

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PROFESSIONAL LICENSURE)	
SERVICES, INC.,)	
)	
Petitioner,)	
)	
vs.)	Case Nos. 07-4792RP
)	07-5370RP
DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
CONSTRUCTION INDUSTRY)	
LICENSING BOARD,)	
)	
Respondent,)	
_____)	

FINAL ORDER ON MOTION TO DISMISS

Respondent, Department of Business and Professional Regulation, Construction Industry Licensing Board (Board), filed a Motion to Dismiss for Lack of Standing, seeking to dismiss the Amended Petition for Determination of Invalidity of Proposed Rules filed by Petitioner, Professional Licensure Services, Inc. The primary basis for the Motion to Dismiss is that Petitioner lacks standing to bring this rule challenge. Petitioner filed a response in opposition.

Section 120.56(1)(a), Florida Statutes (2007), states that any person substantially affected by a rule or a proposed 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).

The Amended Petition includes the following allegations regarding standing:^{1/}

Parties

2. Petitioner is a Florida corporation that assists contractors and potential contractors with navigating Florida's regulatory and licensure framework. Petitioner assists its clients regarding certified and registered license applications and processes. Petitioner assists in the submission of 100 to 150 of the approximately 1,000 applications that are submitted to the Board each month. The proposed rules substantially affect Petitioner by enlarging, modifying and contravening the statutes which form the basis of Petitioner's services. Additionally, the proposed rules provide further restrictions for contractors, which substantially affects Petitioner by reducing the pool of licensure applicants in the State of Florida. This reduction will likewise reduce the number of people who would seek Petitioner's services. See Gold Coast School of Construction v. DBPR, DOAH Case No. 04-0692RP, ¶ 23 (2004). See also Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc., 808 So.2d 243, 251 (Fla. 1st DCA 2002) (a party may challenge a rule that has a "collateral financial impact on the challenger's business"). Finally, Petitioner is

substantially affected because it regularly attends Board meetings and generally advocates for current and future clients.

In its Response to the Motion to Dismiss, Petitioner relies on several cases which address the standing of trade or professional associations in rule challenge proceedings.

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.'

Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc., supra at 250, quoting Florida Home Builders Ass'n v. Department of Labor & Employment Security, 412 So. 2d 351 (Fla. 1982).

Respondent correctly points out that Petitioner is not an association representing licensees or license applicants, but is merely in the business of advising those persons who are affected by regulations, including licensing rules. The cases relied on by Petitioner which address associational standing are distinguishable from the instant case and do not address entities such as Petitioner. e.g., NAACP v. Florida Board of Regents, 863 So. 2d 294, 297-298 (Fla. 2003)(concluding that a

trade or professional association should be able to institute a rule challenge if a substantial number of its members are substantially affected, even though it is acting solely as the representative of its members).

Petitioner further argues that the adoption of these proposed rules would result in several collateral financial impacts on Petitioner's business, but relies on cases in which the challenged rules directly regulate a litigant's profession, not a corporation acting as an applicant's surrogate. e.g., Televisual Communications, Inc., v. State Department of Labor & Employment Security, 667 So. 2d 372 (Fla. 1st DCA 1995 (a publishing company of educational video programs for medical professions had standing to challenge a proposed rule that would require the presence of an instructor when videos were used); and Department of Professional Regulation v. Sherman College, 682 So. 2d 559, 560-561 (Fla. 1st DCA 1995) (chiropractic college had standing to challenge rules which required that candidates for licensure received degree from college with both regional and professional accreditation).

Petitioner challenges proposed Rules 61G4-15.005, 61G4-15.006, 61G4-12.011, and 61G4-15.0021, which deal with certification, registration and licensure of applicants regulated by the Board. Petitioner acknowledges in paragraph 10 of its response to the Motion to Dismiss that the proposed rules

in question do not regulate Petitioner's business directly. The proposed rules which are the subject of this challenge regulate applicants, not entities who help applicants.

Accordingly, the Petition does not sufficiently state specific facts showing that Petitioner is substantially affected in that the Petition does not include a specific showing of a "real and sufficiently immediate injury in fact" that is within the "zone of interest to be protected or regulated."

The undersigned is persuaded that, under the rationale of established case law regarding standing in rule challenge proceedings, Petitioner lacks standing to bring this rule challenge.

Petitioner does not request that it be given an opportunity to amend the Petition to assert and allege further facts which evidence the substantial effect the proposed rules have on Petitioners. Whether requested or not, the effect of the proposed rules on Petitioner has been adequately pled and could not be improved upon by amendment. Petitioner is simply not an entity which is substantially affected by the proposed rules as contemplated by Section 120.56(1)(a), Florida Statutes, and the case law interpreting that section. Accordingly, the undersigned finds that allowing amendment to the Petition on this occasion would not allow Petitioner 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. The hearing scheduled for January 18, 2008, is hereby canceled.

DONE AND ORDERED this 10th day of January, 2008, in
Tallahassee, Leon County, Florida.

S

BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of January, 2008.

ENDNOTE

1/ The case was proceeding under the Amended Petition for Determination of Invalidity of Proposed Rules. A Second Amended Petition for Determination of Invalidity of Proposed Rules was filed but no ruling had been issued as yet. In any event, the Amended and proposed Second Amended Petition contain the identical allegations regarding Petitioner's standing as quoted herein.

COPIES FURNISHED:

Daniel R. Biggins, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399

Timothy P. Atkinson, Esquire
Gavin D. Burgess, Esquire
Oertel, Fernandez, Cole & Bryant, P.A.
Post Office Box 1110
Tallahassee, Florida 32302-1110

Scott Boyd, Executive Director
and General Counsel
Administrative Procedures Committee
Holland Building, Room 120
Tallahassee, Florida 32399-1300

Liz Cloud, Program Administrator
Administrative Code
Department of State
R. A. Gray Building, Suite 101
Tallahassee, Florida 32399

G. W. Harrell, Executive Director
Construction Industry Licensing Board
Department of Business and
Professional Regulation
Northwood Center
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Ned Luczynski, General Counsel
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Holly Benson, Secretary
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

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.