STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL JOHN BADANEK, D.C.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 06-0798RX
	)	
DEPARTMENT OF HEALTH, BOARD OF CHIROPRACTIC MEDICINE,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

This matter came before Larry J. Sartin, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, upon the filing of a Joint Pre-Hearing Stipulation in which the parties agreed there were no disputed issues of fact.

APPEARANCES

For Petitioner: Wilson Jerry Foster, Esquire
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For Respondent: Michael T. Flury, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Florida Administrative Code Rule Subsections 64B2-15.001(2)(e), (i), and (l) constitute an invalid exercise of delegated legislative authority in that

they exceed Respondent's rulemaking authority or enlarge, modify, or contravene the law the Rule implements.

PRELIMINARY STATEMENT

On March 6, 2006, Petitioner Michael John Badanek, D.C., filed a Petition to Determine Invalidity of Existing Rule (hereinafter referred to as the "Petition") with the Division of Administrative Hearings (hereinafter referred to as the "DOAH"). Petitioner challenged the validity of Florida Administrative Code Rule Subsections 64B2-15.001(2)(e), (i), and (l) (hereinafter referred to collectively as the "Challenged Rule Subsections"). Petitioner alleged that the Challenged Rule Subsections constitute an invalid exercise of delegated legislative authority as defined in Sections 120.52(8)(b) and (c), Florida Statutes (2005). All future references to the Florida Statutes are to the 2005 version.

Petitioner's challenge was designated DOAH Case No. 06-0798RX and, by Order of Assignment entered March 8, 2006, the case was assigned to the undersigned.

By Notice of Hearing entered March 9, 2006, a final hearing was scheduled for March 28, 2006. On March 24, 2006, the parties filed a Joint Pre-Hearing Stipulation (hereinafter referred to as the "Stipulation"). In the Stipulation the parties agreed to the admission into evidence of Florida Administrative Code Rule 64B2-15.001, a copy of which was

attached to the Stipulation. That exhibit, which is marked as Joint Exhibit A, is hereby admitted. The parties also stipulated to certain facts relating to Petitioner's standing and relating to Respondent which are accepted. The parties then agreed that "[i]n light of this stipulation, the Parties agree that a hearing is not required."

In light of the foregoing, an Order Canceling Final Hearing and Setting Date for Filing Proposed Final Orders was entered March 28, 2006. The parties were given until April 17, 2006, to file proposed final orders. Both parties timely filed Proposed Final Orders. Those submittals have been fully considered in entering this Final Order.

FINDINGS OF FACT

1. Petitioner Michael John Badanek, D.C., is a duly licensed chiropractic physician in the State of Florida. Dr. Badanek actively practices in Ocala, Florida.

2. Dr. Badanek has engaged in and is engaging in, the advertising of professional services to the public.

3. Dr. Badanek is subject to the provisions of Chapter 460, Florida Statutes, and the rules promulgated by Respondent.

4. Dr. Badanek's failure to adhere to the provisions of Chapter 460, Florida Statutes, and the rules promulgated thereunder, including the Challenged Rule Subsections, may result in the discipline of his professional license.

5. Dr. Badanek has standing to challenge the Challenged Rule Subsections.

6. The affected state agency is the Board of Chiropractic Medicine (hereinafter referred to as the "Board"), located at 4052 Bald Cypress Way, Tallahassee, Florida.

7. The Board is charged by Chapter 460, Florida Statutes, with the duty of regulating the chiropractic profession in Florida. In carrying out that duty, the Board has adopted Florida Administrative Code Rule Chapter 64B2.

8. At issue in this matter is the Challenged Rule Subsections of Florida Administrative Code Rule 64B2-15.001. The Challenged Rule Subsections provide the following:

> **64B2-15.001 Deceptive and Misleading Advertising Prohibited; Policy; Definition.**
>
> . . . .
>
> (2) No chiropractor shall disseminate or cause the dissemination of any advertisement or advertising which is in any way fraudulent, false, deceptive or misleading. Any advertisement or advertising shall be deemed by the Board to be fraudulent, false, deceptive, or misleading, if it:
>
> . . . .
>
> (e) Coveys the impression that the chiropractor or chiropractors, disseminating the advertising or referred to therein, posses qualifications, skills, or other attributes which are superior to other chiropractors, other than a simple listing of earned professional post-doctoral or other professional achievements. However, a

chiropractor is not prohibited from advertising that he has attained Diplomate status in a chiropractic specialty area recognized by the Board of Chiropractic.

1. Chiropractic Specialties recognized by the Board are those recognized by the various Councils of the American Chiropractic Association or the International Chiropractic Association. Each specialty requires a minimum of 300 hours of post-graduate credit hours and passage of a written and oral examination approved by the American Chiropractic Association or International Chiropractic Association. Titles used for the respective specialty status are governed by the definitions articulated by the respective councils.

2. A Diplomate of the National Board of Chiropractic Examiners is not recognized by the Board as a chiropractic specialty status for the purpose of this rule.

3. A chiropractor who advertises that he or she has attained recognition as a specialist in any chiropractic or adjunctive procedure by virtue of a certification received from an entity not recognized under this rule may use a reference to such specialty recognition only if the board, agency, or other body which issued the additional certification is identified, and only if the letterhead or advertising also contains in the same print size or volume the statement that "The specialty recognition identified herein has been received from a private organization not affiliated with or recognized by the Florida Board of Chiropractic Medicine."

4. A chiropractor may use on letterhead or in advertising a reference to any honorary title or degree only if the letterhead or advertising also contains in

the same print size or volume the statement "Honorary" or (Hon.) next to the title.

. . . .

(i) Contains any representation regarding a preferred area of practice or an area of practice in which the practitioner in fact specializes, which represents or implies that such specialized or preferred area of practice requires, or that the practitioner has received any license or recognition by the State of Florida or its authorized agents, which is superior to the license and recognition granted to any chiropractor who successfully meets the licensing requirements of Chapter 460, F.S. However, a chiropractor is not prohibited from advertising that he has attained Diplomate status in a specialty area recognized by the Board, or

. . . .

(l) Contains a reference to any other degree or uses the initials "M.D." or "D.O." or any other initials unless the chiropractic physician has actually received such a degree and is a licensed holder of such degree in the State of Florida. If the chiropractic physician licensee is not licensed to practice in any other health care profession in Florida, the chiropractic physician must disclose this fact, and the letterhead, business card, or other advertisement shall also include next to the reference or initials a statement such as "Not licensed as a medical doctor in the State of Florida" or "Licensed to practice chiropractic medicine only" in the same print size or volume.

. . . .

9. The authority cited by the Board as its "grant of rulemaking authority" for the Challenged Rule Subsections is Section 460.405, Florida Statutes, which provides:

> **Authority to make rules.**--The Board of Chiropractic Medicine 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.

10. The Board has cited Sections 456.062 and 460.413(1)(d), Florida Statutes, as the "law implemented" by the Challenged Rule Subsections.

11. Section 456.062, Florida Statutes, provides:

> **Advertisement by a health care practitioner of free or discounted services; required statement.**--In any advertisement for a free, discounted fee, or reduced fee service, examination, or treatment by a health care practitioner licensed under chapter 458, chapter 459, chapter 460, chapter 461, chapter 462, chapter 463, chapter 464, chapter 465, chapter 466, chapter 467, chapter 478, chapter 483, chapter 484, chapter 486, chapter 490, or chapter 491, the following statement shall appear in capital letters clearly distinguishable from the rest of the text: THE PATIENT AND ANY OTHER PERSON RESPONSIBLE FOR PAYMENT HAS A RIGHT TO REFUSE TO PAY, CANCEL PAYMENT, OR BE REIMBURSED FOR PAYMENT FOR ANY OTHER SERVICE, EXAMINATION, OR TREATMENT THAT IS PERFORMED AS A RESULT OF AND WITHIN 72 HOURS OF RESPONDING TO THE ADVERTISEMENT FOR THE FREE, DISCOUNTED FEE, OR REDUCED FEE SERVICE, EXAMINATION, OR TREATMENT. However, the required statement shall not be necessary as an accompaniment to an advertisement of a licensed health care practitioner defined by this section if the advertisement appears in a classified

> directory the primary purpose of which is to provide products and services at free, reduced, or discounted prices to consumers and in which the statement prominently appears in at least one place.

12. Section 460.413(1)(d), Florida Statutes, provides the following ground for disciplinary action: "False, deceptive, or misleading advertising." While neither this provision nor any other specific provision of Chapter 460, Florida Statutes, imposes a specific duty upon the Board to define what constitutes "false, deceptive, or misleading advertising," the Board is necessarily charged with the duty to apply such a definition in order to carry out its responsibility to discipline licensed chiropractors for employing "false, deceptive, or misleading advertising."

CONCLUSIONS OF LAW

13. Dr. Badanek has instituted this proceeding pursuant to Section 120.56, Florida Statutes, which allows substantially affected persons to challenge the facial validity of rules. See Fairfield Communities v. Florida Land and Water Adjudicatory Commission, 522 So. 2d 1012, 1014 (Fla. 1st DCA 1988)("At the outset, we note that we are being asked [in this appeal of a final order of a Division hearing officer in a rule challenge proceeding] to determine the facial validity of these two rules [being challenged], not to determine their validity as applied

to specific facts, or whether the agency has placed an erroneous construction on them.").

14. The DOAH, therefore, has jurisdiction over the parties to and the subject matter of this matter pursuant to Sections 120.56(1) and (3), Florida Statutes.

15. Section 120.56(1), Florida Statutes, provides, in pertinent part, the following:

> (1) GENERAL PROCEDURES FOR CHALLENGING THE VALIDITY OF A RULE OR A PROPOSED RULE.--
>
> (a) Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.
>
> . . . .

16. Pursuant to Section 120.56(1)(a), Florida Statutes, a person must be "substantially affected by a rule" in order to challenge its validity. See also §120.56(3)(a), Fla. Stat. The evidence in this case supports the stipulation of the parties that Dr. Badanek is substantially affected by the Challenged Rule Subsections and, therefore, has standing.

17. Section 120.56(1)(a), Florida Statues, also specifies that the bases for challenging an existing rule is limited to an assertion that the rule is an "invalid exercise of delegated legislative authority." The terms "invalid exercise of

delegated legislative authority" are defined in Section 120.52(8), Florida Statutes, as:

> (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. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or
> (f) 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.

18. Dr. Badanek has alleged that the Challenged Rule Subsections constitute an invalid exercise of delegated legislative authority as defined in Sections 120.52(8)(b) and (c), Florida Statutes.

19. Section 120.56(1)(b), Florida Statutes, requires that the challenge to an existing rule be instituted by petition. That petition must be filed in compliance with the following:

> (b) The petition seeking an administrative determination must state with particularity the provisions alleged to be invalid with sufficient explanation of the facts or grounds for the alleged invalidity and facts sufficient to show that the person challenging a rule is substantially affected by it, or that the person challenging a proposed rule would be substantially affected by it.

20. As to his allegation that the Board has "exceeded its grant of rulemaking authority" in adopting the Challenged Rule Subsections, Dr. Badaneck has alleged the following in his Petition:

> 13. The board rules at issue exceed the grant of rule making authority contained in Section 460.405, Florida Statutes, which

> gives the Board limited authority, " . . . to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this chapter *conferring duties upon it*." (Emphasis in original.)

21. As to his allegation that the Board's rule "enlarges, modifies, or contravenes the specific provisions of law implemented", Dr. Badaneck has alleged the following in his Petition with regard to the authority of Section 456.062, Florida Statutes:

> Notable, there are no words in the subsection which "confer duties" upon the Board of Chiropractic Medicine.

Thus, Dr. Badaneck concludes that Section 456.062, Florida Statutes, is not being implemented consistent with the Board's rulemaking authority because it does not implement "the provisions of this chapter conferring duties upon [the Board]."

22. As to the Board's implementation of the authority of Section 460.413(1)(d), Florida Statutes, Dr. Badaneck has suggested in his Petition that the rule "enlarges, modifies, or contravenes" that authority for the following reason:

> 14. The board rules at issue also enlarge, modify and contravene Section 460.405, Florida Statutes, which limits the authority of the Board to implement only those provisions of Chapter 460, "conferring duties upon it."

As further explained in his Proposed Final Order, Dr. Badaneck suggests that there is no specific "duty" conferred upon the

Board by Section 460.413(1)(d), Florida Statutes, to adopt the definitions or guidelines concerning what actually constitutes "false, deceptive, or misleading advertising" found in the Challenged Rule Subsections.

23. In summary, Dr. Badaneck, as is clear from his Petition and his Proposed Final Order, is asserting that the only rulemaking authority granted to the Board by Section 460.405, Florida Statutes, is the authority to adopt rules which implement a specific statutory "duty" imposed upon the Board. He goes on to assert that, because the specific statutory provisions being implemented by the Board's adoption of the Challenged Rule Subsections do not specifically impose any duty on the Board to provide any definition of what the Board believes is false, deceptive, or misleading advertising, the Board has exceeded its authority.

24. While, based upon a very restricted, literal reading of the pertinent statutory provisions at issue in this matter, may lend some support to Dr. Badanek's assertions, his reading of the pertinent provisions is rejected as unreasonable. Section 460.405, Florida Statutes, grants the Board broad discretion to adopt rules. Essentially, the Board is authorized to adopt any rule necessary for it to carry out the duties imposed upon it by Chapter 460, Florida Statutes.

25. Although not necessarily specifically expressed as a "duty," one of the most significant responsibilities, and thus "duties," of the Board provided in Chapter 460, Florida Statutes, is the to supervise and, where necessary, discipline persons licensed as chiropractors in the State of Florida. That duty includes broad responsibility for the investigation of complaints, the prosecution of administrative complaints against licensees, the final determination of whether a licensee has committed violations alleged in the administrative complaint, and, if so, the appropriate penalty. See Chs. 456 and 460, Fla. Stat.

26. Where the Board, in carrying out its duty to discipline chiropractors, develops a policy which constitutes an "agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency . . . " it faces a challenge pursuant to Section 120.56(4)(a), Florida Statutes, if it fails to adopt that policy as a rule. Section 120.56(4)(a), Florida Statutes, provides the following:

> Any person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state with particularity facts sufficient to show that the statement constitutes a rule under s. 120.52 and that the agency has not adopted

> the statement by the rulemaking procedure provided by s. 120.54.

In adopting this provision, the legislature clearly intended that agencies, including boards, adopt their policies, once developed, as rules in order to put those subject to agency action on notice of an agency's policy.

27. The Board has obviously developed a policy that constitutes an agency statement of general applicability in carrying out its duty to discipline Chiropractors who engage in "false, deceptive or misleading advertising." That policy "implements [and] interprets" Sections 456.062 and 460.413(1)(d), Florida Statutes. Its failure to adopt that policy as a rule would subject it to challenge pursuant to Section 120.56(4)(a), Florida Statutes.

28. It is concluded, therefore, that the Board not only has the authority to provide the guidance when it adopted the Challenged Rule Subsections, but would be subject to challenge pursuant to Section 120.56(4), Florida Statutes, had it failed to do so.

ORDER

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

ORDERED that the Petition to Determine Invalidity of Existing Rule is DISMISSED.

DONE AND ORDERED this 16th day of May, 2006, in Tallahassee, Leon County, Florida.

LARRY J. SARTIN
Administrative Law Judge
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Filed with the Clerk of the
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this 16th day of May, 2006.

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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.