STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JUAN CUELLAR, LUIS GARCIA, AND GERARDO QUINTERO,	)	
Petitioners,	)	
vs.	)	Case No. 07-5767RX
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, CONSTRUCTION INDUSTRY LICENSING BOARD,	)	
Respondent.	)	

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, on January 25, 2008, in Tallahassee, Florida.

APPEARANCES

For Petitioners: Timothy P. Atkinson, Esquire
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For Respondent: Tom Barnhart
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STATEMENT OF THE ISSUES

1. Whether Florida Administrative Code Rule 61G4-15.008, constitutes an invalid exercise of delegated legislative authority because it enlarges, modifies, or contravenes Section 489.129(1)(a), Florida Statutes, and because it exceeds Respondent’s rulemaking authority; and

2. Whether an interpretation of Section 455.227(1)(h), Florida Statutes, constitutes an unpromulgated “rule.”

PRELIMINARY STATEMENT

On December 20, 2007, Petitioners Juan Cuellar, Luis Garcia, and Gerardo Quintero, filed a Petition for Invalidity of Existing Rule and Unadopted Rule (hereinafter referred to as the "Petition") with the Division of Administrative Hearings (hereinafter referred to as the "DOAH").

Petitioner's challenge was designated DOAH Case No. 07-5767RX by Order of Assignment entered December 24, 2007, and was assigned to the undersigned.

By Notice of Hearing entered January 3, 2008, after consultation with the parties, a final hearing was scheduled for January 25, 2008. On January 24, 2008, the parties filed a Joint Factual Stipulation (hereinafter referred to as the "Stipulation"), and Petitioners filed a Motion for Administrative Law Judge to Take Official Recognition.

At the commencement of the final hearing, the Motion for Administrative Law Judge to Take Official Recognition was granted without objection. In light of the Stipulation, the parties presented no evidence at hearing. Both parties did, however, present oral argument.

The parties, pursuant to agreement at the close of the final hearing, both filed Proposed Final Orders on February 11, 2008. Those submittals have been fully considered in entering this Final Order.

FINDINGS OF FACT

The first 12 findings of fact are facts contained in the Stipulation:

1. Prior to June 2005, Petitioner, Juan Cuellar, Luis Garcia, and Gerardo Quintero, received what appeared to be a valid Miami-Dade Building Business Certificate of Competency.

2. Upon receipt, Petitioners applied to the Department of Business and Professional Regulation (hereinafter referred to as the “Department”), to obtain a registered contractor’s license using the Certificates of Competency.

3. Based on the Certificates of Competency, the Department issued each Petitioner a registered contractor’s license bearing license numbers RG291103667 (Mr. Cuellar), RF11067267 (Mr. Garcia), and RF11067268 (Mr. Quintero).

4. Petitioners each applied for a certificate of authority for their respective businesses, Cuellar Construction and Drywall (Mr. Cuellar), A.P.A. Plumbing Corp. (Mr. Garcia), and Q Plumbing Services Corp. (Mr. Quintero).

5. Based on the fact the Certificates of Competency and the registered contractor's licenses had been granted, the Department issued a certificate of authority to Cuellar Construction and Drywall, QB 41342; APA Plumbing Corp., QB 42763; and Q Plumbing Services Corp., QB 42825.

6. At the time the Department issued Petitioners their registered contractor's licenses and subsequent certificates of authority, it did so based solely on the Miami-Dade Building Business Certificates of Competency presented by Petitioners and the only information submitted to it.

7. The parties stipulate that Petitioners were not entitled to their registered contractor's licenses and certificates of authority because the Miami-Dade Building Business Certificates of Competency were not valid certificates.

8. At the time of their applications to the Department, Petitioners were not qualified by any local jurisdiction or any other method necessary to receive a registered contractor's license from the Department.

9. The Department filed Administrative Complaints against Petitioners for the suspension or revocation of their licenses

based on violations of Sections 489.129(1)(a), 489.129(1)(d), 489.129(1)(m), and 455.227(1)(h), Florida Statutes (hereinafter collectively referred to as the "Administrative Complaints"). (All references to Sections of Chapter 489, Florida Statutes, as they relate to the Administrative Complaint are to the 2005 version. All other references to Florida Statutes are to the 2007 version).

10. Each Petitioner challenged the Administrative Complaint filed against him in DOAH Case No. 07-2823PL (Mr. Cuellar), DOAH Case No. 07-2824PL (Mr. Garcia), and DOAH Case No. 07-2825PL (Mr. Quintero).

11. On December 13, 2007, the undersigned, as the Administrative Law Judge to whom the cases had been assigned, issued a Recommended Order in DOAH Case No. 07-2823PL (Mr. Cuellar), DOAH Case No. 07-2824PL (Mr. Garcia), and DOAH Case No. 07-2825PL (Mr. Quintero), determining that Petitioners violated Sections 489.129(1)(a), 489.129(1)(m), and 455.227(1)(h), Florida Statutes (hereinafter referred collectively as the "Recommended Orders").

12. The "Recommendation" in each of the Recommended Orders was, except for the name of the Respondent, the same as the following:

> Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the

> Department finding that Luis Garcia violated the provisions of Sections 489.129(1)(a) and (m), and 455.227(1)(h), Florida Statutes, as alleged in Counts I, III, and IV of the Administrative Complaint; dismissing Count II of the Administrative Complaint; requiring that Respondent pay the costs incurred by the Department in investigating and prosecuting this matter; giving Respondent 30 days to voluntarily relinquish his license; and revoking Respondent's license if he fails to voluntarily relinquish it within 30 days of the final order.

13. Based upon the foregoing, and the fact that no final decision has been entered by the Construction Industry Licensing Board (hereinafter referred to as the "Board"), Petitioners are facing the possible revocation or voluntary relinquishment of their licenses (an adverse impact whether they are "entitled" to the licenses or not), continued defense against the Administrative Complaints, and the payment of the cost incurred by the Department in prosecuting the Administrative Complaints.

14. Should the Board revoke Petitioners' licenses, they will also be precluded from re-applying for licensure for a period of five years pursuant to Section 489.129(9), Florida Statutes. Petitioners face the same consequence even if they voluntarily relinquish their license pursuant to Florida Administrative Code Rule 61G4-12.017(3)(a).

15. The adverse consequences of the possible final action on the Administrative Complaints which they face stem in part

from a finding that they have violated Section 489.129(1)(a), Florida Statutes, which provides the following:

> (1) The board may take any of the following actions against any certificateholder or registrant: place on probation or reprimand the licensee, revoke, suspend, or deny the issuance or renewal of the certificate, registration, or certificate of authority, require financial restitution to a consumer for financial harm directly related to a violation of a provision of this part, impose an administrative fine not to exceed $10,000 per violation, require continuing education, or assess costs associated with investigation and prosecution, if the contractor, financially responsible officer, or business organization for which the contractor is a primary qualifying agent, a financially responsible officer, or a secondary qualifying agent responsible under s. 489.1195 is found guilty of any of the following acts:
>
> (a) Obtaining a certificate, registration, or certificate of authority by fraud or misrepresentation.
>
> . . . .

16. Petitioners were found in the Recommended Orders to have violated Section 489.129(1)(a), Florida Statutes, based upon an interpretation of that statutory provision adopted by the Board in Florida Administrative Code Rule 61G4-15.008, an existing rule which Petitioners have challenged in this proceeding (hereinafter referred to as the "Challenged Existing Rule"), which provides:

> Material false statements or information submitted by an applicant for certification or registration, or submitted for renewal of certification or registration, or submitted for any reissuance of certification or registration, shall constitute a violation of Section 489.129(1)(a), F.S., and shall result in suspension or revocation of the certificate or registration.

17. Essentially the same conclusions of law were reached in the Recommended Orders concerning the application of the Challenged Existing Rule (in paragraphs numbered “23” through “25” or “25” through 27” of the Recommended Orders):

> While Respondent has not been specifically charged with a violation of Florida Administrative Code Rule 61G4-15.008, the Department cited the Rule, which contains the following interpretation of what constitutes "[o]btaining a certificate, registration, or certificate of authority by . . . misrepresentation" in violation of Section 489.129(1)(a), Florida Statutes, in support of Count I of the Administrative Complaint:
>
> . . . .
>
> It is the Department’s position, that despite the fact that Respondent did not commit “fraud” in obtaining his license and a certificate of authority for [the business] and, in fact, did not knowingly submit false information to the Department in obtaining his license and the certificate of competency, “[m]aterial false statements or information” were nonetheless submitted by Respondent in support thereof.
>
> Florida Administrative Code Rule 61G4-15.008, in defining what constitutes the act of "[o]btaining a certificate, registration, or certificate of authority by . . .

> misrepresentation" eliminates the need for the Department to prove any knowledge on the part of Respondent that he has made a material misrepresentation or any intent on the part of Respondent to rely upon a material misrepresentation. All that is required is proof that a material representation was made and that the representation was false.

18. Petitioners have challenged the validity of the Challenged Existing Rule as being an invalid exercise of delegated legislative authority as defined in Section 120.52(8)(b) and (c), Florida Statutes.

19. Petitioners were also found in the Recommended Orders to have violated Section 455.227(1)(h), Florida Statutes, based upon an interpretation of that statutory provision advanced by the Department during the prosecution of the Administrative Complaints.

20. Section 455.227(1)(h), Florida Statutes, provides that the following act constitutes grounds for which disciplinary action may be taken:

> (h) Attempting to obtain, obtaining, or renewing a license to practice a profession by bribery, by fraudulent misrepresentation, or <u>through an error of the department or the board</u>. (Emphasis added).

21. The Department's argument concerning the appropriate interpretation and application of Section 455.227(1)(h), Florida Statutes, advanced in the prosecution of the Administrative

Complaints, was advanced in paragraphs 24 through 26 of the Department's Proposed Recommended Order:

> 24. Obtaining a certificate or registration in error as a result of a misrepresentation made during the application process is conduct proscribed by Section 455.227(1)(h), Florida Statutes.
>
> 25. Respondent was issued a registration by error of the Department. To be issued a registration by the Department, an applicant must submit along with an application for registration, a copy of the applicant's validly issued competency card from a local government licensing board . . . .
>
> 26. Respondent submitted a fake competency card that appeared to be validly issued by the Miami Compliance Office. . . . If the Department had known Respondent's Competency Card was fake and Respondents' answer to the attest statement was false, the Department would not have issued Respondent a registration. Thus, since the Department did not have truthful and accurate information, the registration issued to Respondent was in error.

22. The Department's interpretation was described and accepted in the Recommended Orders (in paragraphs numbered "29" through "31" or "31" through 33", in the Recommended Orders), as follows:

> In support of this alleged violation, the Department has argued that Respondent obtained his license "through an error of the department . . . ." That "error" was the Department's reliance upon an improperly issued Miami-Dade building business Certificate of Competency.

> The evidence proved clearly and convincingly that the Department issued the Respondent's license in "error." While it is true that Respondent did not intentionally cause or even know of the error, the Department reasonably takes the position that Respondent obtained his license nonetheless as a result of this error and that is all that Section 455.227(1)(h), Florida Statutes.
>
> The Department has proved clearly and convincingly that Respondent violated Section 455.227(1)(h), Florida Statutes [requires].

23. Although not specifically quoted in their Petition in this case, Petitioners have quoted what they believe is the unpromulgated rule of the Board which they are challenging in this case in paragraph 60 of Petitioner's Proposed Final Order (hereinafter referred to as the "Challenged Language"):

> . . . . Essentially, the Board applies the following unadopted rule when applying Section 455.227(1)(h):
>
> > Disciplinary action may be taken pursuant to Section 455.227(1)(h), Florida Statutes, where an individual attempts to obtain a license through an error of the department even if the individual did not have knowledge of the error.

24. As of the date of the final hearing of this matter, the Board had taken no action on the Recommended Orders.

CONCLUSIONS OF LAW

A. Jurisdiction.

25. The DOAH has jurisdiction over the parties and the subject matter of this proceeding pursuant to Section 120.56(1) and (4), Florida Statutes.

B. Standing.

26. "Substantially affected persons" may challenge the facial validity of existing rules pursuant to Section 120.56(1) and (3), Florida Statutes, and to challenge agency statements which come within the definition of a "rule" but have not been adopted pursuant to Section 120.54(1)(a), Florida Statutes, pursuant to Section 120.56(4), Florida Statutes. Petitioners were, therefore, as a threshold issue, required to prove they are "substantially affected" by the Challenged Existing Rule and the Challenged Language" to institute the instant proceeding. See Department of Professional Regulation, Board of Medical Examiners v. Durrani, 455 So. 2d 515 (Fla. 1st DCA 1984).

27. In order to prove that they are "substantially affected," Petitioners were required to specifically prove (a) a real and sufficiently immediate injury in fact; and (b) that their alleged interest is arguably within the "zone of interest" to be protected or regulated. See Ward v. Board of Trustees of the Internal Improvement Trust Fund, 651 So. 2d 1236 (Fla. 4th DCA 1995). The Department has argued unconvincingly that

Petitioners have failed to prove either prong of the foregoing test.

28. Both the Challenged Existing Rule and the Challenged Language are being relied upon, at least in part, by the Department to prosecute the Administrative Complaints. As a result of the Department's prosecution, the Recommended Orders entered as a result of the Department's action, and the potential adverse action which the Board may take against Petitioners' interests based upon the Challenged Existing Rule and the Challenged Language, Petitioners have proved the type of immediate injury which gives them standing.

29. The Department's suggestion, in light of the fact that the Board has not yet taken final action on the Recommended Orders, that Petitioners "have yet to suffer any 'sufficiently real and immediate injury in fact'" ignores first, the fact that Petitioners have been required to defend themselves against the Administrative Complaints and, secondly, that Section 120.56, Florida Statutes, does not require that a challenger to a rule wait until the injury occurs to institute a rule-challenge. The potential injury which Petitioners face as a result of the issuance of the Administrative Complaints is more than adequate to satisfy the "injury" test of standing.

C. The Challenged Existing Rule.

30. Section 120.56(1) and (3), Florida Statutes, provide in 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.
>
> (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.
>
> (e) Hearings held under this section shall be de novo in nature. The standard of proof shall be the preponderance of the evidence. Hearings shall be conducted in the same manner as provided by ss. 120.569 and 120.57, except that the administrative law judge's order shall be final agency action. The petitioner and the agency whose rule is challenged shall be adverse parties. Other substantially affected persons may join the proceedings as intervenors on appropriate terms which shall not unduly delay the proceedings. Failure to proceed under this section shall not constitute failure to exhaust administrative remedies.
>
> . . . .

> (3) CHALLENGING EXISTING RULES; SPECIAL PROVISIONS.--
>
> (a) A substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule. The petitioner has a 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.
>
> (b) The administrative law judge may declare all or part of a rule invalid. The rule or part thereof declared invalid shall become void when the time for filing an appeal expires. The agency whose rule has been declared invalid in whole or part shall give notice of the decision in the Florida Administrative Weekly in the first available issue after the rule has become void.

31. An existing rule may be challenged pursuant to Section 120.56, Florida Statutes, only on the ground that it is an "invalid exercise of delegated legislative authority." See Schiffman v. Department of Professional Regulation, Board of Pharmacy, 581 So. 2d 1375, 1379 (Fla. 1st DCA 1991); and Lewis Oil Co., Inc. v. Alachua County, 496 So. 2d 184, 189 (Fla. 1st DCA 1986).

32. As the First District Court of Appeal observed in Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, 597-98 (Fla. 1st DCA 2000):

> This phrase ["invalid exercise of delegated legislative authority," as used in Section 120.56, Florida Statutes] is defined in section 120.52(8), Florida Statutes, as

> an "action that goes beyond the powers, functions, and duties delegated by the Legislature." Section 120.52(8) then lists seven circumstances in which a rule is an invalid exercise of delegated legislative authority:
>
> . . . .
>
> In addition to the seven enumerated grounds for challenging a rule, section 120.52(8) provides a set of general standards to be used in determining the validity of a rule in all cases. These standards are contained in the closing paragraph of the statute. . . .

33. In the instant case, Petitioners contend that the Challenged Existing Rule is an "invalid exercise of delegated legislative authority," within the meaning of Subsections (8)(b) and (c) of Section 120.52, Florida Statutes, which provide as follows:

> "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:
>
> . . . .
>
> (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.;

34. Subsections (8)(b) and (c) of Section 120.52, Florida Statutes, although they are "interrelated," "address two different problems" or "issues." Board of Trustees of Internal Improvement Trust Fund v. Day Cruise Association, Inc., 794 So. 2d 696, 701 (Fla. 1st DCA 2001); and St. Johns River Water Management District v. Consolidated Tomoka Land Co., 717 So. 2d 72, 81 (Fla. 1st DCA 1998). Subsection (8)(b) "pertains to the adequacy of the grant of rulemaking authority," including any statutory qualifications upon the exercise of such authority. Day Cruise Association, 794 So. 2d at 701; Department of Business and Professional Regulation v. Calder Race Course, Inc., 724 So. 2d 100, 104 (Fla. 1st DCA 1998); and Consolidated Tomoka Land Co., 717 So. 2d at 81. "Under section 120.52(8)(c), the test is whether a . . . rule gives effect to a 'specific law to be implemented,' and whether the . . . rule implements or interprets 'specific powers and duties.'" Day Cruise Association, 794 So. 2d at 704.

35. Subsections (8)(b) and (c) of Section 120.52, Florida Statutes, must be read in pari materia with the "closing paragraph of the statute," which is known as the "flush left paragraph" and provides as follows:

> 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.

36. As to Petitioners allegation that the Challenged Existing Rule is invalid because the Board "has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1" and "enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1." Petitioners alleged the following in their Petition:

> As interpreted by Respondent and the Administrative Law Judge, existing Rule 61G4-15.008, Fla. Admin. Code, apparently allows Respondent to impose discipline on a licensee for a "false statement" even though Petitioners did not <u>intend</u> to submit a false statement. As such, existing Rule 61G4-15.008 violates Section1 20.52(8)(b) and (c), Florida Statutes, by exceeding the legislative grant of rulemaking authority and by enlarging, modifying or contravening the specific provisions of Section 489.129(1)(a) and (3), Florida Statutes. The phrase "fraud or misrepresentation" contemplates that a licensee intend or have

> knowledge of a false statement submitted to the Board . . . .

37. The foregoing assertion by Petitioners misses the mark. All Petitioners have alleged is that the Challenged Existing Rule is being "interpreted" in a way which Petitioners assert is contrary to Section 489.129(1)(a), Florida Statutes. In order to declare the Challenged Existing Rule inconsistent with the law implemented or in excess of the Board's rulemaking authority, it must be shown that the rule is invalid on its face.

38. Section 489.129(1), Florida Statutes, establishes the grounds for which the Board may take disciplinary action against a licensee. Section 489.129(3), Florida Statutes, gives the Board specific authority to "specify by rule the acts or omissions which constitute violations of this section." It is Section 489.129(3), Florida Statutes, which the Board has specifically cited as the "specific authority" for adopting the Challenged Existing Rule.

39. Section 458.129(3), Florida Statutes, authorizes the Board to do precisely what the Challenged Existing Rule attempts to do: define specific circumstances which the Board has concluded will constitute a violation of Section 489.129(1)(a), Florida Statutes. Therefore, Petitioners have failed to prove that the Challenged Existing Rule "has exceeded its grant of

rulemaking authority, citation to which is required by s. 120.54(3)(a)1."

40. Turning to the question of whether the Challenged Existing Rule "enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1," while not raising the issue in their Petition, Petitioners argue for the first time in their Proposed Final Order that the Challenged Existing Rule is invalid pursuant to Section 120.52(8)(c), Florida Statutes, because the implementing law cited by the Board in support of the Challenged Existing Rule is incorrect.

41. The specific "law implemented" noted by the Board for the Challenged Existing Rule is Section 489.129(3), Florida Statutes, which is the law which gives the Board the authority to adopt rules interpreting Section 489.129(1), Florida Statutes. Section 489.129(3), Florida Statutes, while giving the Board general rule-making authority, clearly is not the specific law the Board intended to implement. This error on the part of the Board was first raised at the final hearing of this matter by the undersigned.

42. Petitioners' argument is rejected for two reasons. First, Petitioners were required to "state with particularity the provisions alleged to be invalid with sufficient explanation of the facts or grounds for the alleged invalidity . . ." in

their Petition. § 120.56(1)(b), Fla. Stat. This Petitioners did not do. The sole basis for their challenge to the Challenged Existing Rule, quoted, supra, raised Petitioners' substantive argument concerning the validity of the rule and not the procedural issue noted by the undersigned at the final hearing.

43. Secondly, while the cited "law implemented" is in error, it is clear that neither Petitioners nor any other person interested in the rule will not realize what law is actually being implemented by the Challenged Existing Rule: Section 458.129(1)(a), Florida Statutes. By its very terms, the Challenged Existing Rule states that the Board's specifically described circumstances "shall constitute a violation of Section 489.129(1)(a), F.S. . . ."

44. Turning to the substantive arguments raised by Petitioners in their challenge to the Challenged Existing Rule, it is noted that Section 489.129(1)(a), Florida Statutes, is one the Board is specifically responsible for administering. Therefore, the Board's construction of this provision (as incorporated in the rule) "should be upheld when it is within the range of permissible interpretations." Board of Podiatric Medicine v. Florida Medical Association, 779 So. 2d 658, 660 (Fla. 1st DCA 2001); see also Gulfstream Park Racing Association v. Tampa Bay Downs, No. SC05-251, 2006 Fla. LEXIS 2207 *11 (Fla.

2006). The agency's construction need not be the sole possible construction, or even the most desirable one, but must only be within the range of possible and reasonable constructions. See Cagle v. St. Johns County School District, No. 5D05-1380, 2006 Fla. App. LEXIS 14626 *9 (Fla. 5th DCA September 1, 2006); Florida Department of Education v. Cooper, 858 So. 2d 394, 396 (Fla. 1st DCA 2003); and Republic Media v. Department of Transportation, 714 So. 2d 1203, 1205 (Fla. 5th DCA 1998).

45. On the other hand, it must be kept in mind that "Legislative intent is the 'polestar' in interpretation of statutory provisions." Blinn v. Florida Department of Transportation, 781 So. 2d 1103, 1107 (Fla. 1st DCA 2000). Accordingly, if the Board's construction of the statute is contrary to the plain legislative intent, the Board's interpretation is not entitled to any deference and must be rejected.

46. "Legislative intent must be derived primarily from the words expressed in the statute. If the language of the statute is clear and unambiguous, these words must be given effect." Florida Department of Revenue v. Florida Municipal Power Agency, 789 So. 2d 320, 323 (Fla. 2001).

47. Guidance in ascertaining the meaning of an undefined statutory term may be obtained by looking at definitions of the same term found elsewhere in Florida Statutes, notwithstanding

that these definitions are not directly applicable. See Dufresne v. State, 826 So. 2d 272, 275 (Fla. 2002).

48. As pointed out by Petitioners, the Department has argued and undersigned concluded in the Recommended Orders that, based upon the Challenged Existing Rule, it is not necessary to prove that the false information proved by Petitioners in support of their licenses was knowingly or intentionally provided in order to find a violation of Section 489.129(1)(a), Florida Statutes. In order for Petitioners to prevail in their challenge, it must be concluded first that this interpretation is inconsistent with Section 489.129(1)(a), Florida Statutes, the implemented statute, and, secondly, that there is no other reasonably interpretation of the Challenged Existing Rule which would be consistent with the implemented statute.

49. As to the first issue, whether the interpretation of Section 489.129(1)(a), Florida Statutes, advanced by the Department and accepted by the undersigned is inconsistent with Legislative intent, the Department has cited Saunders Leasing System, Inc. v. Gulf Central Distribution Center, Inc., 513 So. 2d 1303 (Fla. 2d DCA 1987). The Department argues this case supports its conclusion that the term “misrepresentation” in the statute, does not require intent or knowledge on the part of the licensee or applicant.

50. The Department has quoted the following language from Saunders Leasing:

> The elements of misrepresentation are: (1) Misrepresentation of a material fact; (2) knowledge by the misrepresenter, or representations made without knowledge of the truth or falsity of those representations, or representations made in circumstances where the representer should have known of the falsity of those representations; (3) an intention to induce reliance; and (4) resulting injury to the party acting in justifiable reliance on those misrepresentations. Joiner v. McCullers, 158 Fla. 562, 28 So.2d 823 (1947). [Emphasis added].

Saunders Leasing, 513 So.2d at 1306. Relying on the emphasized language quoted above, the Department argues that the court held that "intent" is not necessary to find a "misrepresentation."

51. The Department's argument is rejected. The language relied upon by the Department contemplates a showing that the person making the representation actually knew it was false, that the person should have known it was false, or that the person simply ignored any concern about whether the representation was true or false. The court's application of the test in Saunders Leasing, supports this conclusion:

> First, any misrepresentation regarding mileage or condition was not material because Saunders agreed to maintain the vehicles and provide substitute vehicles within four hours after notice that a given vehicle was not operational. Even Bill Gregory admitted that if Saunders had corrected the quality deficiencies on the

tractors, he would have accepted the tractors notwithstanding the mileage. Gulf Central also admitted that all of the noted deficiencies could have been corrected. In fact, Saunders was correcting them when it received notice of Gulf Central's repudiation.

Second, there is no evidence that Whitson knew that the trucks that were to be delivered would have mileages in excess of 175,000 miles or would not comport with Gulf Central's desires as to condition. Neither is there evidence that Whitson should have known of same.

Third, Whitson did not describe the tractors as "creampuff[s]." That was Bill Gregory's term.

Fourth, while Gulf Central argues that it would not have entered into the contract but for Saunders' alleged misrepresentations, that argument is contrary to the obvious fact that if those terms were so material to Gulf Central's bargain, they would or should have been included in the contract. Since they were not, and particularly since Gulf Central's attorney added the last revisions to the contract, the argument must fail.

Fifth, Bill Gregory apparently did not feel defrauded when he wrote his September 16 letter. In that letter, Bill Gregory wrote: "I spent a very restless night last night. It is not often, in ones [sic] lifetime, a person meets one like yourself. You know your business extremely well and are a most powerful salesman. You are a man I would be proud to be associated with in any endeavor." This is not the language of a man who feels he has been defrauded. There was simply no evidence of fraud in the inducement here and the express disclaimer of warranties is, therefore, effective. Barile Excavating & Pipeline Co. v. Vacuum

> Under-Drain, Inc., 362 So.2d 117 (Fla. 1st DCA 1978). [Emphasis added].

Saunders Leasing, 513 So.2d at 1306-1307.

52. The stipulated facts in this case and in the prosecution of the Administrative Complaints failed to prove that Petitioners actually knew the information provided to the Board was false, that they should have known it was false, or, most importantly, that they simply ignored whether their representation was true or false. Unlike Saunders Leasing, the Petitioners in this case had every reason to believe that the information provided to the Board in support of their licensing was true.

53. More persuasive are the cases of Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652 (Fla. 5th DCA 1998), and Munch v. Department of Professional Regulation, Division of Real Estate, 592 So. 2d 1136 (Fla. 1st DCA 1992). Walker had been charged with a violation of Section 475.25(1)(m), Florida Statutes, with authorized the Florida Real Estate Commission (hereinafter referred to as "FREC"), to impose discipline where a licensee "[h]as obtained a license by means of fraud, misrepresentation, or concealment", language materially the same as the language of Section 489.129(1)(a), Florida Statutes. Munch had been charged with a violation of Section 475.25(1)(b), Florida Statutes, which authorized FREC to

impose discipline where a licensee "[h]as been guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme, or device, culpable negligence, or breach of trust in any business transaction in this state or any other state, nation, or territory . . . ."

54. Although the ultimate results in Walker and Munch were different, in pertinent part, the court in both cases recognized that there must be a showing of "intent" or knowledge to find a "misrepresentation" under either Subsection 475.25(1)(b) or (m), Florida Statutes.

55. As pointed out by Petitioners, the interpretation of "misrepresentation" as requiring a showing of "intent" has also been followed in at least two DOAH Recommended Orders: Harrell v. Department of Insurance and Treasurer, DOAH Case No. 89-2767 (1990), and Contessa v. Department of Busienss and Professional Regulation, Division of Real Estate, DOAH Case No. 82-3100 (1983).

56. Petitioners have also relied upon the definition of "misrepresentation" found in Black's Law Dictionary: "material representation of presently existing or past fact, made with knowledge of its falsity, and with intention that other party rely thereon, resulting in reliance by that other party to his detriment." Black's Law Dictionary 1001 (6th Ed. 1990).

57. Based upon the foregoing, it is concluded that the Department's interpretation of Section 489.129(1)(a), Florida Statutes, that a "misrepresentation" may be made without intent, erroneously accepted by the undersigned in the Recommended Orders, is inconsistent with the clear legislative intent of Section 489.129(1)(a), Florida Statutes.

58. Turning the second issue, it is also concluded that Challenged Existing Rule is not capable of an interpretation which would make it consistent with the foregoing interpretation of the implemented statute. That is, the only reasonable interpretation of the Challenged Existing Rule, and the one advanced by the Department, is that it is not necessary that a licensee intentionally submit false information in support of an application for a certificate in or to find that the certificate was obtained by "misrepresentation."

59. The Challenged Existing Rule provides that a submission of any "[M]aterial false statements or information . . ." by a licensee or applicant, regardless of intent or knowledge on the part of the licensee or applicant, constitutes "fraud or misrepresentation" as used in Section 489.129(1)(a), Florida Statutes.

60. Based upon the foregoing, the Board, in adopting the Challenged Existing Rule, "has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1."

D. The Challenged Unpromulgated Rule.

61. Petitioners have challenged the following language as being a "rule" which the Board has failed to adopt pursuant to Section 120.54(1)(a), Florida Statutes:

> Disciplinary action may be taken pursuant to Section 455.227(1)(h), Florida Statutes, where an individual attempts to obtain a license through an error of the department even if the individual did not have knowledge of the error.

62. Petitioners have challenged the Challenged Language pursuant to Section 120.56(4)(a), Florida Statutes, which provides, in part, 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.

63. "When section 120.54(1)(a) is read together with section 120.56(4), it becomes clear that the purpose of a section 120.56(4) proceeding is to force or require agencies into the rule adoption process. It provides them with incentives to promulgate rules through the formal rulemaking process." Osceola Fish Farmers Association, Inc. vs. Division

of Administrative Hearings, 830 So. 2d 923, 934 (Fla.4th DCA 2002).

64. "An agency statement constituting a rule may be challenged pursuant to Section 120.56(4), Florida Statutes, only on the ground that 'the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54.'" Zimmerman v. Department of Financial Services, Office of Insurance Regulation, DOAH Case No. 05-2091RU, slip op. at 11 (Fla. DOAH August 24, 2005)(Summary Final Order of Dismissal); see also Southwest Florida Water Management District v. Charlotte County, 774 So. 2d 903, 908-09 (Fla. 2d DCA 2001).

65. What constitutes a "rule" is defined by Section 120.52(15), Florida Statutes, which provides, in pertinent 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. The term does not include:
>
> . . . .

66. Only agency statements of "general applicability," i.e., those statements which are intended by their own effect to create or adversely effect rights, to require compliance, or to

otherwise have the direct and consistent effect of law, fall within the definition of Section 120.52(15), Florida Statutes. See Department of Highway Safety and Motor Vehicles v. Schluter, 705 So. 2d 81, 82 (Fla. 1st DCA 1997); Balsam v. Department of Health and Rehabilitative Services, 452 So. 2d 976, 977-978 (1st DCA, 1984); and McDonald v. Department of Banking and Finance, 346 So. 2d 569, 581 (Fla. 1st DCA 1977).

67. Petitioners' assertion that the Challenged Language constitutes a policy of the Board is based upon essentially three things: (1) statements of the Department contained in pleadings filed in the prosecution of the Administrative Complaints; statements of undersigned in the Recommended Orders entered in those cases; and (3) statements of the Administrative Law Judge in a Recommended Order entered in Department of Business and Professional Regulation v. Gonzales, DOAH Case No. 07-2501PL (Oct. 2007).

68. The statements relied upon by Petitioners are not "rules", first because they are not statements of the Board. Even it is likely the Board will accept the conclusions of law in the Recommended Order and the Recommended Order in DOAH Case No. 07-2501PL, it has not done so at this time. The evidence, therefore, failed to prove that the Challenged Language is a "rule."

69. Secondly, even if the Challenged Language were attributable to the Board, the allegations in this case fail to substantiate a finding that the policy is one of "general applicability." The statement challenged by Petitioners is a statement made in pleadings and decisions involving alleged violations of Section 455.227(1)(h), Florida Statutes, by Petitioners and one other individual. As such, they are not "rules." See Wisconsin Life Insurance Company v. Florida Department of Insurance, DOAH Case No. 01-3135RU (Nov. 2001), affirmed, 831 So. 2d 239 (Fla. 1st DCA 2002); Sydney T. Bacchus v. Department of Business and Professional Regulation, DOAH Case No. 06-4816RX (Jan. 2007); and The Pool People, Inc. v. Board of Professional Engineers, DOAH Case No. 05-1637RU (Dec. 2005). See also George Marshall Smith vs. Alex Sink, as Agency Head and Chief Financial Officer and Department of Financial Services, DOAH Case No. 07-4746RU (Jan. 2008).

70. Petitioners failed to prove that the Challenged Language constitutes a "rule."

ORDER

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

ORDERED:

1. Florida Administrative Code Rule 61G4-15.008, constitutes an invalid exercise of delegated legislative

authority because it enlarges, modifies, or contravenes Section 489.129(1)(a), Florida Statutes; and

2. To the extent the Petition alleges that the Challenged Language constitutes an unpromulgated "rule," it is DISMISSED.

DONE AND ORDERED this 26th day of February, 2008, in Tallahassee, Leon County, Florida.

LARRY J. SARTIN
Administrative Law Judge
Division of Administrative Hearings
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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.