STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE FLORIDA CHAPTER OF THE AMERICAN COLLEGE OF EMERGENCY PHYSICIANS, INC.; AND JORGE LOPEZ-FERRER, M.D.,	)	
Petitioners,	)	
vs.	)	Case No. 06-1901RX
DEPARTMENT OF HEALTH, BOARD OF MEDICINE,	)	
Respondent,	)	
and	)	
THE AMERICAN ASSOCIATION OF PHYSICIAN SPECIALISTS, INC.,	)	
Intervenor.	)	

FINAL ORDER ON MOTION TO DISMISS

Respondent, Department of Health, Board of Medicine (Board), and Intervenor, American Association of Physician Specialists, Inc. (AAPS), filed a Motion to Dismiss the Petition for Formal Administrative Hearing to Determine the Invalidity of Rule 64B8-11.001, Florida Administrative Code, filed by Petitioners, the Florida Chapter of the American College of Emergency Physicians, Inc. (FCEP), and Jorge Lopez-Ferrer, M.D. The primary basis for the Motion to Dismiss is that Petitioners

lack standing to bring this rule challenge. Petitioners filed a response in opposition.

Section 120.56(1)(a), Florida Statutes, (2005) states that any person substantially affected by a rule may seek an administrative determination of the rule on the ground that the rule is an invalid exercise of delegated legislative authority. In order to demonstrate that a party is substantially affected by a rule, one must establish that application of the rule will result in "a real and sufficiently immediate injury in fact" and that "the alleged interest is arguably within the zone of interest to be protected or regulated." Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc., 808 So. 2d 243, 250 (Fla. 1st DCA 2002).

Trade or professional associations have standing in certain circumstances to challenge a rule:

> To be permitted to do so, the trade or professional association must demonstrate that [1] a substantial number of its members, although not necessarily a majority, are 'substantially affected' by the challenged rule[;]. . . [2] the subject matter of the rule [is] within the association's general scope of interest and activity[;] and [3] the relief requested [is] of the type appropriate for a trade association to receive on behalf of its members.'

Id., quoting Florida Home Builders Ass'n v. Department of Labor & Employment Security, 412 So. 2d 351 (Fla. 1982).

Paragraph (8) of the Petition alleges that Florida Administrative Code Rule 64B8-11.001(7)(c) is an invalid exercise of delegated legislative authority because: (a) the Board exceeded its grant of rulemaking authority when it promulgated the Rule; (b) the Rule is arbitrary and capricious; (c) the Rule is not supported by competent substantial evidence; and (d) the Board's actions in promulgating the Rule were not substantially justified.[1/]

Additionally, the Petition also alleges that Section 458.3312, Florida Statutes, the law implemented by the challenged portion of the Rule, is an unlawful delegation of legislative authority because it lacks specificity and guidelines and grants the Board unbridled discretion to determine what, if any, standards should be met by an organization applying for approval as a specialty recognizing agency in violation of Article III, Section 1 of the Florida Constitution.[2/]

Section 24, ch. 97-264, Laws of Florida, created Section 458.3312, Florida Statutes, which reads as follows:

> A physician licensed under this chapter may not hold himself or herself out as a board-certified specialist unless the physician has received formal recognition as a specialist from a specialty board of the American Board of Medical Specialties <u>or other recognizing agency approved by the board</u>. However, a physician may indicate the services offered and may state that his

> or her practice is limited to one or more types of services when this accurately reflects the scope of practice of the physician. (emphasis supplied)

Florida Administrative Code Rule 64B8-11.001(2)(f) reads in pertinent part as follows:

> ...For purposes of this rule, the Board approves the specialty boards of the American Board of Medical Specialties (ABMS) as recognizing agencies, and such other recognizing agencies as may request and receive future approval by the Board based upon the following criteria: . . .

The Rule then enumerates seven criteria that other recognizing agencies must meet to receive future Board approval. The Rule identifies three "recognizing agencies currently approved" by the Board in subparagraphs (7)(a) through (c), to include AAPS.

The Petition sets forth a factual background regarding the portion of the Rule being challenged. That is, in 2002, AAPS petitioned the Board for a waiver or variance of the criteria of Rule 64B8-11.001(2)(f)1-7. The petition for waiver or variance was granted by order of the Board in February 2002. The Board then amended the Rule by adding AAPS as the third recognizing agency currently approved by the Board in 64B8-11.001(7)(c), which is the subject of this rule challenge. The Board and AAPS allege that Petitioners' rule challenge is actually a collateral attack on the action taken by the Board in granting AAPS's

petition for waiver or variance. This question need not be reached to decide the Motion to Dismiss.

Citing numerous cases as authority, the Board and AAPS argue that the Petition does not sufficiently state specific facts showing that Dr. Lopez-Ferrer is substantially affected and that the Petition does not include a specific showing of an "injury in fact" that is within the "zone of interest" protected by the statute and the challenged rule implementing it. The Board and AAPS also argue that the Petition does not attempt to show how a "substantial number" of the members of Petitioner FCEP are "substantially affected" by the challenged rule.

The Petition includes the following allegations regarding standing:

> Petitioner's [sic] Standing
>
> 19. By permitting previously unqualified physicians to advertise themselves as specialists in the area of emergency medicine, the Rule substantially impacts the rights of hundreds of emergency medicine physicians represented by the FCEP who have completed a residency program in the specialty of emergency medicine and are board certified by ABMS [American Board of Medical Specialties] approved certifying entities such as the ABEM [American Board of Emergency Medicine]and the AOBEM [American Osteopathic Board of Emergency Medicine].
>
> 20. The Rule serves to confuse the public and to allow previously unqualified physicians and physicians lacking the same credentials, education, training and certification as ABMS board certified

emergency medicine physicians to advertise that they have certifications and credentials equal to or the same as ABMS board certified emergency physicians.

21. Despite the Board's assertions to the contrary, the Petitioners have standing under Florida law to challenge the validity of the Rule. Petitioners have a substantial interest in establishing and maintaining the standards of education and competence required for board certification in the specialty of emergency medicine with the State of Florida. Florida law recognizes specifically acknowledges [sic] this fact. Section 458.301, Florida Statutes, states that 'the practice of medicine is potentially dangerous to the public if conducted by unsafe and incompetent practitioners.' The FCEP shares this viewpoint and through its educational and professional purposes strives to help prevent the practice of emergency medicine by unsafe, incompetent or unqualified practitioners.

22. The FCEP asserts that the Board's approval of the AAPS' Petition has a substantial impact on emergency physicians in the State of Florida, a large majority of whom are members of the FCEP. The FCEP further asserts that a significant amount of data and information exists that was never presented to the Board as part of the AAPS' Petition due to the proceedings and correspondence surrounding the approval of the AAPS' Petition and the Board's handling of the AAPS' Petition.

23. The relief requested by the Petitioners herein is necessary to protect the public health, safety, and welfare and to maintain and clarify the public's understanding of the specialty recognizing agencies for emergency medicine. The protection of the public's health, safety and welfare through proper understanding of the emergency

> medicine specialty is one of the primary goals, objectives and purposes of the FCEP and all of the FCEP's members. Thus, both the FCEP and its members are substantially affected by the Rule.

The Board and AAPS argue the following in paragraph 13 of the Motion:

> 13. The Petition makes ambiguous and generalized allegations of Petitioners' interest in maintaining standards of training in accordance with ABMS standards, protecting the practice of emergency medicine from physicians who are allegedly not as qualified as ABMS certified emergency medicine physicians, and protecting the public from confusion as to the equality of non-ABMS and ABMS certified emergency medicine physicians. As in Board of Optometry, Petitioner's [sic] have failed to acknowledge that the statute being implemented by the challenged rule has removed any claim Dr. Lopez-Ferrer or the other members of FCEP ever had to maintain an ABMS standard for the recognition of specialty certified emergency room physicians or to 'protect' the public from non-ABMS certified emergency medicine physicians. The statute at issue, § 458.3312, Florida Statutes, specifically approves the recognition of non-ABMS certified physicians and obliges the Board of Medicine to set up a process by which to approve recognition of non-ABMS certifying agencies. In this case, Petitioner's (sic) cannot assert an exclusive right to hold themselves out as specialty certified in emergency medicine and are therefore not in a position to assert a protected economic right and their general interest in 'protecting' the quality of emergency medical care provided to the public is not predicated upon a legally recognized right of sufficient immediacy and reality to support their standing to challenge the

> validity of the adopted rule. Board of Optometry v. Society of Ophthalmology, 538 So. 2d 878,881 (Fla. 1st DCA 1988).

Particularly compelling is a comparison of that argument to the court's opinion in Board of Optometry, which reads in pertinent part:

> Appellants argue that petitioners ignore the significant change made by chapter 86-289 in the statutory authority of optometrists to use certain topical ocular drugs. . . .In the instant case, petitioners' right to administer topical ocular drugs is no longer exclusively reserved to their field of practice...and they are no longer in a position...to assert a protected economic right that has been impaired by the subject rule.

538 So. 2d 878, 881.

Petitioners rely on, among other cases, Board of Dentistry v. Florida Dental Hygienist Association, Inc., 612 So. 2d 646 (Fla. 1st DCA 1993). After careful review of the court's opinion and the underlying Final Order (Division of Administrative Hearings, Case Nos. 89-4427RP and 90-0258RP, October 25, 1990), the undersigned is persuaded that Board of Dentistry is distinguishable when compared to the instant case. While the court in Board of Dentistry ultimately found the Florida Dental Hygienist Association to have standing, it acknowledged that that the issue of standing in the case was "not easily resolved from existing case law" and was not "clear-

cut." Board of Dentistry, 612 So. 2d 646, 650. In reaching this conclusion, the court recognized and discussed the Board of Optometry decision:

> In that case, Judge Zehmer, writing for the court, first pointed out that the petitioners in that case . . .because of statutory changes were no longer in a position to assert a statutorily protected economic right that had been impaired by a rule. Judge Zehmer then added: 'Consequently, petitioners' continuing general interest in the quality of eye care being provided to the public is not predicated upon a legally recognized right of sufficient immediacy and reality to support their standing to challenge the validity of the adopted rule.'

612 So. 2d 646 at 650, quoting from 538 So. 2d at 881.

The court in Board of Dentistry did not retreat from its decision in Board of Optometry but distinguished it, relying heavily on the legislative history of the controlling statute, Section 466.007(2)(b), Florida Statutes (1989). That statute required, in pertinent part, that an applicant who desired to be licensed as a dental hygienist must be a graduate of a dental hygiene college or school approved by the board or accredited by an accreditation agency. The Board of Dentistry court, and the hearing officer below, traced the legislative history of the statute in concluding that despite the use of the disjunctive "or" in Section 466.007(2)(b), the Legislature intended to restrict the Board of Dentistry in approving dental hygiene

schools or colleges to either accredited schools or colleges or unaccredited schools or colleges that were comparable to accredited schools and colleges. Board of Dentistry, 612 So. 2d 646, 653-654. This conclusion, based in large part of the legislative history of the applicable statute, is distinguishable from the instant case, as ordinarily, the use of the word "or" is generally construed in the disjunctive and normally indicates that alternatives were intended. Sparkman v. McClure, 498 So. 2d 892 (Fla. 1986).

The undersigned is persuaded that, under the rationale of Board of Optometry, Petitioners lack standing to bring this rule challenge.

In their response to the Motion to Dismiss, Petitioners plead, in the alternative, that they be given an opportunity to amend the Petition "to assert and allege further facts which evidence the substantial effect the Rule has on Petitioners." The effect of the Rule on Petitioners has been adequately pled and need not be elaborated. Understanding the effect the Rule has on Petitioners, this effect is insufficient to confer standing on Petitioners in light of the language of Section 458.3312, Florida Statutes, which by its terms creates the opportunity for the Board to approve other recognizing agencies apart from those of ABMS.

Accordingly, the undersigned finds that allowing amendment to the Petition on this occasion would not allow Petitioners to state a cause of action in this rule challenge proceeding. See Undereducated Foster Children of Florida v. Florida Senate et al., 700 So. 2d 66 (Fla. 1st DCA 1997).

Based upon the above, it is

ORDERED:

1. The Motion to Dismiss is granted.

2. Petitioners' request to amend the petition is denied.

3. The hearing scheduled for August 22 and 23, 2006, is canceled.

DONE AND ORDERED this 21st day of July, 2006, 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 21st day of July, 2006.

ENDNOTES

1/ The Board and AAPS correctly assert that the criterion that a rule is not supported by competent substantial evidence as the basis of a rule challenge was repealed in 2003 by s. 1, Ch. 2003-94, Laws of Florida.

2/ The Board and AAPS correctly assert that the undersigned is without authority to decide constitutional challenges to statutes or to existing rules. Department of Administration, Division of Personnel v. Department of Administration, Division of Administrative Hearings, 326 So. 2d 187 (Fla. 1st DCA 1976).

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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 agency 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.