the Time Tracking Report. It summarizes the total hours spent on a case, by unit, the cost per unit, and the expenses. The total reflected in the Complaint Cost Summary corresponds to the individual subtotals by unit, plus the expenses, which are detailed in the Time Tracking Report.

20. When a specific case goes before the Board for entry of a Final Order that will impose some discipline, various procedures have been used to bring the data concerning the costs related to the investigation and prosecution of that case before the Board. The procedures have varied over time and type of case. For example, when the Board considers defaults and informal hearing recommended orders, it may be informed about the costs in one of several ways, including by written motion, ore tenus motion, or simple statement of the costs. Consent agreements may be considered for assessments of costs in other ways because the amount of the costs would be included in the consent agreement. In the past, cost summaries have not been presented to the Board in cases involving recommended orders; however, more recently cost summaries are being provided to the

Board and may include additional materials such as an affidavit from Ms. Willoughby. In some cases, there have been motions to assess costs filed and in others there were oral presentations made to the Board regarding the costs. In the last 13 months, there has been no consistent procedure used by the Department to request the assessment of costs related to the investigation and prosecution by the Board. However, the Department has consistently included its direct and indirect expenses, including an attorney's time in its requests for costs.

21. In Petitioner's disciplinary case, the Department originally requested the assessment of the costs related to the investigation and prosecution in the prayer for relief in the Administrative Complaint, Paragraph (G). Prior to the final hearing, the Department filed a Notice of Dismissal of Paragraph (G) of the Prayer for Relief of the Administrative Complaint, stating that it was dismissing the request concerning the assessment of the costs for the investigation and prosecution of the case. The Department further included the following in the motion:

Should the Board enter a final order imposing discipline in this matter, the [Department] intends to request the Board of Medicine to assess costs in the following manner:

a. Upon entry of Recommended Order by the Division of Administrative Hearing, an appropriate Motion to Assess Costs shall be

filed with the Board to be considered immediately following Board consideration of said Recommended Order. The motion shall provide [Dr. Abdel-Aziz] an opportunity to file timely written objections to the amount of costs incurred by the Petitioner related to the investigation and prosecution of the case.

b. If a timely written objection to the assessment of costs incurred by the Petitioner related to the investigation and prosecution of the case is filed by [Dr. Abdel-Aziz], the Department shall request the Board to conduct a hearing on the assessment of costs. That hearing shall be conducted either after consideration of the Recommended Order and prior to entry of the Final Order disposing of the case or [sic] a part of a separate bifurcated proceeding if it is appropriate to enter a Final Order before the hearing can be conducted.

c. If a disputed issue of material fact arises, then the matter concerning such dispute shall be forwarded to the Division of Administrative Hearings for a formal hearing.

The Department has filed similar notices in at least two other cases before the Division of Administrative Hearings.

22. The Board has not used a specific procedure in the manner in which it addresses the issue of costs related to the investigation and prosecution. It has considered written motions, oral motions, and has, at least on one occasion, just asked the Department representative at the Board meeting what the amount of the costs were. The Board has been interpreting Section 456.072(4), Florida Statutes, to require the inclusion

of the direct and indirect expenses of the Department, including those costs listed in subsections b, c, d, e, f, and g of paragraph 4 of this Final Order, when assessing the costs related to the investigation and prosecution of a case against a physician, who is before the Board as a result of a recommended order. In doing so, the Board has implicitly adopted those costs appearing in subsections b, c, d, e, f, and g of this Final Order as the costs it will assess related to the investigation and prosecution of a case.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Sections 120.56 and 120.57, Florida Statutes.

24. Section 120.52(15), Florida Statutes, defines a rule as follows:

(15) "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 effect 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.

25. Petitioner is challenging Respondents' treatment of the provision of Section 456.072(4), Florida Statutes, which provides:

In addition to any other discipline imposed through final order, or citation, entered on or after July 1, 2001, pursuant to this section or discipline imposed through final order, or citation, entered on or after July 1, 2001, for a violation of any practice act, the board, or the department when there is no board, shall assess costs related to the investigation and prosecution of the case.

26. In Department of Administration v. Harvey, 356 So. 2d 323, 325 (Fla. 1st DCA 1978), the First District Court of Appeal discussed the definition of a rule and stated:

Whether an agency statement is a rule turns on the effect of the statement, not on the agency's characterization of the statement by some appellation other than "rule." The breadth of the definition in Section 120. 52[(15)] indicates that the legislature intended the term to cover a great variety of agency statements regardless of how the agency designates them. Any agency statement is a rule if it "purports in and of itself to create certain rights and adversely affect others," Stevens, 344 So. 2d at 296, or serves "by (its) own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law." McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 581 (Fla. 1st DCA 1977). See also Straughn v. O'Riordan, 338 So. 2d 832 (Fla. 1976); Price Wise Buying Group v. Nuzum, 343 So. 2d 115 (Fla. 1st DCA 1977).

27. Section 120.56(4), Florida Statutes, provides that "[a]ny person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a)." To qualify as a substantially affected person, Petitioner must show that he will suffer a substantial and immediate "injury in fact." Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc., 808 So. 2d 243, 250 (Fla. 1st DCA 2002). In the disciplinary case against Dr. Abdel-Aziz, the Board will be assessing the costs related to the investigation and prosecution, and the Department will be requesting the imposition of the costs. How the Department determines the amount of costs and what charges it includes in its request for assessment of costs do not substantially affect Dr. Abdel-Aziz because the Department is merely requesting that certain expenses be assessed. It is up to the Board to implement Section 456.072(4), Florida Statutes, by assessing what the Board determines to be the costs of investigation and prosecution, not necessarily what the Department considers to be within the realm of such costs. It is the assessment not the request that results in an injury in fact. Therefore, Petitioner does not have standing to challenge what the Department contends are costs that will be included in its

request for assessment of costs pursuant to Section 456.072(4), Florida Statutes.

28. The Complaint Cost Summary and Time Tracking Report are the formats that the Department uses to collect the data of direct and indirect costs attributable to each case that goes to the Board for final disposition. The calculation of costs by the Department includes the salaries and benefits of the timekeepers, including an attorney's time; the overhead expenses; OPS expenses; and the salaries and benefits of non-timekeepers. The Department has used different methodologies in calculating the staff rate or hourly rate per timekeeper. How the Department calculates the costs of investigation and prosecution and what the Department includes in its calculation are not rules because the Department does not impose the requested costs on the physician and cannot require the physician to pay those costs. The Complaint Cost Summary, the Time Tracking Report, and the methodologies are internal memoranda, which by definition are not rules. See Subsection 120.52(15)(a), Florida Statutes.

29. Different procedures have been used by the Department in bringing the issue of costs of investigation and prosecution before the Board. There has been no consistent procedure by the Board in the manner in which the Board may take up the issue of costs. The procedures used by the Department and the Board in

addressing the issue of costs are not procedures of general applicability and, therefore, are not rules.

30. Section 456.072(4), Florida Statutes, does not include a definition of "costs related to the investigation and prosecution of the case." Section 455.227(3), Florida Statutes (1994 Supp.), was the genesis for the imposition of costs by the Board and stated:

In addition to any other discipline imposed pursuant to this section or discipline imposed for a violation of any practice act, the board . . . may assess costs related to the investigation and prosecution of the case excluding costs associated with an attorney's time.

31. In 1999, the statute, now numbered Section 455.624(4) was amended to read as follows:

In addition to any other discipline imposed pursuant to this section or discipline imposed for a violation of any practice act, the board . . . may assess costs related to the investigation and prosecution of the case.

32. In 2000, the statute was moved to Chapter 456 and renumbered Section 456.072(4). The wording of the statute remained the same as the 1999 version. In 2001, the statute was amended to its current version.

33. The removal of the phrase, "excluding costs associated with an attorney's time," does not necessarily mean that the costs related to the investigation and prosecution of a case

include attorney costs. "The right to recover attorney's fees as part of the costs of an action did not exist at common law, and therefore it must be provided for by statute or contract." Dade County v. Strauss, 246 So. 2d 137, 141 (Fla. 3d DCA 1971).

34. In In re Hapner, 737 So. 2d 1075 (Fla. 1999), the Judicial Qualifications Commission (JQC) was seeking to recover the costs of investigation and prosecution as provided in Article V, Section 12(f)(2), Florida Constitution. The JQC was seeking attorney's fees and travel costs as part of the costs to be taxed by the Florida Supreme Court. In determining what costs would be awarded, the Florida Supreme Court stated:

We note that the constitution is silent as to which costs in particular may be assessed in a JQC proceeding. By way of comparison, this Court has held that in disciplinary proceedings of The Florida Bar (the Bar) "only those costs specifically identified in the Rules Regulating the Florida Bar may be assessed against either a respondent or the Bar." Florida Bar v. Chilton, 616 So. 2d 449, 451 (Fla. 1993). See also Florida Bar v. Bossee, 609 So. 2d 1320 (Fla. 1992). Although the Florida Judicial Qualifications Commission Rules do not currently include a rule identifying taxable costs, we conclude that this Court may nevertheless award limited costs in light of the specific constitutional authority to do so.

Id. at 1076. The Court concluded that the constitutional provision was a "prevailing party" requirement and that the assessed costs should be kept within strict boundaries. Id.

Attorney's fees and travel costs were not included in that award of costs, which were limited "to the following charges of the court reporter: per diem fees, deposition costs, and costs associated with the preparation of the transcript and record." Id. at 1077. The Court went on to direct the Florida Rules of Judicial Administration Committee of The Florida Bar to draft rules addressing the assessment of costs in a JQC proceeding.

35. The Board has consistently included costs for timekeepers, including attorneys, and indirect costs such as overhead expenses, support staff time, and OPS expenses in its assessment of costs related to investigation and prosecution. This policy interprets and implements Section 456.072(4), Florida Statutes, and adversely affects physicians who are found guilty of a practice act. This policy is a rule and should be promulgated pursuant to Section 120.54, Florida Statutes.

36. Subsection 120.54(1)(a), Florida Statutes, provides that "[r]ulemaking is not a matter of agency discretion" and that rules shall be adopted as soon as "feasible and practicable." Rulemaking is presumed to be feasible and practicable.

37. The Board has the burden to rebut the presumption of feasibility by proving that there has not been enough time to gain the knowledge and experience necessary to address the policy by rulemaking; that the issue of what is included in

costs is not sufficiently resolved for it to be addressed by rulemaking; or that the Board has started the rulemaking process.

38. "Rulemaking shall be presumed practicable to the extent necessary to provide fair notice to affected persons of relevant agency procedures and applicable principles, criteria, or standards for agency decisions." Subsection 120.54(1)(a)2, Florida Statutes. The Board may rebut this presumption by demonstrating that it can not reasonably establish the criteria for assessing costs with detail or precision or that the issue of costs is so narrow that the assessment can only be made through an adjudication on a case-by-case basis.

39. The Board has failed to rebut the presumption that promulgating rules to establish the criteria for assessment of the costs related to the investigation and prosecution of the case is neither feasible nor practicable. There has been sufficient time to determine what is meant by costs related to the investigation and prosecution of the case since the Board has had the authority to assess such costs since 1994. The current version of Section 456.072(4), Florida Statutes, has been codified since 2001.

40. The issue of costs has been resolved sufficiently for the Board to assess costs. It has been consistently including the direct and indirect costs in its assessment. The Board has

not begun the rulemaking process to adopt its policy for assessment of costs.

41. The Board has not rebutted the presumption that rulemaking is not practicable. There is ample case law available to the Board which can be used as a guide in determining what types of expenses should be included in costs. Additionally, the Florida Supreme Court has adopted the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions, which can also be used as a guideline. If the Florida Supreme Court can identify guidelines for taxation of costs, the issue of assessment of costs is not such a narrow issue that the Board cannot promulgate rules to put physicians on notice as to what types of expenses are included in the phrase "costs related to the investigation and prosecution of the case."

42. The Board has the authority to promulgate rules addressing the issue of the assessment of costs. Its general rulemaking authority appears in Section 458.309(1), Florida Statutes, which provides that the Board "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." Subsection 458.307(6), Florida Statutes, states that "[a]ll provisions of chapter 456 related to activities of the [B]oard shall apply." Thus, the Board has the authority to promulgate rules governing its activities in Chapter 456, Florida Statutes,

including Section 456.072(4), which requires the Board to assess the costs relating to the investigation and prosecution of the case.

43. Section 120.56(4)(d), Florida Statutes, precludes the Board from relying on the policies set forth in subsections b, c, d, e, f, and g of paragraph 4 of this Final Order in assessing costs. However, the Board is not precluded from assessing costs which by case law have traditionally been defined as costs. See In re Hapner, supra. Such costs may include court reporter fees, transcript costs, witness fees, and cost of service of process. See Winn-Dixie Stores, Inc. v. Vote, 463 So. 2d 459 (Fla. 2d DCA 1985).

ORDER

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

ORDERED that:

1. The Petition to Determine the Invalidity of Existing Non-Rule Policy and its amendment as it relates to the Department of Health is DISMISSED.

2. The Board's policy as to the assessment of costs as set forth in subsections b, c, d, e, f, and g of paragraph 4 of this Final Order are rules which are subject to the rulemaking provisions of Section 120.54, Florida Statutes. The Board shall

immediately discontinue all reliance upon the policies or similar policies as a basis for agency action.

3. The Petition to Determine the Invalidity of Existing Non-Rule Policy and its amendment as it relates to the Board of Medicine as set forth in subsections a, h, i, j, k, and l of paragraph 4 of this Final Order is DISMISSED.

4. Jurisdiction is retained to determine the award of attorney's fees and costs pursuant to Section 120.56(4), Florida Statutes.

DONE AND ORDERED this 4th day of June, 2003, in Tallahassee, Leon County, Florida.

SUSAN B. KIRKLAND
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of June, 2003.

ENDNOTE

1/ The Petition to Determine the Invalidity of Existing Non-Rule Agency Policy states that the petition is being brought pursuant to Sections 120.56(4) and 120.57(1)(e), Florida Statutes. A proceeding brought pursuant to Section 120.57(1)(e), Florida Statutes, must be filed directly with the agency and referred by the agency to DOAH. See Section 120.56(2)(a), Florida Statutes.

This procedure was not followed and DOAH does not have jurisdiction to hear the Section 120.57(1)(e) case on the issue of costs.

The underlying disciplinary case against Dr. Abdel-Aziz before DOAH did not involve the issue of costs because that issue had been withdrawn by the Department. Thus, a Section 120.57(1)(e) case would not have been appropriate in the disciplinary case since the Board had not taken any action to assess costs.

Additionally, the issue of whether the policies determined to be rules meet the requirements of Section 120.57(1)(e), Florida Statutes, is moot. The Board has not initiated rulemaking prior to the issuance of this Final Order and is precluded pursuant to Section 120.56(4), Florida Statutes, from relying on the policies as a basis for agency action.

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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.