STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THOMAS FILIPPI, Petitioner, vs. DEPARTMENT OF EDUCATION and STATE BOARD OF EDUCATION, Respondents.	)	Case No. 07-4783RU

FINAL ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on February 15, March 24, and April 4, 2008, at sites in Tallahassee, Miami, and Fort Lauderdale, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues in this case are, first, whether a section of an application form, which was adopted as a rule, is an invalid exercise of delegated legislative authority; and, second, whether portions of an outdated online version of the same application form constituted an agency statement defined as a rule, which was not adopted in accordance with (and thus violated) Section 120.54(1)(a), Florida Statutes.

PRELIMINARY STATEMENT

By a Notice of Reasons dated May 30, 2006, John L. Winn,[1] as Commissioner of Education, notified Petitioner Thomas R. Filippi that the Department of Education intended to deny his application for a teaching certificate pursuant to Section 1012.56(10), Florida Statutes. As grounds for the denial, the Commissioner asserted that Filippi lacks the good moral character required to be eligible for a teaching certificate and that he had committed acts which would authorize the Education Practices Commission to revoke a teaching certificate. Filippi disputed the factual allegations and timely requested a review by the Education Practices Commission. On October 9, 2007, the Education Practices Commission referred the matter, for a formal hearing, to the Division of Administrative Hearings, where it was docketed as Case No. 07-4628.

Meantime, on October 19, 2007, Mr. Filippi filed a petition with the Division of Administrative Hearings seeking to nullify certain provisions of the forms on which he had applied for licensure, either as constituting an invalid exercise of delegated legislative authority (which he alleged in relation to the form on which he first applied) or as part of an unadopted rule (which he claimed was the legal status of the form on which he made his second, third, and fourth applications). This rule challenge, brought against the department and the State Board of Education, was docketed as Case No. 07-4783RU. On November 30, 2007, at the parties' joint request, the undersigned consolidated the two cases for all purposes, including final hearing.

In the run-up to the final hearing, each side sought, and was granted, leave to amend its pleading. Consequently, Case No. 07-4628 proceeded to hearing on the charges brought in the Commissioner's Third Amended Notice of Reasons. In Case No. 07-4783RU, the issues were framed in Mr. Filippi's Amended Petition for Determination of Invalidity of Adopted and Unadopted Rules.

At the final hearing of the consolidated cases, which was held over the course of several days, on February 15; March 24; and April 4, 2008, Mr. Filippi called the following witnesses (in addition to himself): Father Enrique Estrada (whose video deposition was received in lieu of a live appearance); Dr. Maria Chelala; and Kevin S. Trim. In addition, Petitioner's Exhibits 1-

8, 9(a)-(9d), 10(a)-10(e), 11(a)-11(d), 12, 15, 17, 18, 19(k), 20, 21(b)-21(h), 22(a), 23-27, 31(b), 31(k), 31(l), 44, 49, 58, 62, and 71 were admitted into evidence.

Respondents presented the following witnesses: Beverly W. Gregory, Ana Rasco, Heather Deskins, Marian Lambeth, and Ronald G. Stowers. Respondents' Exhibits 5-9, 13, 15 18, 18(b), 19, and 23 were received also, as were two depositions of Mr. Filippi, whose prior testimony was admitted in addition to his extensive hearing testimony.

The undersigned took official recognition of numerous documents, as memorialized in the file.

The transcript of the final hearing, comprising five volumes (one of which is unnumbered), was filed seriatim, over time, with the final tranche arriving on May 14, 2008. By Order dated May 22, 2008, the undersigned severed Case Nos. 07-4268 and 07-4783RU, for disposition. Thereafter, each party timely submitted a Proposed Final Order (in Case No. 07-4783RU) before the deadline of May 27, 2008; their papers were duly considered.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2007 Florida Statutes.

FINDINGS OF FACT

1. Petitioner Thomas Filippi ("Filippi") desires to be issued an Educator's Certificate authorizing him to teach in the public schools in the State of Florida. Accordingly, on or

about March 1, 2005, Filippi filled out and signed an Application for Florida Educator's Certificate. Through this application, Filippi sought to become certified to teach Chemistry (Grades 6-12) in the Florida public schools. Filippi mailed his application to the Department of Education ("Department"), where it was received on March 7, 2005.

2. Question No. 22 of the application, on the subject of professional sanctions, comprised four subparts, and asked the following:

> [1] Have you ever had any professional license (*a driver's license is not a professional license*) or professional certificate, including a teaching certificate, sanctioned by the issuing agency in this or any state? Sanction is defined to include: suspension; revocation; discipline, such as issuance of a reprimand or fine; or otherwise conditioned, such as placed on any restriction or probation. [2] Have you ever resigned, surrendered, or otherwise relinquished a professional license or certificate in this or any state? [3] Is there any action pending in this or any state against a professional license or certificate that you hold or held? [4] Is there any action pending in this or any state against an application for a professional license or certificate that you have on file? (A determination of academic ineligibility is not considered denial of a license or certificate.)

(Bracketed numbers added.) Beneath these questions, for the applicant whose answer would be "yes," were lines on which to identify, with respect to any sanction(s) prompting the

affirmative response, the "State," "Year," "License or Certificate," "Issuing Agency," and "Reason."

3. Over the next seven months, on April 12, 2005; May 16, 2005; and October 11, 2005, Filippi filed three additional applications for licensure with the Department, each one seeking certification in a different subject or subjects. Filippi's second, third, and fourth applications (collectively, the "Online Applications"), unlike his first, were completed and submitted electronically via the internet.

4. The Online Applications were identical to each other in form, but differed somewhat from Filippi's first application. This was because, in December 2004, the State Board of Education ("SBE") had adopted an updated version of the application for a teaching certificate, which form was duly incorporated by reference into, and made a part of, Florida Administrative Code Rule 6A-4.0012. Due to an oversight, however, the Department had not revised the online application to reflect the most recent changes to this form——and would not do so until October 2006, when it discovered the mistake. Consequently, Filippi's first application was made on the then-current form; his Online Applications, however, despite having been submitted later in time, were made on an older version of the form.

5. There was a question in the Online Applications dealing with professional sanctions. The inquiry, however, contained

only three subparts rather than four, as had Question No. 22 of the first application Filippi had submitted. The following shows the differences between the Online Applications (which the Department inadvertently had neglected to update), on the one hand, and Filippi's first application (which used the then-current form), on the other, by underlining the language that was *not* in the Online Applications (but *should have been*), and striking through a word ("denial") that *was* in the Online Applications (but should *not* have been):

> [1] Have you ever had any professional license (*a driver's license is not a professional license*) or professional certificate, including a teaching certificate, sanctioned by the issuing agency in this or any state? Sanction is defined to include: ~~denial~~; suspension; revocation; discipline, such as issuance of a reprimand or fine; or otherwise conditioned, such as placed on any restriction or probation. [2] Have you ever resigned, surrendered, or otherwise relinquished a professional license or certificate in this or any state? Is there any action pending in this or any state against a professional license or certificate that you hold or held? [3] Is there any action pending in this or any state against an application for a professional license or certificate that you have on file? (A determination of academic ineligibility is not considered denial of a license or certificate.)
>
> A YES or NO answer is required by Florida Law. If YES, you must give the information requested for each sanction.

(Bracketed numbers added.)

6. The Commissioner of Education ("Commissioner"), as head of the Department, decided that Filippi should not be permitted to teach in Florida. Among the reasons for the Commissioner's preliminary decision to deny Filippi's application for a teaching certificate was the Commissioner's belief that Filippi willfully had failed to disclose, in his applications for a teaching certificate, certain material facts, including information concerning the adverse actions that had been taken, respectively, against his applications for licensure as a teacher in the states of West Virginia and Pennsylvania.

7. In this proceeding, Filippi alleges that the question regarding professional sanctions in the first application he submitted was an invalid existing rule. Filippi asserts that the question was invalid for several reasons. First, he argues that the SBE lacks rulemaking authority to ask an applicant for a teaching certificate about *any* previous professional sanctions he might have suffered, much less about any adverse actions that might be pending elsewhere against some other application(s) for licensure of the applicant. Second, he contends that the professional-sanctions question empowers the Department to deny an application merely because of an action pending elsewhere against another application of the applicant, even though such pending action (of itself) would not authorize the Education Practices Commission ("EPC") to revoke a teaching certificate.

Third, Filippi insists that the question regarding professional sanctions was impermissibly vague.

8. With regard to the Online Applications, Filippi charges that the SBE violated the rulemaking procedure prescribed in Section 120.54, Florida Statutes, because (Filippi contends) the question regarding professional sanctions in the Online Applications constituted an agency statement meeting the legal definition of the term "rule," which rule-by-definition (Filippi claims) the SBE was required promptly to adopt formally as a rule.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.56, 120.569, and 120.57(1), Florida Statutes, and the parties have standing.

THE EXISTING RULE

10. In a challenge to an existing rule, the "petitioner has [the] burden of proving by a preponderance of the evidence that the existing rule is an invalid exercise of delegated legislative authority as to the objections raised." See § 120.56(3)(a), Fla. Stat.

11. The Fundamental Rules of Decision[2]

The starting point for determining whether an existing or proposed rule is invalid is Section 120.52(8), Florida Statutes,

in which the legislature defined the term "invalid exercise of delegated legislative authority." In this definition, the legislature created a catalog of the salient defects which distinguish rules that exceed an agency's delegated powers, functions, and duties from those which do not. Pertinent to this case are the following provisions:

> 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; [or]
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

§ 120.52(8), Fla. Stat.

12. Also included in Section 120.52(8) is a concluding paragraph——commonly called the "flush-left paragraph"——in which the legislature expressed a clear intent to curb agency rulemaking authority:

> 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.

§ 120.52(8), Fla. Stat. The legislature enacted the very same restrictions on rulemaking authority in Section 120.536(1), Florida Statutes, apparently for emphasis.

13. The meaning of the flush-left paragraph was the subject of a pair of influential appellate decisions, starting with Southwest Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594 (Fla. 1st DCA 2000). There, the First District Court of Appeal considered a challenge to rule provisions which granted exemptions to certain permitting requirements based upon prior governmental approval. By statute, the agency had been delegated the power to establish exemptions, but the power was qualified: only exemptions that did not "allow significant adverse [environmental] impacts to occur" could be granted. Id. at 600.

14. Examining the then-recently revised flush-left paragraph, the court found, as an initial matter, that the

language prohibiting agencies from adopting any rules except those "that implement or interpret the specific powers and duties granted by the enabling statute" is clear and unambiguous. Id. at 599. The court observed that, "[i]n the context of the entire sentence, it is clear that the authority to adopt an administrative rule must be based on an explicit power or duty identified in the enabling statute. Otherwise, the rule is not a valid exercise of delegated legislative authority." Id.

15. In the opinion's most memorable paragraph, the court encapsulated its position as follows:

> [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.* Either the enabling statute authorizes the rule at issue or it does not. [T]his question is one that must be determined on a case-by-case basis.

Id. (underlining added). In other words, according to the court, the relevant inquiry is whether the specific law being implemented (the enabling statute) evinces a legislative intent to grant the agency the specific power or specific duty behind the subject rule. In answering this question, the specificity of the enabling statute's terms is not the primary consideration. (Obviously, however, specificity *is* a factor to consider, inasmuch as a relative lack of specificity tends to

obscure legislative intent, whereas relative precision in legislative draftsmanship tends to reveal such intent.)

16. Because, the court found, the exemptions at issue in Manatee Club had been based "entirely on prior approval," and because, moreover, the enabling statute did "not provide specific authority for an exemption based on prior approval," the disputed rule provisions did "not implement or interpret any specific power or duty granted in the applicable enabling statute;" hence they were invalid. Id.

17. The first district revisited the flush-left paragraph of Section 120.52(8), Florida Statutes, in Bd. of Trustees of Internal Improvement Trust Fund v. Day Cruise Ass'n, 794 So. 2d 696 (Fla. 1st DCA 2001), clarified, rehr'g denied, question certified, 798 So. 2d 847 (Fla. 1st DCA 2001), rev. denied, 823 So. 2d 123 (Fla. 2002). The proposed rule under attack in that case would have forbidden the use of sovereignty submerged lands for anchoring cruise ships engaged in carrying passengers on so-called "cruises to nowhere"——legal gambling excursions. Id. at 697. A divided court held the challenged rule to be invalid on two interrelated grounds, namely, that it (a) exceeded the agency's rulemaking authority and (b) enlarged the specific provisions of law purportedly implemented.

18. To make these determinations, the court defined the specific power that the agency had exercised as being the

authority to "prohibit[] the use of sovereignty submerged lands on account of lawful [gambling] activities on board ships at sea which have no physical or environmental effect on sovereignty submerged lands or adjacent waters." 794 So. 2d at 702. To this the court added:

> Although framed as a regulation of anchoring or mooring, the proposed rule does not regulate the mode or manner of mooring. It does not govern the use of the bottom in any way that protects its physical integrity or fosters marine life. Instead it deliberately and dramatically interferes with certain kinds of commerce solely on account of activities that occur many leagues from any dock.

Id.

19. Upon examining the statutory grant of rulemaking authority applicable specifically to sovereignty submerged lands, the court concluded that a provision in the grant which prohibited regulations that "interfere with commerce" qualified the agency's power "in ways that are incompatible with the adoption of the proposed rule." Id. at 702. Thus the proposed rule was outside the agency's rulemaking authority.

20. The court next looked at the broad constitutional grant of authority to the agency to acquire, administer, manage, control, supervise, conserve, protect, and dispose of state lands, including the sovereignty submerged lands. Id. at 703. It found that "[n]one of the cited constitutional or statutory

provisions makes reference to, much less gives specific instructions on the treatment of, the 'day cruise industry' or contains any other specific directive that would provide the support for the proposed rule that the [law] now requires." Id. Driving this point home, the court continued that, despite the breadth of the general language contained in the state constitution,

> [n]o provision listed as being implemented in the proposed rule purports to authorize——much less specifically to direct——the [agency] to prohibit only certain vessels from mooring on the basis of lawful activities on board (possibly other) vessels once they are on the high seas.
>
> * * *
>
> The provisions purportedly to be implemented here are completely silent about day cruises and about gambling and confer no authority to bar day cruise vessels——or any other vessels——from sovereignty submerged lands based on lawful activities occurring outside Florida's territorial jurisdiction.

Id. at 703-04 (footnote omitted).

21. The court concluded, "In the absence of a specific power or duty" which would enable or require "the [agency] to regulate cruises to nowhere or to regulate gambling or to regulate on the basis of activities occurring aboard vessels after they leave sovereignty submerged lands and adjacent waters, the [agency's] rule exceeds the [agency's] rulemaking authority and is an invalid exercise of delegated legislative

authority as defined in *section 120.52(8)(c)*." Id. at 704 (footnote omitted; emphasis in original).

22. Having studied the basic principles governing rule challenges, it is time to look at the specific objections that Filippi has raised.

23. On the Sufficiency of the SBE's Rulemaking Authority

Filippi complains that the professional-sanctions question is ultra vires, that it is not within the scope of the Department's rulemaking power. Before addressing the merits of Filippi's position, it will be helpful first to structure a decisional path based on the applicable legal principles, which were reviewed above. Considering Section 120.52(8), subparts (b) and (c), Florida Statutes, in conjunction with Manatee Club and Day Cruise, supra, it is possible to articulate an analytical framework for resolving questions regarding rulemaking authority.

24. The threshold question is whether the agency has been delegated the power to make rules. This issue will rarely be disputed since most agencies have been granted general rulemaking powers. See Day Cruise, 794 So. 2d at 702 (general power to adopt rules "normally should be of little interest" because almost all agencies have been given that). As both Manatee Club and Day Cruise make clear, however, if the agency has been empowered or directed specifically to make particular

rules or kinds of rules, it will be necessary, in determining the specific powers or duties delegated to the agency, to pay close attention to any pertinent restrictions or limitations on the agency's rulemaking authority.

25. After it has been determined that the agency has the necessary grant of rulemaking authority, the next question is: What is the specific power or specific duty that the agency has implemented or interpreted through the challenged rule? Logically, one needs to know what to look for before searching the enabling statute for the requisite grant.

26. The task of defining the specific power being exercised is arguably the most crucial step in the process of determining a rule's validity. *How the exercised power is defined will likely be outcome determinative in most cases*. The challenge is to define the power at the appropriate level of generality, neither too narrowly nor too broadly, so that the description of the exercised power accurately reflects the rule's meaning and effect without transforming either. The description of the power should be derived neutrally from the rule's text, without considering (for this purpose) the statutory grant of authority.

27. As an illustration of the importance——and potential difficulty——of defining the specific agency power purportedly being implemented, the case of Frandsen v. Dep't of Envtl.

Prot., 829 So. 2d 267 (Fla. 1st DCA 2002), rev. denied, 845 So. 2d 889 (Fla. 2003), cert. denied, 540 U.S. 948, 124 S. Ct. 400, 157 L. Ed. 2d 279 (2003), is instructive. The rule at issue in Frandsen regulated "free speech activities" (e.g. public speaking, passing out pamphlets, performances, etc.) in public parks. The agency had the authority to "'supervise, administer, regulate, and control the operation of all public parks . . .' and to 'preserve, manage, regulate, and protect all parks and recreational areas held by the state . . . .'" Id. at 269 (quoting § 258.004, Fla. Stat. (1999)). The court found that the rule "falls under [this] specific grant of authority and is otherwise" valid. Id.

28. The court, however, did not expressly define the specific power being exercised through the rule or otherwise explain how the rule implemented or interpreted such a power. (Most of its opinion concerns the First Amendment challenge to the rule's constitutionality.) Yet the proper definition of the power, at the level of generality that the rule's text warrants, is not self-evident. By "zooming in" on the rule and defining the power at a low level of generality, as was done in Day Cruise (which decision the Frandsen court cited with approval), the power that the agency implemented could reasonably be described as the authority to regulate speech or other expressive conduct occurring in a public park. Because the

enabling statue is silent about free speech activities, just as the grants of authority examined in Day Cruise were silent about "cruises to nowhere," defining the power thusly might drive a decision that the free speech rule is invalid.

29. Or it might not. The conduct being regulated by the rule in Frandsen is arguably distinguishable from the gambling activities which the proposed rule in Day Cruise sought to curtail. For the free speech rule, unlike the proposed gambling ship regulation, only reaches activities taking place on the lands within the agency's jurisdiction, whereas the proposed rule directed at "cruises to nowhere" would have affected conduct occurring outside of, and having no effect on, the lands within the agency's jurisdiction. The difference between regulating the properties and facilities comprising public parks, on the one hand, and regulating free speech activities in, on, or making use of such properties and facilities, on the other, might fairly be considered a matter of degree. On that basis, the decision in Frandsen can be squared with Day Cruise.

30. The question whether the free speech rule at issue in Frandsen implemented a specific power delegated to the agency is a closer one than the court's opinion suggests. The court made the answer seem obvious by not stating the agency power being exercised. As shown above, however, had the power been stated at a level of generality supported by the rule's text, the rule

could conceivably have been invalidated on the authority of Manatee Club and Day Cruise without doing violence to the principles underlying either of those decisions. The point is not to criticize Frandsen, for the decision in that case is consistent, too, with Manatee Club and Day Cruise; it is to demonstrate the importance, which cannot be gainsaid, of identifying and accurately stating the power being exercised through the rule under review.

31. The next analytical step, once the specific power being implemented has been defined, is to examine the enabling statute to determine whether the specific power or duty, as defined, is among the specific powers or duties delegated to the agency by the legislature. This entails the "difficult task" of identifying and defining "the kind of delegation that *is* sufficient to support a rule." St. Johns River Water Mgmt. Dist. v. Consolidated-Tomoka Land Co., 717 So. 2d 72, 79 (Fla. 1st DCA 1998)(italics in original).

32. Unfortunately, less judicial attention has been paid to defining the kind of enabling statute that *is* sufficient to support a rule than to pointing out, with regard to enabling statutes, that which is either insufficient or unnecessary. Thus, for example, it is now axiomatic that a delegation is insufficient to support a rule if it merely prescribes a class of powers and duties. "An administrative rule must fall within

the class of powers and duties delegated to the agency, but that alone will not make the rule a valid exercise of legislative power." Manatee Club, 773 So. 2d 599.

33. A similarly well settled proposition holds that it is unnecessary for an enabling statute to be detailed. The court reached this conclusion in Manatee Club, just as it had in Consolidated-Tomoka in a "part of [that] decision [which] appears to have survived" subsequent legislation. See Manatee Club, 773 So. 2d at 599. The surviving piece of Consolidated-Tomoka provides in pertinent part as follows:

> In our view, [the since-amended, 1996 version of the flush-left paragraph, which is no longer the law,] restricts rulemaking authority to subjects that are directly within the class of powers and duties identified in the enabling statute. It was not designed to require a minimum level of detail in the statutory language used to describe the powers and duties.

Consolidated-Tomoka, 717 So. 2d at 79 (emphasis added).

34. Fortunately, the available guidance is not all negative in nature. In Manatee Club, the court taught, in an affirmative way, that the enabling statute "must contain a specific grant of legislative authority for the rule . . . ." 773 So. 2d at 599 (emphasis added). Or, as the court put it another way, "it is clear that the authority to adopt an administrative rule must be based on an explicit power or duty identified in the enabling statue." Id. (emphasis added).

Taking these positive statements together, which tell what *is* required for a delegation of legislative authority to be sufficient to support a rule, it is concluded that the flush-left paragraph, in its present form, restricts rulemaking authority to:

> (a) specific (or explicit) powers and duties
>
> (b) whose distinguishing characteristics (i.e. the features that make the power *specific* and not merely *categorical*)
>
> (c) are established ("identified"), that is, actually present ("contained"), in the enabling statute.

35. In this third stage of the analysis, then, having at the second step defined the specific power being exercised (and, in the process, revealed its distinguishing characteristics), the question is whether the enabling statute either explicitly or implicitly (if ordinary rules of statutory construction permit such an inference) includes within its provisions the characteristics that give the specific power its *identity* (or at least enough of such characteristics to support the conclusion that the delegated power and the exercised power are *identical*), thereby evincing an intent to confer the specific power on the agency.

36. The last question, assuming the enabling statute delegates the specific power or duty being exercised, is whether

the rule at issue actually implements or interprets such power or duty, for a rule, to be valid, must implement or interpret the specific powers granted. If, however, the specific power or duty was properly defined earlier in the analysis, and if, further, the specific power or duty, as defined, was properly located in the enabling statute, then the conclusion here will probably be foregone.

37. The foregoing legal frame of reference can now be used to determine whether the question regarding professional sanctions is within the Department's rulemaking authority.

38. The first question is whether the SBE has been granted general rulemaking powers. The answer is *yes*. See, e.g., § 1001.02(1), Fla. Stat. (The SBE "has authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of law conferring duties upon it . . . ."); § 1001.02(2)(n), Fla. Stat. (The SBE has the duty to "adopt cohesive rules pursuant to ss. 120.536(1) and 120.54, within statutory authority."); and § 1001.03(3), Fla. Stat. ("The State Board of Education shall . . . establish competencies, including . . . certification requirements for all school-based personnel, and prescribe rules in accordance with which the professional, temporary, and part-time certificates shall be issued by the Department of Education to applicants who meet the standards

prescribed by such rules[.]"). Clearly the SBE possesses the necessary general grant of rulemaking authority.

39. Consequently, it is necessary to take the second analytical step, which entails defining the specific power or duty being exercised through the professional-sanctions question. Taking full account of the question's meaning and effect, it is determined that the specific power which the SBE has exercised is the power to ask each applicant for a teaching certificate to disclose the existence of, and some basic facts concerning: (a) any past disciplinary measures taken against the applicant in his capacity as a professional licensee; (b) any disciplinary proceedings currently pending against the applicant in his capacity as a professional licensee; and (c) any measures currently being taken in response to an application of the applicant for a professional license, as a result of which such application is in danger of being disapproved.

40. The next question, then, is whether this particular power is among the specific powers and duties that the legislature has granted to the SBE. In this regard, Section 1012.55(1), Florida Statutes, imposes on the SBE certain duties, providing in pertinent part as follows:

> The State Board of Education shall . . . establish competencies, including . . . certification requirements for all school-based personnel, and adopt rules in accordance with which the professional,

> temporary, and part-time certificates shall be issued by the Department of Education to applicants who meet the standards prescribed by such rules for their class of service.

41. In exercising its specific statutory duty to establish certification requirements, the SBE must follow Section 1012.56, Florida Statutes, which prescribes the minimum requirements for obtaining a teaching certificate. This statute provides, in relevant part, as follows:

> (2) ELIGIBILITY CRITERIA.--To be eligible to seek certification, a person must:
> (a) Be at least 18 years of age.
> (b) File an affidavit that the applicant subscribes to and will uphold the principles incorporated in the Constitution of the United States and the Constitution of the State of Florida and that the information provided in the application is true, accurate, and complete. The affidavit shall be by original signature or by electronic authentication. The affidavit shall include substantially the following warning:
>
> WARNING: Giving false information in order to obtain or renew a Florida educator's certificate is a criminal offense under Florida law. Anyone giving false information on this affidavit is subject to criminal prosecution as well as disciplinary action by the Education Practices Commission.
>
> (c) Document receipt of a bachelor's or higher degree from an accredited institution of higher learning, or a nonaccredited institution of higher learning that the Department of Education has identified as having a quality program resulting in a bachelor's degree, or higher. Each applicant seeking initial certification must

> have attained at least a 2.5 overall grade point average on a 4.0 scale in the applicant's major field of study. The applicant may document the required education by submitting official transcripts from institutions of higher education or by authorizing the direct submission of such official transcripts through established electronic network systems. The bachelor's or higher degree may not be required in areas approved in rule by the State Board of Education as nondegreed areas.
> (d) Submit to background screening in accordance with subsection (9). If the background screening indicates a criminal history or if the applicant acknowledges a criminal history, the applicant's records shall be referred to the investigative section in the Department of Education for review and determination of eligibility for certification. If the applicant fails to provide the necessary documentation requested by the department within 90 days after the date of the receipt of the certified mail request, the statement of eligibility and pending application shall become invalid.
> (e) Be of good moral character.
> (f) Be competent and capable of performing the duties, functions, and responsibilities of an educator.
> (g) Demonstrate mastery of general knowledge, pursuant to subsection (3).
> (h) Demonstrate mastery of subject area knowledge, pursuant to subsection (4).
> (i) Demonstrate mastery of professional preparation and education competence, pursuant to subsection (5).

§ 1012.56(2), Fla. Stat.

42. In addition to setting forth eligibility criteria, Section 1012.56 specifies grounds for denying an application, as follows:

> The Department of Education may deny an applicant a certificate if the department possesses evidence satisfactory to it that the applicant has committed an act or acts, or that a situation exists, for which the Education Practices Commission would be authorized to revoke a teaching certificate.

§ 1012.56(11)(a), Fla. Stat.

43. The acts or situations for which the EPC is authorized to revoke a teaching certificate are enumerated in Section 1012.795(1), Florida Statutes, which authorizes the EPC to take disciplinary action (including revocation of a guilty teacher's certificate) against a certified teacher who:

> (a) Obtained or attempted to obtain an educator certificate by fraudulent means.
> (b) Has proved to be incompetent to teach or to perform duties as an employee of the public school system or to teach in or to operate a private school.
> (c) Has been guilty of gross immorality or an act involving moral turpitude.
> (d) Has had an educator certificate sanctioned by revocation, suspension, or surrender in another state.
> (e) Has been convicted of a misdemeanor, felony, or any other criminal charge, other than a minor traffic violation.
> (f) Upon investigation, has been found guilty of personal conduct which seriously reduces that person's effectiveness as an employee of the district school board.
> (g) Has breached a contract, as provided in s. 1012.33(2).
> (h) Has been the subject of a court order directing the Education Practices Commission to suspend the certificate as a result of a delinquent child support obligation.
> (i) Has violated the Principles of Professional Conduct for the Education

> Profession prescribed by State Board of Education rules.
> (j) Has otherwise violated the provisions of law, the penalty for which is the revocation of the educator certificate.
> (k) Has violated any order of the Education Practices Commission.
> (l) Has been the subject of a court order or plea agreement in any jurisdiction which requires the certificateholder to surrender or otherwise relinquish his or her educator's certificate. A surrender or relinquishment shall be for permanent revocation of the certificate. A person may not surrender or otherwise relinquish his or her certificate prior to a finding of probable cause by the commissioner as provided in s. 1012.796.

44. The SBE's specific authority with regard to the establishment of certification requirements must be determined based on a reading together of Sections 1012.55, 1012.56, and 1012.795, Florida Statutes, which are, on the common subject of such requirements, *in pari materia*;[3] these enabling statutes, taken as a whole, either authorize the professional-sanctions question, or they do not.

45. There can be no reasonable disagreement with the proposition that, in exercising its specific duty to establish certification requirements, the SBE is authorized (indeed required) to create an application designed to identify applicants who meet such requirements——and to weed out those who do not. See § 1012.56(1), Fla. Stat. (requiring each person seeking a teaching certificate to submit a completed application

therefor). As a matter of logic, therefore, it follows that the SBE is specifically empowered to ask applicants, in the application, not only about any of the statutory eligibility criteria, but also about acts or situations which, if known to the Department, would afford a basis for denial of an application.

46. Some of the eligibility (and disqualifying) criteria lend themselves to straightforward questions. For example, an application may be denied if the applicant has had a teaching certificate "sanctioned by revocation, suspension, or surrender in another state." §§ 1012.56(11)(a), 1012.795(1)(d), Fla. Stat. To the extent the professional-sanctions question merely asks the applicant to disclose a *direct basis for denial*, such as whether he has had a teaching certificate sanctioned by revocation, suspension, or surrender in another state, the question is clearly within the SBE's specific powers and duties.

47. Other eligibility (and disqualifying) criteria are less amenable to direct questions. Asking an applicant directly whether he is of good moral character, for example, or competent and capable of performing the duties, functions and responsibilities of a teacher, is unlikely to uncover any useful information; after all, few applicants (one hopes) believe they themselves are immoral or incompetent, and very few (if any) of those who do would honestly admit to being either. Obviously,

in reference to matters, such as character and competence, which require the Department to make judgment calls about an applicant, what must be learned through the application are basic objective facts from which ultimate determinations (e.g. the applicant appears to be of good moral character) can be made.

48. In complaining that the SBE has exercised authority it doesn't have in asking about professional sanctions, Filippi has completely overlooked that some matters simply must be inquired about indirectly, if useful information is to be obtained. The undersigned concludes that just as the SBE is specifically empowered to ask directly about any matter that is statutorily required for certification, or that would be a direct basis for denial of an application, so too is the SBE authorized specifically to inquire indirectly about all such matters, at least to the extent such indirect questions are calculated to discover *markers* for the presence of eligibility (or disqualifying) criteria.

49. As it happens, this case does not present any close or difficult issues, for the professional-sanctions question is safely within the limits of the SBE's authority to inquire.[4] This is because, insofar as the matters inquired about in the professional-sanctions question are not direct grounds for denial, they are clearly markers for such grounds. Past

discipline or a pending disciplinary action, for example, reveals at a minimum that the applicant has gotten into sufficient trouble to draw the attention of a regulatory agency, which is the sort of thing that marks a person as possibly having characterological defects that ought to be investigated. And apart from that, the underlying acts or situations that led to the prior discipline or pending disciplinary proceeding, about which the Department might not learn without posing the professional-sanctions question (or something like it), could be grounds themselves for denial of the application.

50. The same can be said about the specific query involving actions pending against an application. The very fact that another licensing authority has singled out an applicant's application for the purpose of taking some adverse action signals that *something* about the applicant's background or credentials is possibly amiss. Whatever that *something* is ought to be investigated, because persons whose other applications have been marked for disapproval might have problems that would counsel against the issuance of a Florida teaching certificate as well.

51. In summary, the undersigned concludes, based on a reading together of Sections 1012.55, 1012.56, and 1012.795, Florida Statutes, that the legislature intended to empower the SBE with the specific authority to ask teaching-certificate

applicants to disclose any past professional sanctions, pending disciplinary proceedings, and any actions pending in response to an application for professional licensure which reflect a negative view of such application.

52. It is concluded, finally, that the professional-sanctions question *does* implement a specific power or duty delegated by the enabling statutes. Accordingly, because the question meets the criteria specified in the flush-left paragraph, it comes within the SBE's rulemaking authority.

On Whether the Professional-Sanctions Question Enlarges or Modifies the Law Implemented

53. Filippi argues that the professional-sanctions question provides the Department with authority to deny an application if the applicant either (a) has had a professional license "merely reprimanded or conditioned" in another state, or (b) is currently a party to an action against an application for a professional license. This alleged authority, according to Filippi, enlarges or modifies Section 1012.795(1)(d), Florida Statutes, which authorizes the EPC to revoke a teaching certificate if the holder has surrendered a similar certificate in another state, or had one revoked or suspended——but not for any lesser or different sanctions, and not on the basis of actions taken against *applications* (as opposed to certificates or licenses).

54. Contrary to Filippi's argument, however, the professional-sanctions question does not confer any authority on the Department, either expressly or by necessary implication, to deny an application on the basis of matters not specified in the statutes. The question, rather, merely asks for information that, while not necessarily disqualifying per se, usually would *suggest the presence* of a possibly disqualifying problem.

55. To illustrate, the fact that an action is pending in another state against the applicant's application in that state for a professional license would *not*, of itself, be a basis for the Department to deny his Florida application, and nothing in the professional-sanctions question provides otherwise. On the other hand, the *reason* for that action might be. (Suppose, for example, the other state's licensing authority believes the applicant is not competent to teach. If the Department agrees with that assessment, after independently reviewing the situation, then it should deny the application, not because of the other state's action, but because the applicant is incompetent.) In short, the Department is trying to discover facts which, having previously come to the attention of another licensing agency, have caused concern about the applicant. Facts that have caused such concern elsewhere obviously are (and should be) of interest to the Department.

56. It is concluded that the professional-sanctions question does not enlarge or modify any of the provisions of law implemented.

On Whether the Professional-Sanctions Question Is Vague

57. Filippi advances a number of arguments in support of his contention that the professional-sanctions question——and particularly the subpart thereof which asks about "any action pending . . . against an application" (the "Troubled Application Question")——was vague, ambiguous, and confusing. It is not necessary here to examine in detail Filippi's contentions regarding the alleged opacity of the Troubled Application Question or the professional-sanctions question as a whole. Suffice to say that while the professional-sanctions question is not an example of skillful draftsmanship, neither is it incomprehensible. Filippi has a point, in other words, but he tries to make entirely too much of it.

58. Upon being read for the first time, for example, the Troubled Application Question could cause a reasonable applicant who has applied previously for a certificate or has such an application pending somewhere to pause and think about what is being asked. It is conceivable too that, as Filippi argues, an applicant might ponder whether an action pending against an application——or even the denial thereof——constitutes a "sanction." (Although it is *conceivable*, the undersigned

believes that very few ordinary applicants actually would draw the technical legal distinction between a disciplinary sanction against a license, on the one hand, and the regulatory denial of an application, on the other. The undersigned is fairly confident that the term "sanction," as used in everyday discourse, is broad enough to include the denial of an application for professional licensure within its range of customary meanings.) Or, as Filippi also insists, an applicant might possibly stumble over the "compound" nature of the professional-sanctions question, with its several subparts.

59. It is difficult to imagine, however, that a reasonable applicant ultimately would be stymied by the professional-sanctions question, after giving it some careful attention and thought. At bottom, given a fair reading, the Troubled Application Question requires an affirmative answer if any application of the applicant, owing to a potentially fatal flaw, has been culled from the batch of applications moving through the pipeline towards approval and identified as problematic. The key words are: (a) "action *pending*," which reasonably denotes both (i) a continuing, as yet unfinished proceeding (e.g. an administrative appeal), and (ii) an impending act (e.g. a decision expected to come soon); and (b) "action . . . *against* an application," which reasonably means that the posture of the ongoing proceeding or imminent decision is unfavorable (or in

opposition) to the application. (Emphasis added.) Any application which is the object of a "pending" action that is also "against" the application is, by any reasonable measure, an application in trouble. A reasonable applicant should be able to figure out, without too much difficulty, that such an application must be disclosed.

60. The test for determining the vagueness of an administrative rule is whether persons of common understanding and intelligence must guess at its meaning. See State, Dep't of Health & Rehabilitative Services v. Health Care & Retirement Corp., 593 So. 2d 539, 541 (Fla. 1st DCA 1992). The professional-sanctions question, though it might be clumsily worded, is yet not so obscure that ordinary people must guess at its meaning. The question is not, therefore, invalid for vagueness pursuant to Section 120.52(8)(d), Florida Statutes.

THE ALLEGED UNADOPTED RULE

61. Filippi alleges that the form he used for his Online Applications was an unadopted rule because, in December 2004, the SBE had amended Florida Administrative Code Rule 6A-4.0012(1)(a) so as to incorporate by reference an updated version of the application form, which updated form the Department mistakenly failed to post online for nearly two years. Pursuant to Section 120.56(4), Florida Statutes, Filippi contends that the Department's failure to update the online

version of the teaching-certificate application violated Section 120.54(1)(a), Florida Statute, which provides that each agency statement defined as a "rule" must be formally adopted as soon as feasible and practicable.

62. The threshold question that Filippi's challenge raises is whether the outdated online form was a "rule" as that term is statutorily defined. The definition is found in Section 120.52(15), Florida Statutes, which provides in relevant part as follows:

> "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.

(Emphasis added.)

63. As a form which solicits information not specifically required by statute, the outdated application certainly could be a rule-by-definition. But under the somewhat unusual facts of this case, such a conclusion would be unwarranted, as will be explained.

64. Suppose that an agency official in good faith informs an applicant that, to be approved for licensure, he needs to do "X." Suppose, however, that the official is mistaken: the

agency has an applicable rule which does *not*, in fact, require X, and, moreover, it is undisputed that the agency never intended to require X. It is clear to the undersigned that the statement, "You must do X to obtain a license," while *appearing* to be a rule-by-definition, is not a "rule" because it does not declare law or agency policy. An erroneous statement should not be elevated to the status of a rule unless the agency has enforced the statement or otherwise knowingly allowed it to operate as a rule, in which latter event the agency conduct, by making the statement *effective*, would belie any subsequent characterization of the statement as a "mistake."

65. Expanding the foregoing hypothetical will illustrate the point. Suppose the same facts as above, except that, when the time comes to make a decision, the agency announces its intent to deny the application because the applicant did not meet the requirement X. If the applicant requests a substantial interests hearing and the agency thereafter insists that the requirement to do X is a condition of licensure, then the agency has taken ownership of the statement, at which point the statement might well be found to constitute a rule-by-definition, even if it were born of a mistake.

66. Suppose however that, in attempting to meet the requirement X, the applicant intentionally lied to the agency and represented that he had done X when in fact he had not. If

the agency discovers the deception and announces its intent to deny the application because the applicant attempted to obtain a license by fraudulent means, is its position tantamount to adopting, as agency policy, the original, mistaken statement, "You must do X"? Or could the agency, consistent with its intended denial, nevertheless maintain that X was not actually a requirement and hence the statement "do X" not a rule-by-definition?

67. The undersigned concludes that there is no logical inconsistency between (a) disowning the statement, "You must do X," as an erroneous statement that does not reflect agency policy, and (b) denying licensure to an applicant who, when required (mistakenly) to do X, fraudulently reports that he has done X when he has not. Position (a) *would* be logically inconsistent, however, with (c) denying licensure to an applicant for failing to do X. This is because position (c) amounts to enforcement of the statement requiring X, which is inconsistent with disowning the statement. In contrast, position (b) does not amount to enforcing the statement requiring X; rather, position (b) rests on the enforcement of a separate and independent duty of the applicant: to tell the truth (or, stated negatively, *not* to use fraudulent means to obtain a license).

68. Here, the outdated online form remained available for use by applicants such as Filippi because of a mistake. Neither the SBE nor the Department intended that applicants should use the old form. As soon as the mistake was discovered, the online form was updated to conform to the then-current form, which had been duly adopted as a formal rule.

69. The undersigned concludes that the outdated form, like the hypothetical statement, "You must do X," in the first example above, was merely a mistake——nothing more. The old form did not declare law or agency policy. Indeed, the SBE would not have adopted the old form in accordance with the rulemaking mandate of Section 120.54(1)(a), Florida Statutes, had it known the old form remained (erroneously) in use, because it did not want the old form to be used any longer. The notion that the SBE should have adopted its outdated form as a rule (which underlies Filippi's challenge) is nonsensical.

70. There is, moreover, no evidence in the record suggesting that either the SBE or the Department ever deliberately took action to enforce or otherwise make operative the challenged provisions (i.e. the professional-sanctions question) of the outdated form, to the extent such provisions differed from the corresponding provisions of the current, adopted form.[5] (It is not clear that such enforcement could have occurred, in any event, because the substantive difference

between the old professional-sanctions question and the new one was the *addition* (in the new application) of a subpart that asked about actions pending against a license. In other words, the new application was more inquisitive than the old one, and hence the Department's failure consistently to use the new form was detrimental only to the Department.)

71. The upshot is that the outdated form was not a "rule." For that reason, the Department's failure to update the online application form did not violate Section 120.54(1)(a), Florida Statutes.

72. That said, however, even if an erroneous statement, which neither declared law or policy nor was given effect as such, can be deemed a rule-by-definition, the undersigned still would conclude that Section 120.54(1)(a) was not violated in this instance, for the reasons which follow.

73. As a starting point, the undersigned believes it is self-evident, and therefore he concludes, that the outdated form could be an "unadopted" rule only to the extent that its terms and/or meaning differed from the terms and/or meaning of the updated, adopted form. For example, if the updated form incorporated, say, 90 percent of the form it was intended to replace, then only ten percent (or so) of the outdated form could possibly be considered an "unadopted" rule.

74. Here, Filippi challenges only the professional-sanctions question as an unadopted rule. The version of this question that appears in the outdated form (the alleged "unadopted" rule) is substantially similar to the version that appears in the updated form. The one substantive difference between the two, as mentioned above, is that the updated professional-sanctions question contains an additional subpart, making it *more* inquisitive. (The few other differences merely fine-tune the language in ways that do not materially change the substance of the professional-sanctions question.) Put another way, the outdated form is different from the revised version, not for what it says, but largely because of what it does *not* say.

75. Consequently, applicants who applied online between December 2004 and October 2006, unlike applicants who submitted applications on paper during this period, were *not* asked about actions pending against other licenses they might have held. The Department's failure to ask some applicants this question, which was in essence a failure to follow Rule 6A-4.0012(1)(a), might have been unfair (to applicants who applied on paper) and might have afforded an aggrieved applicant (presumably one who had applied on paper) a basis for complaint. But under the circumstances of this case, the undersigned concludes that the Department's *not* asking online applicants the question about

pending disciplinary proceedings——this agency *silence*——cannot be viewed as an agency *statement*.

76. Because it was not an "agency statement," the Department's *failure to ask* online applicants about actions pending against other licenses they might have held was not a "rule" under Section 120.52(15), Florida Statutes.

ATTORNEY'S FEES AND COSTS

77. Pursuant to Section 120.595(3), Florida Statutes, the undersigned is required to award reasonable costs and reasonable attorney's fees to the agency for successfully defending a challenge to an existing rule if he determines that the opposing party brought the rule challenge for an "improper purpose." See § 120.595(3), Fla. Stat. In this context, the term "improper purpose" means "participation in a proceeding . . . *primarily* to harass or to cause unnecessary delay or for frivolous purpose or to *needlessly* increase the cost of litigation, licensing, or securing the approval of an activity." § 120.595(1)(e)1., Fla. Stat. (emphasis added).

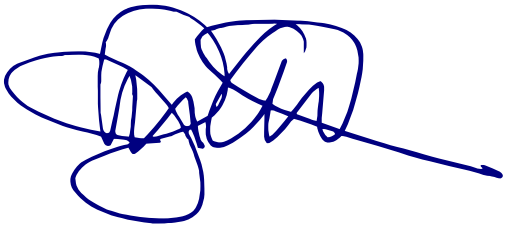
78. The undersigned finds that Filippi brought the instant action primarily for the purpose of increasing his chances of obtaining a teaching certificate. Therefore, he did not participate herein for an "improper purpose" as defined by Section 120.595(1)(e), Florida Statutes. Accordingly,

attorney's fees and costs shall not be awarded to the Department or the SBE.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the revised application, which was duly adopted as a rule, is not an invalid exercise of delegated legislative authority; and that the outdated application, which was mistakenly made available to online applicants for a time after the adoption of the revised form, was not an unlawful unadopted rule.

DONE AND ORDERED this 20th day of June, 2008, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 20th day of June, 2008.

ENDNOTES

[1]/ While this proceeding was pending, Eric J. Smith, Ph.D., succeeded Mr. Winn as Florida's Commissioner of Education.

[2]/ An expanded discussion of this topic appears in Home Delivery Incontinent Supplies Co., Inc. v. Agency For Health Care Administration, No. 07-4167RX, 2008 Fla. Div. Adm. Hear. LEXIS 205, *11-*26 (Apr. 18, 2008).

[3]/ See, e.g., Mehl v. State, 632 So. 2d 593, 595 (Fla. 1993)(separate statutory provisions that are *in pari materia* should be construed to express a unified legislative purpose); Lincoln v. Florida Parole Commission, 643 So. 2d 668, 671 (Fla. 1st DCA 1994)(statutes on same subject and having same general purpose should be construed *in pari materia*).

[4]/ To be sure, the undersigned can imagine questions that would test——and might exceed——the boundaries of this specific power. Suppose, for example, there was a question on the application that asked: *Do you look at pornography on the internet? If yes, identify the sites that you visit, the frequency of your visits, and the approximate number of hours per week you spend engaged in this activity.* Whether such a question would be permissible the undersigned obviously need not decide in this case, but the pornography inquiry is problematic in ways that the professional-sanctions question is not. While an applicant's consumption of internet pornography might be a marker for the presence of eligibility or disqualifying criteria (e.g. the ones relating to morality), inquiring into such a matter would implicate privacy concerns that the professional-sanctions question does not raise. The pornography question is therefore a different *kind* of question, and deciding whether it falls within the SBE's specific authority to inquire would be much more difficult than is the resolution of the issues at hand.

[5]/ The Department *did* allege (and prove), in Case No. 07-4628, that Filippi had given false and fraudulent answers to the Troubled Application Question. That, however, did not amount to enforcement of the Troubled Application Question, but rather vindicated the separate and independent duty, arising from § 1012.56(2)(b), Fla. Stat., of applicants to tell the whole truth. Further, the Troubled Application Question is common to both the outdated application and the revised (adopted) application. Therefore, it was not in any meaningful sense "unadopted."

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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.