

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

VIPUL PATEL, )  
)  
Petitioner, )  
)  
vs. ) Case No. 08-2728RX  
)  
BOARD OF PHARMACY, )  
)  
Respondent. )  
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MIRIAM L. HERNANDEZ, )  
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Petitioner, )  
)  
vs. ) Case No. 08-2729RX  
)  
BOARD OF PHARMACY, )  
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Respondent. )  
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MIRLEY ALEMAN-ALEJO, )  
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Petitioner, )  
)  
vs. ) Case No. 08-2730RX  
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BOARD OF PHARMACY, )  
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Respondent. )  
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VALLIAMMAI NATARAJAN, )  
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Petitioner, )  
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vs. ) Case No. 08-2731RX  
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BOARD OF PHARMACY, )  
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Respondent. )  

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JOHN H. NEAMATALLA,	)	
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Petitioner,	)	
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vs.	)	Case No. 08-2732RX
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BOARD OF PHARMACY,	)	
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Respondent.	)	
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SAMAD MRIDHA,	)	
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Petitioner,	)	
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vs.	)	Case No. 08-2733RX
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BOARD OF PHARMACY,	)	
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Respondent.	)	
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SE YOUNG YOON,	)	
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Petitioner,	)	
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vs.	)	Case No. 08-2734RX
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BOARD OF PHARMACY,	)	
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Respondent.	)	
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SAURIN MODI,	)	
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Petitioner,	)	
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vs.	)	Case No. 08-2821RX
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BOARD OF PHARMACY,	)	
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Respondent.	)	
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DEEPAKKUMAR SHAH, M.PH.,	)	
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Petitioner,	)	
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vs.	)	Case No. 08-2823RX
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BOARD OF PHARMACY,	)	
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Respondent.	)	
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<hr/> MIJEONG CHANG,	)	
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Petitioner,	)	
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vs.	)	Case No. 08-2824RX
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BOARD OF PHARMACY,	)	
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Respondent.	)	
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<hr/> NABIL KHALIL,	)	
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Petitioner,	)	
	)	
vs.	)	Case No. 08-3298RX
	)	
BOARD OF PHARMACY,	)	
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Respondent.	)	
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<hr/> HADYA ALAMEDDINE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-3347RX
	)	
BOARD OF PHARMACY,	)	
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Respondent.	)	
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BALAJI LAKSHMINARAYANAN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-3488RX
	)	
BOARD OF PHARMACY,	)	
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Respondent.	)	
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<hr/> ANAND NARAYANAN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-3510RX
	)	
BOARD OF PHARMACY,	)	
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Respondent.	)	
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PARTIAL FINAL ORDER

In lieu of a final hearing, the parties agreed to the entry of a summary final order based on undisputed material facts and applicable law.

APPEARANCES

For Petitioners: George F. Indest, III, Esquire  
Tressa J. James, Esquire  
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For Respondent: Deborah B. Loucks, Esquire  
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Tallahassee, Florida 32399

PRELIMINARY STATEMENT

Vipul Patel; Miriam L. Hernandez; Mirley Aleman-Alejo; Valliammai Natarajan; John H. Neamatalla; Samad Mridha; Se Young Yoon; Saurin Modi; Deepakkumar Shah, M.PH; Mijeong Chang; Nabil Khalil; Hadya Alameddine; Balaji Lakshminarayanan; and Anand Narayanan, hereinafter referred to collectively as Petitioners, filed Petitions to Determine the Invalidity of an Existing Agency Rule, Rule 64B16-26.2031, F.A.C. (Licensure by Examination; Foreign Pharmacy Graduates) and the Invalidity of Agency Policy and Statements Defined as Rules (Petitions), alleging that the challenged rule of the Respondent, Board of Pharmacy (Board), is an invalid exercise of delegated legislative authority and that certain statements and policies of the Board are rules which have not been adopted as rules. The Petitions were assigned to Administrative Law Judge Susan B. Harrell and were consolidated.

On June 19, 2008, Petitioners filed Petitioners' Motion to Amend Notice of Hearing. On June 23, 2008, an Amended Notice of Hearing was issued, which amended the issues to be considered.

The final hearing was scheduled for June 26 and 27, 2008. On June 23, 2008, a Joint Motion for Continuance of Final Hearing was filed. The motion was granted, and the cases were rescheduled for August 7 and 8, 2008.

On July 18, 2008, Petitioners filed four requests for official recognition. On July 21, 2008, Petitioners filed another request for official recognition. By Orders dated July 23, 2008, official recognition was taken of Sections 120.536, 456.021, 465.007, 468.211, 468.306, 474.207, and 478.45, Florida Statutes (2007)<sup>1</sup>; Florida Administrative Code Rule 64B16-26.2031 (August 8, 2007); and Florida Administrative Code Rule 64B16-26.2031 (January 11, 2005).

On July 30, 2008, a Joint Motion for Abatement was filed. On July 31, 2008, an Order was entered placing the cases in abeyance and requiring the parties to file a status report by August 20, 2008.

On July 29, 2008, Petitioners filed two requests for official recognition. The requests are granted, and official recognition is taken of Sections 57.105, 120.595, 120.56, 120.54, 120.56, 120.595, 465.002, 465.005, and 456.013, Florida Statutes; Florida Administrative Code Rule 64B16-26.203 (2007); Page 914, Black's Law Dictionary, Abridged Sixth Edition (1991); and Page 1645, Random House Unabridged Dictionary (2001).

On August 20, 2008, Petitioners filed Petitioners' Status Report and Motion to Lift Abatement and Re-Schedule Final Hearing. The motion was granted, and the final hearing was rescheduled for September 4 and 5, 2008.

On September 3, 2008, the parties filed a Joint Pre-hearing Stipulation. The parties stipulated to facts which are contained in section (e) of the Joint Pre-hearing Stipulation. Petitioners listed Exhibits P-1 through P-33, which had been filed with the Division of Administrative Hearings and to which Respondent had no objection. Petitioners' Exhibits P1 through P-33 are admitted in evidence. Respondent listed Exhibit R-1, which was filed with the Division of Administrative Hearings on September 4, 2008. Respondent's Exhibit R-1 is admitted in evidence.

On September 3, 2008, a Joint Motion to Cancel Hearing and to Submit Consolidated Cases for Summary Disposition was filed. The parties represented that based on the parties' Joint Pre-hearing Stipulation, there were no material facts in dispute. The parties requested that they be allowed to submit proposed final orders addressing each party's position regarding the application of law to the stipulated facts.

By Order dated September 8, 2008, the motion was granted; the parties were to file their proposed final orders by September 16, 2008, and all exhibits were to be filed no later than September 12, 2008.

The parties timely filed their Proposed Final Orders, which have been considered in the preparation of this Final Order.

FINDINGS OF FACT

1. Petitioners are graduates of pharmacy schools located outside the United States.

2. Petitioners have taken the Foreign Pharmacy Graduate Equivalency Examination (FPGEE), the Test of Spoken English (TSE), and the Test of English as a Foreign Language (TOEFL), which are required by Subsection 465.997(1)(b), Florida Statutes. Petitioners obtained passing scores set by the Board at the time they took the examinations.

3. Petitioners obtained a score of 45 on the TSE, which was the score accepted by the Board prior to August 8, 2007.

4. In order to become licensed as pharmacists, the Petitioners were also required to complete certain internship requirements to obtain a number of hours of work experience as interns in Florida. The Petitioners were also required to pass two additional tests: the National Association of Pharmacy Licensure Examination (NAPLEX) and the Multistate Pharmacy Jurisprudence Examination (MPJE).

5. Petitioners met all the requirements to be issued registration as interns in Florida. Prior to August 8, 2007, the Board issued Intern Registrations to Petitioners. The Intern Registrations do not expire. Petitioners have demonstrated that they do not present a danger in that they are registered interns working under the supervision of Florida licensed pharmacists.



6. Once Petitioners were granted Intern Registrations, the Board provided a Work Activity Manual that includes a preceptor form that was to be returned to the Board. The Board approved the preceptors and sent a confirmation of approval to the preceptors.

7. In 2007, the Board amended Florida Administrative Code Rule 64B16-26.2031 (the Rule). The effective date of the Rule was August 8, 2007. Petitioners have challenged the Rule which provides:

In order for a foreign pharmacy graduate to be admitted to the professional licensure examination, the applicant must: Be a graduate of a four year undergraduate pharmacy program at a school or college outside the United States and have completed an internship program approved by the board.

(1) Be certified by the Foreign Pharmacy Graduate Examination Commission to have passed the Foreign Pharmacy Graduate Equivalency Examination, the Test of English as a Foreign Language, and the Test of Spoken English.

(2) Complete a minimum of 500 hours of supervised work activity within the State of Florida. Such experience must be equivalent to that required in the internship program as set forth in Rule 64B16-26.2032, F.A.C. The work experience program including both the preceptor and the permittee must be approved by the Board of Pharmacy. Further no program of work activity will be approved for any applicant until said applicant has been certified by FPGEE Foreign Pharmacy Graduate Examination Commission.

8. The Rule contains a requirement not existing in Section 465.007, Florida Statutes. The Rule requires that foreign pharmacy graduates be certified by the Foreign Pharmacy Graduate Examination Commission to have passed the FPGE, the TOEFL, and the TSE. The Foreign Pharmacy Graduate Examination Commission does not exist; however, the Foreign Pharmacy Graduate Examination Committee (FPGEC) does exist, and it is a certification program which operates under the auspices of the National Association of Boards of Pharmacy (NABP). To obtain FPGEC certification, an applicant must pass the FPGE, the TOEFL, and the TSE or the TOEFL internet-based test. The score for passing TSE for FPGEC certification is 50, which is a higher score than previously required by Florida Administrative Code Rule 61B16-26.2031, in effect prior to August 8, 2007.

9. FPGEC certification requires an additional expense to the pharmacy intern of over \$700.00.

10. The Board admits that it does not have specific statutory authority to require foreign pharmacy graduate applicants to obtain FPGEC certification and that the requirement enlarges or modifies the specific provisions of Section 465.007, Florida Statutes.

11. On August 1, 2008, a Notice of Rule Development for Florida Administrative Code Rule 64B16-26.2031 was published in the Florida Administrative Law Weekly. On August 21, 2008, the

Board approved proposed changes to the Rule, eliminating the FPGEC requirement, incorporating by reference the Foreign Graduate Examination Application, and stating time frames for the application of the Rule as it relates to test scores.

12. Some Petitioners filed petitions for a variance and waiver from the Rule without having an application on file. Those Petitioners' petitions for a variance were incorrectly denied for lack of standing, and some petitions were also denied on substantive grounds.

13. All Petitioners who had a Foreign Pharmacy Graduate Application for Licensure by Examination pending on August 21, 2008, have been approved to sit for the NAPLEX and the Florida version of the MPJE.

14. During all relevant time periods, the Board included on the Foreign Pharmacy Graduate Application for Licensure by Examination an instruction directing the pharmacist interns not to apply for licensure by examination until they had completed the TSE, the TOEFL or the FPGEC certification, together with all of their pharmacist internship hours.

15. The Board stated the following on the April 2008 NAPLEX examination applications:

PLEASE DO NOT COMPLETE THE FOLLOWING  
APPLICATION UNTIL YOU HAVE COMPLETED THE  
FOLLOWING:

- Complete the FPGEC® certification process with NABP®
- 2080 required intern hours (500 in Florida.)

Foreign Graduate Work Activity Manual.

16. Prior Board NAPLEX application forms contained similar statements. These include the following:

PLEASE  
DO NOT COMPLETE THIS APPLICATION  
UNTIL THE FOLLOWING HAVE BEEN  
SUBMITTED TO THE BOARD OF PHARMACY

FPGEE EXAM  
 TOEFL EXAM  
 TSE EXAM

500 REQUIRED INTERN HOURS IN FLORIDA

and

PLEASE DO NOT COMPLETE THIS APPLICATION  
UNTIL THE FOLLOWING HAVE BEEN PASSED.

FPGEE EXAM  
 TOEFL EXAM  
 TSE EXAM

PLEASE DO NOT COMPLETE THIS APPLICATION  
UNTIL THE FOLLOWING HAVE BEEN COMPLETED:

500 REQUIRED INTERN HOURS IN FLORIDA WORK  
 ACTIVITY PROGRAM

17. The Board admits that the instructions in its Foreign Pharmacy Graduate Application for Licensure by Examination (NAPLEX application) that instructed potential applicants not to apply prior to obtaining all of the required internship hours are an invalid non-rule policy.

18. During the relevant time period, the Board's website stated the following:

The work experience program including both the preceptor and the permittee must be approved by the Board of Pharmacy. Further, no program of work activity will be approved for any applicant until said applicant has been certified by FPGE (Foreign Pharmacy Graduate Examination Commission).

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. § 120.56, Fla. Stat. (2008).

20. The parties have stipulated that the Petitioners have standing to bring this rule challenge.

21. Petitioners have challenged existing Florida Administrative Code Rule 64B16-26.2031 and have 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." § 120.56(3)(a), Fla. Stat.

22. Subsection 120.052(8), Florida Statutes, defines "invalid exercise of delegated legislative authority" as follows:

"Invalid exercise of delegated legislative authority" means action that 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:

(a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;

(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.;

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

(e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or

(f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

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 enabling statute.

23. Petitioners allege that the Rule is an invalid exercise of delegated legislative authority because it "enacts and retroactively applies certain requirements that the enabling statute, Section 465.007, Florida Statutes (2007), does not require."

24. The Rule requires that foreign pharmacy graduates obtain FPGEC certification, a requirement not contained in Section 465.007, Florida Statutes, which provides:

(1) Any person desiring to be licensed as a pharmacist shall apply to the department to take the licensure examination. The department shall examine each applicant who the board certifies has:

(a) Completed the application form and remitted an examination fee set by the board not to exceed \$100 plus the actual per applicant cost to the department for purchase of portions of the examination from the National Association of Boards of Pharmacy or a similar national organization. The fees authorized under this section shall be established in sufficient amounts to cover administrative costs.

(b) Submitted satisfactory proof that she or he is not less than 18 years of age and:

1. Is a recipient of a degree from a school or college of pharmacy accredited by an accrediting agency recognized and approved by the United States Office of Education; or

2. Is a graduate of a 4-year undergraduate pharmacy program of a school or college of

pharmacy located outside the United States, has demonstrated proficiency in English by passing both the Test of English as a Foreign Language (TOEFL) and the Test of Spoken English (TSE), has passed the Foreign Pharmacy Graduate Equivalency Examination that is approved by rule of the board, and has completed a minimum of 500 hours in a supervised work activity program within this state under the supervision of a pharmacist licensed by the department, which program is approved by the board.

(c) Submitted satisfactory proof that she or he has completed an internship program approved by the board. No such board-approved program shall exceed 2,080 hours, all of which may be obtained prior to graduation.

(2) The department may permit an applicant who has satisfied all requirements of subsection (1), except those relating to age or the internship program, to take the written examination, but the passing of the examination shall confer no rights or privileges upon the applicant in connection with the practice of pharmacy in this state.

(3) Except as provided in subsection (2), the department shall issue a license to practice pharmacy to any applicant who successfully completes the examination in accordance with this section.

25. The Board concedes that Florida Administrative Code Rule 64B16-26.2031 is an invalid exercise of delegated legislative authority because it enlarges or modifies the specific provisions of Section 465.007, Florida Statutes, and has taken steps to amend the Rule to remove the requirement for FPGE



certification. Thus, Petitioners have established by a preponderance of evidence that Florida Administrative Code Rule 64B16-26.2031 is an invalid exercise of delegated legislative authority to the extent that the Rule requires FPGECC certification.

26. Subsection 120.56(4), Florida Statutes, provides that "[a]ny person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a)."

27. Petitioners have alleged that the following statements or policies are rules, which have not been adopted as rules:

(1) A decision to apply the new requirements in the Rule (which became effective on August 8, 2007), retroactively to pharmacist interns who had applied for and received their pharmacist intern licenses before August 8, 2007.

(2) A decision to apply the new requirements in the Rule (which became effective on August 8, 2007), retroactively to some pharmacist interns but not to others.

(3) Invalidating certain tests required by Section 465.007, Florida Statutes, which were taken and passed by the pharmacist intern under the Rule which was in effect at the time.

(4) Advising pharmacist interns whose internships had been previously approved that they must now present a certificate from the FPGECC showing that their internships had been approved by the FPGECC.

(5) Adopting a policy and making decisions to deny certain pharmacist interns waivers or exceptions from the application of the Rule (pursuant to Section 120.542, Florida Statutes), even though they had been granted pharmacy intern licenses prior to the effective date of the Rule, that they did not have "standing" to request a waiver or variance.

(6) Advising pharmacy interns that they were not allowed to submit an application for a pharmacist license (which is the same as applying to take the NAPLEX Examination) until they had received a FPGE Certificate, while contradictorily advising others that a waiver or variance to the Rule could not be granted because they had failed to submit an application for a pharmacist license.

(7) Advising pharmacist interns who inquired about the newly effective Rule that it was a "statutory requirement" which could not be waived (or words to that effect).

(8) Prohibiting the submission of an exam application prior to completion of all requirements for licensure.

28. Subsection 120.052(16), Florida Statutes, defines a "rule" as follows:

(16) "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:

(a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important

to the public and which have no application outside the agency issuing the memorandum.

(b) Legal memoranda or opinions issued to an agency by the Attorney General or agency legal opinions prior to their use in connection with an agency action.

(c) The preparation or modification of:

1. Agency budgets.

2. Statements, memoranda, or instructions to state agencies issued by the Chief Financial Officer or Comptroller as chief fiscal officer of the state and relating or pertaining to claims for payment submitted by state agencies to the Chief Financial Officer or Comptroller.

3. Contractual provisions reached as a result of collective bargaining.

4. Memoranda issued by the Executive Office of the Governor relating to information resources management.

29. Petitioners erroneously equate being registered as an intern as tantamount to being qualified to apply to take the licensure examination. Section 465.013, Florida Statutes, provides that the Department of Health "shall register as pharmacy interns persons certified by the board as being enrolled in an intern program at an accredited school or college of pharmacy or who are graduates of accredited schools or colleges of pharmacy and are not yet licensed in the state." Florida Administrative Code Rule 64B16-26.400 provides:

(2) An applicant for pharmacy intern registration must submit proof of:

(a) Enrollment in an intern program at an accredited college or school of pharmacy or:

(b) Graduation from an accredited college or school of pharmacy and not yet licensed in the state. For purposes of this rule only, any individual who has been accepted by the Foreign Pharmacy Graduate Examination Commission to sit for the Foreign Pharmacy Graduate Equivalency Examination shall be considered a graduate of an accredited college or school of pharmacy.

30. There is no requirement that to be registered as a pharmacy intern that the intern registrant must have taken and passed TSE, TOEFL or FPGE. If an individual has been accepted to sit for the FPGE, the individual is considered to be a graduate of an accredited college or school of pharmacy.

31. The first three statements deal with the application of the Rule to pharmacist interns. The Rule was applied to the applications filed after the date of the change in the Rule, and, had the Rule been valid, the applicants would have been required to comply with the Rule. The Petitioners have not demonstrated that the first three statements meet the definition of a rule.

32. The fourth statement challenged appears to be taken from the website information regarding approving work program activity for applicants who had not been certified by FPGE. The statement did not require that FPGE certify internships as alleged by Petitioners. Thus, Petitioners have not established that the policy or statement alleged actually existed.

33. The fifth, sixth, and seventh statements dealt with petitions for waivers or variances of the Rule. Essentially, the Board had taken the position that one who petitioned for a waiver or variance prior to submitting an application did not have standing to request a variance or waiver. This position was premised on the underlying policy that, applications could not be accepted until the applicant complied with the Rule for which the Petitioner was requesting a waiver. The Board has conceded that the underlying policy was an invalid non-rule policy. Each Petitioner who requested a variance or waiver has been given a hearing, and the variance or waiver has been granted.

34. The Board concedes that its instructions on its Foreign Pharmacy Graduate Applications for Licensure by Examination, which instructed potential applicants not to apply prior to obtaining all of the required internship hours was an invalid non-rule policy.

35. Subsection 120.56(4)(e), Florida Statutes, provides:

1. If, prior to a final hearing to determine whether all or part of any agency statement violates s. 120.54(1)(a), an agency publishes, pursuant to s. 120.54(3)(a), proposed rules that address the statement, then for purposes of this section, a presumption is created that the agency is acting expeditiously and in good faith to adopt rules that address the statement, and the agency shall be permitted to rely upon the statement or a substantially similar statement as the basis for agency action if

the statement meets the requirements of s. 120.57(1)(e).

2. If, prior to the final hearing to determine whether all or part of an agency statement violates s. 120.54(1)(a), an agency publishes a notice of rule development which addresses the statement pursuant to s. 120.54(2), or certifies that such a notice has been transmitted to the Florida Administrative Weekly for publication, then such publication shall constitute good cause for the granting of a stay of the proceedings and a continuance of the final hearing for 30 days. If the agency publishes proposed rules within this 30-day period or any extension of that period granted by an administrative law judge upon showing of good cause, then the administrative law judge shall place the case in abeyance pending the outcome of rulemaking and any proceedings involving challenges to proposed rules pursuant to subsection (2).

36. The Board has proposed rules which address the instructions in the Foreign Pharmacy Graduate Applications for Licensure by Examination, deleting the requirement that the internship hours be completed prior to the submission of an application. The Board has also proposed rules which address any retroactive application of the rules applying to the application for licensure examination. Thus, the portion of the Petitions dealing with the fifth, sixth, seventh, and eighth statements discussed above is placed in abeyance pending the outcome of the rulemaking and any proceedings involving challenges to proposed rules pursuant to Subsection 120.56(2), Florida Statutes.

37. Subsection 120.595(3), Florida Statutes, provides:

If the court or administrative law judge declares a rule or portion of a rule invalid pursuant to s. 120.56(3), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust. An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency. If the agency prevails in the proceedings, the court or administrative law judge shall award reasonable costs and reasonable attorney's fees against a party if the court or administrative law judge determines that a party participated in the proceedings for an improper purpose as defined by paragraph (1)(e). No award of attorney's fees as provided by this subsection shall exceed \$15,000.

38. Petitioners have demonstrated that they are entitled to an award of reasonable attorney's fees and costs pursuant to Subsection 120.595(3), Florida Statutes. The Board has not demonstrated that it was substantially justified in promulgating the challenged rule or that special circumstances existed to warrant the promulgation of the challenged rule. Jurisdiction is retained to determine the amount of attorney's fees to be awarded.

ORDER

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

1. The provision in Florida Administrative Code Rule 64B16-26.2031 requiring FPGECC certification is an invalid exercise of delegated legislative authority.

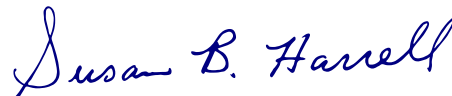
2. The agency statements identified as the first, second, third, and fourth statements are not statements which meet the definition of a rule.

3. The agency statements identified as the fifth, sixth, seventh, and eighth statements do meet the definition of a rule.

4. The portions of the Petitions dealing with the fifth, sixth, seventh, and eighth statements are placed in abeyance pending the outcome of the rulemaking process.

5. Petitioners are entitled to an award of attorney's fees and costs pursuant to Subsection 120.595(3), Florida Statutes. Jurisdiction is retained to determine the amount of fees and costs to be awarded.

DONE AND ORDERED this 16th day of October, 2008, in Tallahassee, Leon County, Florida.



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SUSAN B. HARRELL  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 16th day of October, 2008.

ENDNOTE

<sup>1/</sup> Unless otherwise indicated, all references to the Florida Statutes are to the 2007 version.

COPIES FURNISHED:

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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 one copy of a Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing