STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FRANCISCO VAZQUEZ, M.D.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-0490RU
	)	
DEPARTMENT OF HEALTH, BOARD OF MEDICINE,	)	
	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

This case came before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, on a factual record stipulated to by the parties.

APPEARANCES

For Petitioner: Michael P. Gennett, Esquire
Shutts & Bowen, LLP
210 South Biscayne Boulevard, Suite 1500
Miami, Florida 333131

For Respondent: Edward a. Tellechea
Senior Assistant Attorney General
Donna Canzano McNulty
Assistant Attorney General
Garnett W. Chisenhall
Assistant Attorney General
Department of Legal Affairs
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

The issue in this case is whether an interpretation of Section 458.331(1)(jj), Florida Statutes, by the Board of

Medicine is an agency statement which violates Section 120.54(1)(a), Florida Statutes (2007), pursuant to Section 120.56(4), Florida Statutes.

PRELIMINARY STATEMENT

On January 25, 2008, Petitioner Francisco Vazquez, M.D., filed a Petition for Administrative Determination that Agency Statement Violates Florida Statutes § 120.54(1) and is an Invalid Exercise of Delegated Legislative Authority (hereinafter referred to as the "Petition").

The Petition was designated DOAH Case No. 08-0490RU and, on January 28, 2008, was assigned to the undersigned for proceedings pursuant to Section 120.56(4), Florida Statutes (2007). By Notice of Hearing by Video Teleconference issued February 5, 2008, the final hearing of this matter was scheduled for February 18, 2008, by video conferencing between Miami and Tallahassee, Florida.

On February 15, 2008, a pre-hearing conference was conducted by telephone. During the conference, the parties agreed that, in light of a Joint Stipulation they had entered into and filed on February 14, 2008, there was no longer a need for a formal evidentiary hearing. Instead, the parties agreed that the final hearing should be cancelled; the matter should be submitted for decision based upon the facts and exhibits the parties had stipulated to; that the parties should be given an

opportunity to file proposed final orders and responses thereto pursuant to an agreed briefing schedule; and that this Final Order should then be entered.

Petitioner also made an ore tenus motion to file an amended Petition adding the specific agency language challenged in this proceeding. That motion was granted. On February 20, 2008, Petitioner filed an Amended Petitioner for Administrative Determination That Agency Statement Violates Florida Statutes § 120.54(1) and is an Invalid Exercise of Delegated Legislative Authority (hereinafter referred to as the "Amended Petition").

A second copy of the Stipulation and three stipulated exhibits were filed on February 15, 2008.

By Order Establishing Schedule for Filing Proposed Final Orders entered March 10, 2008, the agreed-to briefing schedule was memorialized. Consistent with that Order, Petitioner filed Petitioner's Proposed Final Order on March 13, 2008, and Respondent filed a Proposed Final Order on March 14, 2008. On March 28, 2008, Petitioner filed Petitioner's Response to Respondent's Proposed Final Order and Respondent filed Board of Medicine's Response to Petitioner's Proposed Final Order. These post-hearing submittals have been fully considered.

All references to Florida Statutes in this Final Order are to the 2007 version, unless otherwise noted.

FINDINGS OF FACT

These findings of fact, with a few changes based upon the stipulated record in this case, are facts contained in the Joint Stipulation:

A. The Parties.

1. Petitioner Franciso Vazquez, M.D., is a licensed medical doctor within the State of Florida, having been issued license number ME 68742.

2. Respondent Board of Medicine (hereinafter referred to as the "Board"), is charged with regulating the practice of medicine pursuant to Section 20.43 and Chapters 456 and 458, Florida Statutes.

3. Dr. Vazquez's address of record is 4595 Palm Beach Boulevard, Fort Myers, Florida 33905.

B. DOAH Case No. 07-0424PL, Dr. Vazquez's Disciplinary Case.

4. Dr. Vazquez signed a written opinion in the form of an Affidavit on September 5, 2003, as required by Section 766.104(1), Florida Statutes (2003), in support of a medical malpractice action related to the death of C.L.

5. Dr. Vazquez named approximately 40 doctors and one hospital in the sworn statement.

6. The sworn statement generally stated that each of the defendants committed medical negligence and a breach of the

prevailing professional standard of care in a multitude of ways, but did not specify which doctor committed which negligent act or how any individual doctor breached the prevailing standard of care.

7. Dr. Vazquez further asserted in this sworn statement that the negligence and breach of the prevailing professional standard of care of all the doctors caused injury, damage and ultimately the death of C.L.

8. That sworn statement ultimately formed the basis for a civil malpractice action filed on February 2, 2004, in the Circuit Court of the Sixth Judicial Circuit of Florida, in and for Pinellas County, Civil Division, Case Number 04-875CI-7.

9. On or about February 22, 2005, circuit court judge Bruce Boyer of the Circuit Court of the Sixth Judicial Circuit of Florida, in an for Pinellas County, Civil Division, in case Number 04-875CI-7, entered an order of dismissal as to two defendant doctors.

10. In the order of dismissal, Judge Boyer stated that the Dr. Vazquez was not a gastroenterologist and did not otherwise appear to be qualified to comment on the defendants' care and did not appear to have made any reasonable effort to investigate and determine what role the [two] defendants played in C.L.'s care.

11. Dr. Vazquez was not provided with any notice of the hearing on February 22, 2005, and neither he nor anyone acting on his behalf was present at the hearing to defend his interests.

12. The court forwarded its order to the Division of Medical Quality Assurance as required by Section 766.206(5)(a), Florida Statutes (2003).

13. On or about May 3, 2006, an Administrative Complaint was issued against Dr. Vazquez charging him with a one count violation of Section 458.331(1)(jj), Florida Statutes (2003), which subjects a physician to license discipline for "being found by any court in this state to have provided corroborating written medical expert opinion attached to any statutorily required notice of claim or intent or to any statutorily required response rejecting a claim without reasonable investigation." The recommended penalties for a violation of Section 4458.331(1)(jj), Florida Statutes (2003), include revocation of the physician's license.

14. Dr. Vazquez is the first and only physician in Florida who has been formally charged with violating Section 458.331(1)(jj), Florida Statutes (2003).

15. On or about January 22, 2007, the Department of Health referred Case No. 2005-03579 (DOH v. Francisco Vazquez, M.D.) to the Division of Administrative Hearings (hereinafter referred to

as the “DOAH”) for a formal evidentiary hearing on the Administrative Complaint pursuant to Chapter 120, Florida Statutes. The case was assigned DOAH Case Number 07-0424PL. The case was assigned to the undersigned.

16. On or about March 1, 2007, Dr. Vazquez filed a Motion to Relinquish Jurisdiction in the administrative proceeding, advising the court of his intent to file his constitutional challenge to Section 458.331(1)(jj), Florida Statutes, in circuit court and arguing the DOAH should relinquish jurisdiction until after the Leon County Circuit Court has ruled on his constitutional challenge.

17. On or about March 5, 2007, Dr. Vazquez filed a Petition for Declaratory Action and/or Injunctive Relief in the Second Judicial Circuit Court in and for Leon County, Florida, alleging that Section 458.331(1)(jj), Florida Statutes, is unconstitutional under the U.S. and state constitutions, in that it allows disciplinary action against a physician’s license based exclusively on the existence of a court order entered in a proceeding in which the physician, acting as a presuit medical expert, is not a party and has no right to notice and an opportunity to be heard. The case was assigned case number 2007-CA-0663.

18. On or about March 19, 2007, an Order Denying Motion to Relinquish was entered by the undersigned.

19. On or about March 21, 2007, a hearing was held before the undersigned on Dr. Vazquez' Motion to Continue Hearing. At the hearing, counsel for the Department of Health, argued that it is her client's position that Section 458.331(1)(jj), Florida Statutes, only requires proof of the existence of a court order that includes the language mentioned in the statute and that, once this is proven, there is no opportunity for the physician to dispute the findings of the court order. The Department of Health's argument was accepted by the undersigned.

20. On or about April 17, 2007, after a formal administrative hearing was conducted but before a recommended order was issued, the Department of Health filed a Motion to Reopen the Hearing and Record and Schedule Evidentiary Formal Hearing. In the motion, the Department of Health urged the undersigned that a new interpretation of Section 458.331(1)(jj), Florida Statutes (2003), should be accepted, stating:

> It is the [Department of Health's] position that Section 458.331(1)(jj), Florida Statutes, creates a rebuttable presumption. Under this interpretation, to create a prima facie case, the Department must prove that [Dr. Vazquez] was found to have provided a corroborating written affidavit in support of a notice of a claim without reasonable investigation. [Dr. Vazquez] may rebut such a showing by demonstrating that, notwithstanding the finding, his investigation was in fact reasonable.

21. On or about May 8, 2007, the undersigned denied the Department of Health's Motion to Reopen, holding that its new interpretation of Section 458.331(1)(jj), Florida Statutes (2003), is contrary to any reasonable reading of the statute.

22. On or about July 5, 2007, the Department of Health filed its Exceptions to the Recommended Order of the undersigned in DOAH Case No. 07-0424PL, in which it reasserted that the correct interpretation of Section 458.331(1)(jj), Florida Statutes (2003), is the one set forth in its Motion to Reopen Hearing (quoted in paragraph 20, supra).

23. On or about July 6, 2007, Dr. Vazquez filed his Reply to Petitioner's Exceptions urging that, even if Petitioner's new interpretation of Section 458.331(1)(jj), Florida Statutes, were to be adopted and applied to this case, the case should be dismissed and sent back to the probable cause panel for a determination made based upon the new interpretation.

24. On or about August 10, 2007, a meeting of the Board was held in Fort Lauderdale, Florida at which the Board approved the Department of Health's Exceptions to the Recommended Order and entered an Order remanding the case back to the DOAH for a "de novo hearing so that findings may be entered consistent with the Board of Medicine's reading of Fla. Stat. § 458.331(1)(jj), as set forth in this order."

25. By accepting the Department of Health's Exceptions, the Board adopted as its own, the interpretation of Section 458.331(1)(jj), Florida Statutes (2003), asserted by the Department of Health in its Motion to Reopen the Hearing and Record and Schedule Evidentiary Formal Hearing and quoted in paragraph 20, supra.

26. In light of the fact that the Board has the final authority over its interpretation of the laws it is charged with applying, the Order of Remand was accepted by Order Accepting Remand and Reopening File entered September 17, 2007.

27. On or about January 8, 2008, Dr. Vazquez filed his Motion to Dismiss Administrative Complaint and Remand to Agency for Probable Cause Determination, again arguing that the probable cause determination made against him was based on a reading of the statute which is substantially different than the reading that the Board adopted in the Order on Remand. The Department of Health opposed this motion. The motion was denied by an Order entered by the undersigned on January 18, 2008.

28. The final hearing on remand in DOAH Case No. 07-0424PL was held on January 29, 2008, pursuant to Section 120.57(1), Florida Statutes.

29. In his Amended Petition, Dr. Vazquez has challenged the statement adopted by the Board through its Order of Remand.

That statement, which is quoted in paragraph 20, supra, will hereinafter be referred to as the "Challenged Agency Statement."

30. The Challenged Agency Statement has not been adopted a rule pursuant to Section 120.54(1), Florida Statutes, and the Board has not initiated any rule-making procedures in this regard.

31. The Board has not argued or presented evidence to support a finding that rule-making is not feasible and practicable under Section 120.54(1)(a), Florida Statutes.

CONCLUSIONS OF LAW

A. Jurisdiction.

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

B. Dr. Vazquez' Challenge.

33. Dr. Vazquez has challenged the Challenged Agency Statement 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.

34. Section 120.56(4)(b), Florida Statutes, goes on to provide, in part, that "[i]f a hearing is held and the petitioner proves the allegations of the petition, the agency shall have the burden of proving that rulemaking is not feasible and practicable under s. 120.54(1)(a)."

35. Section 120.56(4)(c), Florida Statutes, describes the determination which may be made by an administrative law judge:

> The administrative law judge may determine whether all or part of a statement violates s. 120.54(1)(a). The decision of the administrative law judge shall constitute a final order. . . .

36. If the administrative law judge finds all or part of the agency statement in violate of Section 120.54(1)(a), Florida Statutes, Section 120.56(4)(d), Florida Statutes, provdes that "the agency shall immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action."

37. Finally, Section 120.56(4)(e), Florida Statutes, provides procedures to be followed if the agency, before the final hearing or, after the final hearing, before issuance of the final order, takes action to adopt the agency statement. Those procedures are not applicable to this case.

38. Based upon the foregoing, the issues to be resolved in this case are:

a. Is Dr. Vazquez a "person substantially affected" by an agency statement;

b. Is the specific language challenged in the Amended Petition "an agency statement";

c. Does the agency statement constitute a "rule" under Section 120.52(15), Florida Statutes; and

d. Was rulemaking feasible and practicable under Section 120.54(1)(a), Florida Statutes.

C. The Burden of Proof.

39. Generally, the burden of proof in a Chapter 120, Florida Statutes, proceeding, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue in the proceeding. Antel v. Department of Professional Regulation, 522 So. 2d 1056 (Fla. 5th DCA 1988); Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); and Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 249 (Fla. 1st DCA 1977). The initial burden of proof in a challenged brought pursuant to Section 120.56(4), Florida Statutes, is, therefore, on the petitioner.

40. Dr. Vazquez was, therefore, required to prove that he is a "substantially affected" person; that the Challenged Agency Statement is an "agency statement"; and that the Challenged Agency Statement is a "rule" as defined in Section 120.52(15), Florida Statutes.

41. Pursuant to Section 120.56(4)(c), Florida Statutes, if Dr. Vazquez meets his burden of proof, the burden of proof then shifts to the Board to prove that rulemaking was not feasible and practicable.

D. Substantially Affected Person.

42. Only "substantially affected persons" may 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. Dr. Vazquez was, therefore, as a threshold issue, required to prove he is "substantially affected" by the Challenged Agency Statement to institute the instant proceeding. See Department of Professional Regulation, Board of Medical Examiners v. Durrani, 455 So. 2d 515 (Fla. 1st DCA 1984).

43. In order to prove that he is "substantially affected," Dr. Vazquez was required to specifically prove that (a) the Challenged Agency Statement causes a real and sufficiently immediate injury in fact; and that (b) his 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, 1237 (Fla. 4th DCA 1995).

44. In the Amended Petition, paragraph 14, Dr. Vazquez has asserted the following factual basis for his standing in this case:

> The Board's interpretation of Section 458.331(1)(jj) will allow the Board to use a court order issued in a proceeding for which Dr. Vazquez had no right to notice and an opportunity to be heard to establish their prima facia case rebuttable presumption against him, and then shift the burden of proof to Dr. Vazquez to prove his own innocence. The penalty for a violation of Section 458.331(1)(jj) is revocation of the physician's license. Thus, Petitioner is substantially affected by the unadopted rule. *Lanou v. Dept. of Highway Safety and Motro Vehicels*, 751 So.2d 44 (Fla. 1st DCA 1999).

These alleged facts have been proven by the facts to which the parties have stipulated and the record evidence.

45. While the Board correctly concedes that Dr. Vazquez' interest in this case meets the second prong of the Ward test for standing, that his interest is within the zone of interests to be protected pursuant to Section 458.331(1)(jj), Florida Statutes (2003), the Board questions whether Dr. Vazquez has proven that the Challenged Agency Statement may cause him a real and sufficiently immediate injury in fact.

46. The Board concedes that "a cursory review of the case law should lead to the conclusion that Dr. Vazquez has suffered a real and sufficiently immediate injury in fact", in light of the consistent conclusion of Florida appellate courts that a

petitioner satisfies the "substantially affected" test if rules or proposed rules regulate the petitioner's profession or influence the petitioner's ability to earn a living. Despite this concession, the Board goes on to attempt to distinguish this case from court decisions on standing by arguing that:

> if Dr. Vazquez ultimately loses his license, the Board's alleged non-rule statement interpreting Section 458.331(1)(jj), Florida Statutes, will not be the source of that injury. In fact, the Board's revised interpretation of Section 458.331(1)(jj), Florida Statutes, **substantially decreases** the probability that Dr. Vazquez will suffer any injury at all. (Emphasis in original).

47. The Board goes on in its Proposed Final Order to further explain its position as follows:

> 35. Under the Department of Health's original interpretation of Section 458.331(1)(jj), respondents such as Dr. Vazquez had no opportunity to rebut a circuit court's determination that they provided a corroborating written affidavit without conducting a reasonable investigation. The Department of Health's subsequent Motion to Reopen Hearing, in which it revised its interpretation of Section 458.331(1)(jj), was denied.
>
> 36. If the Board had agreed with the Department's original interpretation of the statute, which it did not, then the undersigned would conclude without hesitation that Dr. Vazquez had satisfied the first prong of the "substantially affected" test.
>
> 37. Instead, after a Recommended Order had been issued in the disciplinary case, the Board rejected the ALJ's interpretation

> of Section 458.331(1)(jj), Florida Statutes, and remanded with directions that Dr. Vazquez have an opportunity to rebut the circuit court's determination that he failed to conduct a reasonable investigation.
>
> 38. Because the Board's interpretation of Section 458.331(1)(jj), Florida Statutes, substantially affects Dr. Vazquez in a **positive** manner, Dr. Vazquez has not been injured by that revised interpretation. Therefore, he has no standing to challenge the alleged non-rule statement at issue. (Emphasis in original).

48. The Board's argument that the application of an interpretation of a disciplinary provision at issue in this case which may result in the revocation, suspension, or other discipline of Dr. Vazquez' license to practice medicine in Florida impacts him in a "positive" manner because it may be a less harsh interpretation of the disciplinary provision is rejected. The Board's argument ignores the fact that, under either interpretation of Section 458.331(1)(jj), Florida Statutes (2003), which has been advanced by the Department and/or the Board in this case, Dr. Vazquez is facing a real and substantial injury in the form of the loss or other discipline of his license to practice medicine.

49. The fact that Dr. Vazquez may see the Challenged Agency Statement as presenting him with a somewhat better opportunity to prevail in the disciplinary proceedings against him, does nothing to diminish the fact that ultimately, he is

facing disciplinary action by the Board pursuant to the Board's application of the Challenged Agency Statement.

50. Dr. Vazquez has proven that he is a "substantially affected person" as those terms are used in Section 120.56(4)(a), Florida Statutes.

E. The Challenged Agency Statement is an "Agency Statement"; and It Constitutes a "Rule".

51. Clearly, the Challenged Agency Statement is an "agency statement." The Board does not contest this issue.

52. The primary question to be decided in this case is whether the Challenged Agency Statement comes within the definition of a "rule" as that term is defined in Section 120.50(15), Florida Statutes:

> "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:
>
> . . . .

53. 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).

54. Dr. Vazquez argues that the Challenged Agency Statement is one of general applicability because it:

> . . . is applicable, not only to the prosecution of Dr. Vazquez, but both as articulated as a general interpretation of the statute, and under the doctrine of administrative *stare decisis* once it is applied here, to any and all physicians who may be prosecuted for a violation of Florida Statutes § 458.331(1)(jj)(2003) in the future. It is undisputed that Dr. Vazquez is the first physician in Florida to be prosecuted for violating this statutory subsection, and this case will set precedent for how §458.331(1)(jj) will be interpreted and applied in future cases. [Footnote omitted].

55. Dr. Vazquez argues that the Challenged Agency Statement is also one 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" because the Challenged Agency Statement "implements and interprets" Section 458.331(1)(jj), Florida Statutes, and that it:

> . . . imposes a requirement or solicits information not specifically required by Florida Statutes §458.331(1)(jj)(2003), in that it determines that the statue imposes a "rebuttable presumption", and establishes what will be considered a "prima facie case" and that the burden of proof supposedly shifts to the physician to rebut the presumption. None of these terms are even mentioned in Florida Statutes §458.331(1)(jj)(2003), nor does that statue provide for the physician to "rebut" anything and none of these aspects of the Agency Statement were part of the Department of health's earlier interpretation of the statute. In fact, the Agency Statement is such a radical departure from a plain reading of Florida Statutes §458.331(1)(jj) that this ALJ rejected this interpretation as "contrary to any reasonable reading of the statute."

56. The Board argues that the Challenged Agency Statement is neither an agency statement of "general applicability" nor one 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 Board argues essentially that the Challenged Agency Statement is nothing more that a one-time application of Section 458.331(1)(jj), Florida Statutes (2003).

57. The Board argues essentially that the Challenged Agency Statement is merely an interpretation of Section 458.331(1)(jj), Florida Statutes (2003), which arose from a single disciplinary action and the Board's

> . . . consideration of a specific recommended order issued by DOAH where, pursuant to Section 120.57(1)(l), the Board rejected a conclusion of law and substituted it with its own. . . .
>
> 45. Thus, the Board's action is applicable only to this case and is not a matter of general applicability. Moreover, the Petitioner has failed to present any evidence which would indicate otherwise. In fact, the Petitioner has stipulated to the fact that he is the *first* and *only* physician that has ever been formally charged with violating Section 458.331(1)(jj). . . . Any claims on his part that Section 458.331(1)(jj) will be interpreted in the same manner in the future are merely pure speculation.

58. While it is true that this is the first time that the Board has relied upon the Challenged Agency Statement and it is doing so in conjunction with the prosecution of a disciplinary matter against a single physician, the Challenged Agency Statement is one of general applicability which "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."

59. This is not a case where an agency is applying a statutory provision in a manner which turns on the specific facts and situation of the disciplinary case in which its statutory interpretation is being applied; if it were, the Board's interpretation of its disciplinary provision would not

be a "rule." Stated differently, this is not a case where an agency interpretation of a disciplinary statute is based upon and, therefore, limited to, the specific facts involved in the agency's disciplinary action. In this case, the Board is applying an interpretation of a disciplinary provision, Section 458.331(1)(jj), Florida Statutes (2003), to Dr. Vazquez that establishes a procedure or method of proof unrelated and unaffected by the specific facts involved. At no time has the Board suggested or argued that its interpretation of Section 458.331(1)(jj), Florida Statutes (2003), as challenged in this case is based upon or limited to Dr. Vazquez' circumstances.

60. For the same reasons, the Challenged Agency Statement cannot be considered, as the Board argues, to be the type of statutory interpretation which the courts have found to not be nonrule policy. Both parties have relied upon the following pertinent language from St. Francis Hospital, Inc. v. Department of Health and Rehabilitative Services, 553 So. 2d 1351, 1354 (Fla. 1st DCA 1989):

> We recognize that an agency interpretation of a statute which simply reiterates the legislature's statutory mandate and does not place upon the statute an interpretation that is not readily apparent from its literal reading, nor in and of itself purport to create rights, or require compliance, or to otherwise have the direct and consistent effect of law, is not an unpromulgated rule, and actions based upon such an interpretation are permissible

> without requiring an agency to go through rule making.

61. The Board asserts that the foregoing language supports its position, because the Challenged Agency Statement "reiterates the basic mandate set forth in the plain language of the statute . . . ." Dr. Vazquez argues that the court's decision supports his position because the Challenged Agency Statement "is not readily apparent from [the statute's] literal reading . . . ." In the Recommended Order originally entered in the disciplinary proceeding against Dr. Vazquez, the undersigned concluded that the Challenged Agency Statement is "contrary to any reasonable interpretation of the statute." The Board has offered nothing new in its argument in this case to convince the undersigned that this conclusion was incorrect. Therefore, Dr. Vazquez' application of the court's decision in St. Frances Hospital quoted supra, is accepted.

62. The Challenged Agency Statement is, therefore, one which by its terms is not limited to the facts of the disciplinary case against Dr. Vazquez, but is instead one which the Board apparently believes is required by the general language of Section 458.331(1)(jj), Florida Statutes. The Challenged Agency Statement is, therefore, one of general applicability. The Challenged Agency Statement is also an interpretation which fails to simply reiterate the legislature's

statutory mandate. Instead, the Challenged Agency Statement places upon the statute an interpretation that is not readily apparent from its literal reading, and in and of itself purports to create rights.

63. The Challenged Agency Statement is a "rule" as defined in Section 120.52(15), Florida Statutes, which violates Section 120.54(1)(a), Florida Statutes (2007).

F. The Board Failed to Prove that Rulemaking was not Feasible or Practicable.

64. The Board, by failing to address the issue in its Proposed final Order, apparently concedes that rulemaking was feasible and practicable.

65. The evidence failed to prove that rulemaking was not feasible or practicable.

G. Attorney's Fees and Costs.

66. Section 120.595(4)(a), Florida Statutes, provides the following with regard to an award of attorney's fees and costs:

> Upon entry of a final order that all or part of an agency statement violates § 120.54(1)(a), the administrative law judge shall award reasonable costs and reasonable attorney's fees to the petitioner, unless the agency demonstrates that the statement is required by the Federal Government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds.

67. Jurisdiction over this matter will be retained to give the parties an opportunity to address the issue of attorney's fees and costs.

ORDER

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

ORDERED that the Challenged Agency Statement constitutes a rule as defined in Section 120.52(15), Florida Statutes, which has not been adopted pursuant to Section 120.54(10(a), Florida Statutes.

DONE AND ORDERED this 9th day of April, 2008, in Tallahassee, Leon County, Florida.

LARRY J. SARTIN
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 9th day of April, 2008.

COPIES FURNISHED:

Josefina M. Tamayo, General Counsel
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1701

Edward A. Tellechea
Senior Assistant Attorney General
Department of Legal Affairs
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

Michael P. Gennett, Esquire
Shutts & Bowen, LLP
201 South Biscayne Boulevard, Suite 1500
Miami, Florida 33131

Garnett Chisenhall, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399

M. Catherine Lannon, Esquire
Office of the Attorney General
Administrative Law Section
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

Dr. Ana M. Viamonte Ros, Secretary
Department of Health
4052 Bald Cypress Way, Bin A00
Tallahassee, Florida 32399-1701

R. S. Power, Agency Clerk
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1701

Scott Boyd, Executive Director
Joint Administrative Procedures Committee
120 Holland building
Tallahassee, Florida 32399-1300

Liz Cloud, Chief
Bureau of Administrative Code
The Elliot Building, Room 201
Tallahassee, Florida 32399-0250

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.