STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA CHIROPRACTIC ASSOCIATION, INC., AND MARC H. KALMANSON, d/b/a HOLISTIC HEALTHCARE CONSULTANTS, INC.,

Petitioners,

vs.   Case No. 04-3172RP

DEPARTMENT OF HEALTH, DIVISION OF MEDICAL QUALITY ASSURANCE,

Respondent.

FINAL ORDER

Claude B. Arrington, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Tallahassee, Florida, on October 11, 2004.

APPEARANCES

For Petitioner: Paul W. Lambert, Esquire
Lambert Law Firm
1026 East Park Avenue
Tallahassee, Florida 32301-2673

For Respondent: Donna Erlich, Esquire
Department of Health
4052 Bald Cypress Way, BIN A02
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STATEMENT OF THE ISSUE

Whether the definition for the term “approved provider” in proposed rules 64B-5.001 and 64B-5.002 constitutes an invalid

exercise of delegated legislative authority pursuant to the provisions of Section 120.56(1) and (2), Florida Statutes (2004).[1]

PRELIMINARY STATEMENT

Petitioners filed the subject Petition for Determination of the Invalidity of Proposed Rules with the Division of Administrative Hearings (DOAH) on September 8, 2004, asserting that the challenged portions of the proposed rules exceed Respondent's rulemaking authority and/or that they enlarge, modify, or contravene the specific provisions of law implemented. The matter was assigned to the undersigned administrative law judge and duly noticed for hearing.

The pre-hearing stipulation filed by the parties established that there are no disputed issues of material fact. The findings of fact set forth in this Final Order are based on the parties' pre-hearing stipulation, on the exhibits that were admitted into evidence, or on the statutes and rules officially recognized.

At the final hearing, the parties presented argument in support of their respective positions, but neither party offered any testimony. One joint exhibit was admitted into evidence. Respondent offered three exhibits. Respondent's Exhibits 1 and 2 were admitted into evidence. Respondent's Exhibit 3 was rejected because it had no relevance to any issue. Petitioners

moved for the undersigned to take official recognition of Sections 457.107, 459.008, 460.408, 461.007, 463.007, 464.013, 465.009, 466.014, 468.219, 468.514, 468.711, 478.50, 480.0415, 467.012, 468.806, 468.1195, 468.1715, 468.361, 484.008, 486.109, 468.514, 483.817, 483.821, 483.901, 484.047. 490.0085, 491.0085, 458.319, and 466.0135, Florida Statutes. Respondent moved for the undersigned to take official recognition of Sections 456.004, 456.013, and 456.025, Florida Statutes, and Florida Administrative Code Rules 64B-13.004 and 64B7-28.010. Both motions were granted with the caveat that the parties would have to establish the relevance of each statute or rule.

A transcript of the hearing was filed October 27, 2004. The parties filed Proposed Final Orders, which have been duly considered by the undersigned in the preparation of this Final Order.

FINDINGS OF FACT

1. Petitioner Florida Chiropractic Association, Inc. (FCA) is a Florida not-for-profit corporation and a trade association whose membership consists of chiropractic physicians. The FCA presents five 3-day conventions annually in various sections of the state for chiropractic physicians who may take and receive continuing education credit for the hours of instruction that are presented at the conventions. Continuing education programs that qualify for continuing education credit are determined by

the Board of Chiropractic Medicine pursuant to Sections 456.013(6) and 460.408, Florida Statutes, and Florida Administrative Code Rule 64B2-13.004.

2. There is no specific statute requiring that a continuing education provider for licensees of the Board of Chiropractic Medicine apply to the Board and receive status as an "approved provider" before one of its continuing education programs will be approved. Notwithstanding the lack of that statutory requirement, at all times relevant to this proceeding FCA had applied to and had received from the Board of Chiropractic Medicine approval to serve as a continuing education provider.

3. FCA has standing to bring this Petition.

4. Petitioner Marc Kalmanson, MSN, LMT, RYT, OM, d/b/a Holistic Healthcare Consultants, Inc. (Holistic Healthcare), presents continuing education courses to licensed massage therapists, which courses are approved by the Board of Massage Therapy pursuant to Section 480.0415, Florida Statutes, and Florida Administrative Code Rule 64B7-28.010.

5. There is no specific statute requiring that a continuing education provider for licensees of the Board of Massage apply to the Board and receive status as an "approved provider" before one of its continuing education programs will be approved. Notwithstanding the lack of that statutory requirement, at all times relevant to this proceeding Holistic Healthcare had applied to and had received from the Board of Massage approval to serve as a continuing education provider.

6. Holistic Healthcare has standing to bring this Petition.

7. The proposed rules were published in the Florida Administrative Weekly, Volume 30, Number 30 on July 23, 2004. Petitioners' challenge is limited to the proposed definition of "approved provider."

8. There is no statutory definition of the term "approved provider." Proposed Rule 64B-5.001(1) defines the term "approved provider" as follows:

> (1) "Approved provider" means <u>a person</u> as defined in s. 1.01(3), Florida Statutes, <u>that is required to be approved by a board, or the department when there is no board, to provide continuing education or whose programs are required to be approved by a board</u>, or the department when there is no board. "Approved provider" also means an institution of higher learning or school that is required to be approved by a board, or the department when there is no board, to provide continuing education or whose programs are required to be approved by a

> board, or the department when there is no board. (Emphasis added.)

9. Proposed rule 64B-5.002 requires all "approved providers" to submit to the applicable board, or to the department when there is no board, certain data so that the board or department, as appropriate, can track the continuing education credits for each licensee. The parties stipulated that the ease or difficulty that Petitioners may experience in complying with continuing education tracking requirements has no bearing on the validity or invalidity of the proposed rules.

10. Each proposed rule cites as its "specific authority" Sections 456.004(5) and 456.025(7), Florida Statutes, and cites as the "law implemented" Sections 456.013(9) and 456.025(7), Florida Statutes.

11. Section 456.004, Florida Statutes, confers certain powers and responsibilities on the Department of Health including subsection (5), which provides as follows:

> The department, for the professions under its jurisdiction, shall:
>
> * * *
>
> (5) Adopt rules pursuant to ss. 120.536 (1) and 120.54 to implement the provisions of this chapter.

12. Section 456.025(7), Florida Statutes, provides, in relevant part, as follows:

> (7) ... The department shall implement an electronic continuing education tracking system for each new biennial renewal cycle for which electronic renewals are implemented after the effective date of this act and shall integrate such system into the licensure and renewal system. All approved continuing education providers shall provide information on course attendance to the department necessary to implement the electronic tracking system. The department shall, by rule, specify the form and procedures by which the information is to be submitted. (Emphasis added.)

13. Section 456.013(9), Florida Statutes, provides, in relevant part, as follows:

> (9) Any board that currently requires continuing education for renewal of a license, or the department if there is no board, shall adopt rules to establish the criteria for continuing education courses. . . .

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. § 120.56, Fla. Stat.

15. Section 120.56(2)(a), Florida Statutes, establishes the burden of proof pertinent to this proceeding as follows:

> . . . The petitioner has the burden of going forward. The agency has the burden 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.

16. Pursuant to Section 120.56(2)(c), Florida Statutes, a proposed rule is not presumed to be valid or invalid.

17. The standard of proof is a preponderance of the evidence. See §§ 120.56(2)(a) and 120.57(1)(j), Fla. Stat.

18. Section 120.52(8), Florida Statutes, defines "invalid exercise of delegated legislative authority" to mean:

> . . . 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.
>
> * * *
>
> 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.

19. The final paragraph of Section 120.52(8), Florida Statutes, is frequently referred to as the "flush left" language of the statute.

20. Section 120.536(1), Florida Statutes, states as follows:

> (1) 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.

21. In Southwest Fla. Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000), the Court observed:

> [I]n reviewing for the specific authority for a rule, the issue is not whether the grant of authority is "specific enough," but whether the enabling statute grants legislative authority for the rule at issue:
>
> It follows that the 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. Either the enabling statute authorizes the rule at issue or it does not.

22. Some boards within the Department's supervision have specific statutory authority to require a continuing education provider to apply for and receive status as an "approved provider" while other boards, including the Board of Chiropractic Medicine and the Board of Massage, do not have such statutory authority. The statutory authority vested in some, but not all, boards is a sufficient basis for the Department to adopt the portion of the proposed rules defining "approved provider" to be a "... person ... that is required to be approved by a board, or the department when there is no board ..." without violating the provisions of Section 120.52(8)(b) or (c), Florida Statutes. Petitioners anticipate that the Department will attempt to interpret and apply the definition in a manner that will exceed the explicit statutory authority. While that may turn out to be the case, it is concluded that the cited portion of the definition, as written, does not exceed the

Department's rulemaking authority. The interpretation and application of the rule will have to be resolved in another proceeding.

23. It can be persuasively argued that the provisions of Sections 456.025(7)29 and 456.013(9), Florida Statutes, provide the Department sufficient statutory authority to define the term "approved provider" to include a continuing education provider whose program has been approved by a board or the Department, as applicable. No such argument can be made for defining an "approved provider" to include a continuing education merely because the provider's program or programs will be subjected to approval by a board or by the Department, because there is no statutory authority for including that language in the definition of an "approved provider." The statutory authority for the Department to regulate continuing education programs does not provide statutory authority for it to regulate continuing education providers. A continuing education provider to licensees whose board lacks statutory authority to require prior approval of such providers will not become an "approved provider" until the provider has applied for and received approval for its program. After its program has become approved, the provider arguably becomes an "approved provider."

24. The portion of the proposed rules defining the term "approved provider" to include a person ". . . whose programs

are required to be approved by a board" exceeds Respondent's grant of rulemaking authority within the meaning of Section 120.52(8)(b) and enlarges, modifies, or contravenes the specific provisions of law implemented within the meaning of Section 120.52(8)(c), Florida Statutes. To infer, as Respondent proposes, that the general rulemaking authority contained in Section 456.004(5), Florida Statutes, and the requirements pertaining to continuing education credits set forth in Section 456.025(7), Florida Statutes, provide statutory authority for it to regulate all continuing education providers would violate the "flush left" language of Section 120.52(8), Florida Statutes. Compare Freiberg v. Department of Health, Board of Acupuncture, DOAH Case No. 03-2964RX (November 26, 2003).

ORDER

Based on the foregoing findings and conclusions, it is ORDERED that:

1. The following portion of the definition of an "approved provider" set forth in the challenged proposed rules is invalidated as an invalid exercise of delegated legislative authority: ". . . a person as defined in s. 1.01(3), Florida Statutes, . . . whose programs are required to be approved by a board, or the department when there is no board."

2. Petitioners' remaining challenges are dismissed.

DONE AND ORDERED this 23rd day of November, 2004, in Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of November, 2004.

ENDNOTE

[1/] All statutory references are to Florida Statutes (2004) and all rule references are to the version of the rule as published in Florida Administrative Code as of the date of this Final Order.

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.