STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BARBARA M. BLANCO, Petitioner, vs. DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, REGULATORY COUNCIL OF COMMUNITY ASSOCIATION MANAGERS, Respondent.	)	Case No. 10-2905RX

FINAL ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by telephone conference call on August 23, 2010.

APPEARANCES

For Petitioner: Howard J. Hochman, Esquire
Law Offices of Howard J. Hochman
7695 Southwest 104th Street, Suite 210
Miami, Florida 33156

For Respondent: Thomas E. Dennis, Esquire
Dror Lewy, Esquire
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

The issue in this case is whether a single sentence in Florida Administrative Code Rule 61E14-2.001(5), which provides

that a licensee "shall be deemed responsible" for the misconduct of his agent, constitutes an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On May 27, 2010, Petitioner Barbara M. Blanco ("Blanco") filed with the Division of Administrative Hearings a Petition for Administrative Determination of the Invalidity of Administrative Rule. Blanco alleged that a portion of Florida Administrative Code Rule 61E14-2.001(5) (the "Control of Others Rule") is an invalid exercise of delegated legislative authority. The Control of Others Rule provides, in its entirety, as follows:

> Control of Others. A licensee shall not permit others under his or the management firm's control to commit on his or the firm's behalf, acts or omissions which, if made by either licensee, would place that licensee in violation of Chapter 455, 468, Part VIII, F.S., or Chapter 61-20, F.A.C. or other applicable statutes or rules. A licensee shall be deemed responsible by the department for the actions of all persons who perform community association management related functions under his or its supervision or control.

Fla. Admin. Code R. 61E14-2.001(5)(emphasis added.) The sentence at issue, which is underlined above, will be referred to as the "Imputed Responsibility Provision."

The Control of Others Rule was adopted by the Regulatory Council of Community Association Managers (the "Council"),

which, like a regulatory board, exists within the Department of Business and Professional Regulation (the "Department"). See § 468.4315(1), Fla. Stat. Blanco is licensed in Florida as a community association manager and thus is within the regulatory and disciplinary jurisdiction of the Council and the Department. As of this writing, Blanco is the subject of a disciplinary proceeding in which it is alleged that she personally, or her employees, committed certain disciplinable offenses. See Department of Business and Professional Regulation, Council of Community Association Managers v. Barbara M. Blanco, DOAH Case No. 10-2681PL. Blanco thus is substantially affected by the Control of Others Rule generally, and the Imputed Responsibility Provision in particular.

On June 2, 2010, the undersigned conducted a scheduling conference, at which counsel for both parties appeared by telephone. During the discussion, the parties agreed that an evidentiary hearing would not be necessary because the grounds upon which Blanco bases her contention that Rule 61E14-2.001(5) is invalid do not raise any disputed issues of material fact, but rather present questions of law. Concurring with this assessment, the undersigned directed that, in lieu of an evidentiary hearing, the parties would present their respective arguments first in writing according to a briefing schedule

prescribed by order, and later at an oral argument to be conducted by telephone, which would serve as the final hearing.

Thereafter, the parties fully briefed the issue of whether the Imputed Responsibility Provision is an invalid exercise of delegated legislative authority. Then, pursuant to notice, an oral argument was held on August 23, 2010. The parties have maintained throughout this proceeding that there are no material facts in dispute; at no time has either party urged that an evidentiary hearing be held. Having carefully considered all of the parties' respective arguments, the undersigned concludes that it is both possible and appropriate to decide the disputed legal issue on the existing record, without further supplementation. Because no evidence was offered or received, no findings of fact are set forth in this Final Order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2010 Florida Statutes.

CONCLUSIONS OF LAW

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

2. In a challenge to an existing rule, the "petitioner has [the] burden of proving by a preponderance of the evidence that

the existing rule is an invalid exercise of delegated legislative authority as to the objections raised." See § 120.56(3)(a), Fla. Stat.

3. The Fundamental Rules of Decision[1]

The starting point for determining whether an existing or proposed rule is invalid is Section 120.52(8), Florida Statutes, in which the legislature defined the term "invalid exercise of delegated legislative authority." Pertinent to this case are the following provisions:

> A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> * * *
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.; [or]
>
> (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.

§ 120.52(8), Fla. Stat.

4. As used in Section 120.52(8), the term "rulemaking authority" "means statutory language that explicitly authorizes or requires an agency to adopt, develop, establish, or otherwise create any statement coming within the definition of the term 'rule.'" § 120.52(17), Fla. Stat. The term "law implemented" is defined to mean "the language of the enabling statute being

carried out or interpreted by an agency through rulemaking." § 120.52(9), Fla. Stat.

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

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

The legislature enacted the very same restrictions on rulemaking authority in Section 120.536(1), Florida Statutes.

6. The meaning of the flush-left paragraph was the subject of a pair of influential appellate decisions, starting with Southwest Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594 (Fla. 1st DCA 2000). There, the First District Court of Appeal considered a challenge to rule provisions which

granted exemptions to certain permitting requirements based upon prior governmental approval. By statute, the agency had been delegated the power to establish exemptions, but the power was qualified: only exemptions that did not "allow significant adverse [environmental] impacts to occur" could be granted. Id. at 600.

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

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

> [T]he authority for an administrative rule is not a matter of degree. The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific *enough*. Either the enabling statute authorizes the rule at issue or it does not. [T]his question is one that must be determined on a case-by-case basis.

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

9. Because, the court found, the exemptions at issue in Manatee Club had been based "entirely on prior approval," and because, moreover, the enabling statute did "not provide specific authority for an exemption based on prior approval," the disputed rule provisions did "not implement or interpret any specific power or duty granted in the applicable enabling statute"; hence they were invalid. Id. at 600.

10. The first district revisited the flush-left paragraph of Section 120.52(8), Florida Statutes, in Bd. of Trustees of Internal Improvement Trust Fund v. Day Cruise Ass'n, 794 So. 2d 696 (Fla. 1st DCA 2001), clarified, rehr'g denied, question certified, 798 So. 2d 847 (Fla. 1st DCA 2001), rev. denied, 823 So. 2d 123 (Fla. 2002). The proposed rule under attack in that case would have forbidden the use of sovereignty submerged lands

for anchoring cruise ships engaged in carrying passengers on so-called "cruises to nowhere"——legal gambling excursions. Id. at 697. A divided court held the challenged rule to be invalid on two interrelated grounds, namely, that it (a) exceeded the agency's rulemaking authority and (b) enlarged the specific provisions of law purportedly implemented.

11. To make these determinations, the court defined the specific power that the agency had exercised as being the authority to "prohibit[] the use of sovereignty submerged lands on account of lawful [gambling] activities on board ships at sea which have no physical or environmental effect on sovereignty submerged lands or adjacent waters." 794 So. 2d at 702. To this the court added:

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

Id.

12. Upon examining the statutory grant of rulemaking authority applicable specifically to sovereignty submerged lands, the court concluded that a provision in the grant which prohibited regulations that "interfere with commerce" qualified

the agency's power "in ways that are incompatible with the adoption of the proposed rule." Id. at 702. Thus the proposed rule was outside the agency's rulemaking authority.

13. The court next looked at the broad constitutional grant of authority to the agency to acquire, administer, manage, control, supervise, conserve, protect, and dispose of state lands, including the sovereignty submerged lands. Id. at 703. It found that "[n]one of the cited constitutional or statutory provisions makes reference to, much less gives specific instructions on the treatment of, the 'day cruise industry' or contains any other specific directive that would provide the support for the proposed rule that the [law] now requires." Id. Driving this point home, the court continued that, despite the breadth of the general language contained in the state constitution,

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

> based on lawful activities occurring outside Florida's territorial jurisdiction.

Id. at 703-04 (footnote omitted).

14. The court concluded, "In the absence of a specific power or duty" which would enable or require "the [agency] to regulate cruises to nowhere or to regulate gambling or to regulate on the basis of activities occurring aboard vessels after they leave sovereignty submerged lands and adjacent waters, the [agency's] proposed rule exceeds the [agency's] rulemaking authority and is an invalid exercise of delegated legislative authority as defined in section 120.52(8)(c)." Id. at 704 (footnote omitted).

15. The Council's Rulemaking Authority

Blanco complains that the Imputed Responsibility Provision is not within the scope of the Department's rulemaking power. The threshold question for determination is whether the Council has been delegated the power to make rules. This issue will rarely be disputed since most agencies have been granted general rulemaking powers. See Day Cruise, 794 So. 2d at 702 (general power to adopt rules "normally should be of little interest" because almost all agencies have been given that).

16. The grant of rulemaking authority for the Control of Others Rule is Section 468.4315(2), Florida Statutes, which provides as follows:

> The council may adopt rules relating to the licensure examination, continuing education requirements, continuing education providers, fees, and professional practice standards to assist the department in carrying out the duties and authorities conferred upon the department by this part.

(Emphasis added.) The Control of Others Rule prescribes a standard of professional conduct. Thus, Section 468.4315(2) provides the requisite general authority for the Control of Others Rule.

17. Having determined that the Council has the necessary grant of rulemaking authority, the next question is: What is the specific power or specific duty that the agency has implemented or interpreted through the Imputed Responsibility Provision? In answering this question, it is helpful to identify and describe what it is that the challenged rule does. In this case, the disputed rule provision subjects a licensee to punishment for allowing someone under his supervision or control (an agent) to commit a disciplinable offense, based solely on the fact that the agent committed the offense.

18. A law which requires the finding of an ultimate fact (e.g., the licensee permitted his agent's actions) based on proof of particular predicate facts (the agent's actions) is called an evidentiary presumption. As one court explained,

> [a] presumption is typically an evidentiary tool which compels a trier of fact to find the truth of an ultimate fact which is only

> supported circumstantially by evidence of predicate facts and which is not satisfactorily rebutted by the opposing party's evidence. . . . Similar to an inference, in terms of logical analysis, if the predicate fact of a presumption is true, then the ultimate fact is also presumed to be true; if A, then B.

Tomlinson v. Department of Health & Rehabilitative Services, 558 So. 2d 62, 66 (Fla. 2d DCA 1990)(citations omitted).

19. In Tomlinson, the court examined a rule pursuant to which a state employee could be deemed to have abandoned his position——and hence to have resigned from the Career Service. The rule provided in pertinent part that "'[a]n employee who is absent without authorized leave for 3 consecutive work days shall be deemed to have abandoned the position and to have resigned from the Career Service.'" Id. at 64. The court concluded that this "constructive abandonment regulation" was a "rebuttable presumption." Id. at 63. The court expressed reservations about whether the agency had the "authority to promulgate this regulatory presumption," id. at 66, but declined to resolve the issue because the appellant had neither raised nor preserved it for review, id. at 65.

20. The Imputed Responsibility Provision is indistinguishable, in its operation, from the constructive abandonment regulation discussed in Tomlinson. Under the Imputed Responsibility Provision, a licensee whose agent commits

a disciplinable act shall be deemed to have permitted the agent's act and to have violated the Control of Others Rule. Therefore, the challenged rule provision is an evidentiary presumption, just as was the "constructive abandonment regulation." Because the Imputed Responsibility Provision is a presumption, the specific power that the Council exercised in promulgating this rule is the power to adopt a legal presumption.

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

22. The Control of Others Rule cites two statutes as comprising the "law implemented": Sections 468.433 and 468.436, Florida Statutes. The first of these statutes deals with licensure by examination and plainly does not give the Council the power to adopt the Imputed Responsibility Provision, as the Department itself concedes. The second relates to disciplinary proceedings and provides in pertinent part as follows:

> (2) The following acts constitute grounds for which the disciplinary actions in subsection (4) may be taken:
> (a) Violation of any provision of s. 455.227(1).
> (b)
> 1. Violation of any provision of this part.
> 2. Violation of any lawful order or rule rendered or adopted by the department or the council.
> 3. Being convicted of or pleading nolo contendere to a felony in any court in the United States.
> 4. Obtaining a license or certification or any other order, ruling, or authorization by means of fraud, misrepresentation, or concealment of material facts.
> 5. Committing acts of gross misconduct or gross negligence in connection with the profession.
> 6. Contracting, on behalf of an association, with any entity in which the licensee has a financial interest that is not disclosed.
> (3) The council shall specify by rule the acts or omissions that constitute a violation of subsection (2).

(Emphasis added.)

23. Section 455.227(1), Florida Statutes, which is incorporated by reference in Section 468.436(2)(a), Florida Statutes, provides as follows:

> (1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:
> (a) Making misleading, deceptive, or fraudulent representations in or related to the practice of the licensee's profession.
> (b) Intentionally violating any rule adopted by the board or the department, as appropriate.
> (c) Being convicted or found guilty of, or entering a plea of guilty or nolo contendere

to, regardless of adjudication, a crime in any jurisdiction which relates to the practice of, or the ability to practice, a licensee's profession.
(d) Using a Class III or a Class IV laser device or product, as defined by federal regulations, without having complied with the rules adopted pursuant to s. 501.122(2) governing the registration of such devices.
(e) Failing to comply with the educational course requirements for human immunodeficiency virus and acquired immune deficiency syndrome.
(f) Having a license or the authority to practice the regulated profession revoked, suspended, or otherwise acted against, including the denial of licensure, by the licensing authority of any jurisdiction, including its agencies or subdivisions, for a violation that would constitute a violation under Florida law. The licensing authority's acceptance of a relinquishment of licensure, stipulation, consent order, or other settlement, offered in response to or in anticipation of the filing of charges against the license, shall be construed as action against the license.
(g) Having been found liable in a civil proceeding for knowingly filing a false report or complaint with the department against another licensee.
(h) Attempting to obtain, obtaining, or renewing a license to practice a profession by bribery, by fraudulent misrepresentation, or through an error of the department or the board.
(i) Failing to report to the department any person who the licensee knows is in violation of this chapter, the chapter regulating the alleged violator, or the rules of the department or the board.
(j) Aiding, assisting, procuring, employing, or advising any unlicensed person or entity to practice a profession contrary to this chapter, the chapter regulating the profession, or the rules of the department or the board.

(k) Failing to perform any statutory or legal obligation placed upon a licensee.
(l) Making or filing a report which the licensee knows to be false, intentionally or negligently failing to file a report or record required by state or federal law, or willfully impeding or obstructing another person to do so. Such reports or records shall include only those that are signed in the capacity of a licensee.
(m) Making deceptive, untrue, or fraudulent representations in or related to the practice of a profession or employing a trick or scheme in or related to the practice of a profession.
(n) Exercising influence on the patient or client for the purpose of financial gain of the licensee or a third party.
(o) Practicing or offering to practice beyond the scope permitted by law or accepting and performing professional responsibilities the licensee knows, or has reason to know, the licensee is not competent to perform.
(p) Delegating or contracting for the performance of professional responsibilities by a person when the licensee delegating or contracting for performance of such responsibilities knows, or has reason to know, such person is not qualified by training, experience, and authorization when required to perform them.
(q) Violating any provision of this chapter, the applicable professional practice act, a rule of the department or the board, or a lawful order of the department or the board, or failing to comply with a lawfully issued subpoena of the department.
(r) Improperly interfering with an investigation or inspection authorized by statute, or with any disciplinary proceeding.
(s) Failing to comply with the educational course requirements for domestic violence.
(t) Failing to report in writing to the board or, if there is no board, to the

> department within 30 days after the licensee is convicted or found guilty of, or entered a plea of nolo contendere or guilty to, regardless of adjudication, a crime in any jurisdiction. A licensee must report a conviction, finding of guilt, plea, or adjudication entered before the effective date of this paragraph within 30 days after the effective date of this paragraph.
> (u) Termination from a treatment program for impaired practitioners as described in s. 456.076 for failure to comply, without good cause, with the terms of the monitoring or treatment contract entered into by the licensee or failing to successfully complete a drug or alcohol treatment program.

(Emphasis added.)

24. In reviewing the foregoing statutes to determine whether they contain a specific grant of legislative authority for the Imputed Responsibility Provision, the undersigned is mindful that "presumptions arise as a matter of law, and the power to establish them is reserved solely to the courts and the legislature." B.R. v. Department of Health & Rehabilitative Services, 558 So. 2d 1027, 1029 (Fla. 2d DCA 1989)(agency policy requiring finding of child abuse if bruises remained visible for at least 24 hours was unauthorized and unconstitutional). Thus, "[a]n agency of the executive branch of our government has no authority to formulate an evidentiary presumption." Id.

25. In Little v. Department of Labor & Employment Sec., 652 So. 2d 927, 928 (Fla. 1st DCA 1995), the First District Court of Appeal held that the constructive abandonment

regulation, which had troubled the court in Tomlinson, could not be applied. The court reasoned as follows. First, an "agency lacks implied or inherent power to fashion, adopt, or apply a legal presumption for application in an administrative proceeding in the absence of specific authority in a statute or the constitution." Id. Second, there was "no specific statutory or constitutional authority for the presumption" at issue. Id. Consequently, the court found, the presumption was *ultra vires* and hence "impermissible." Id.; see also McDonald v. Department of Professional Regulation, Bd. of Pilot Comm'rs, 582 So. 2d 660, 664 (Fla. 1st DCA 1991)("Under the principle of strict construction applicable to disciplinary statutes and [because "there is no authority under Florida law for an agency to adopt and apply a legal presumption in the absence of specific legislative authorization by the legislature"], it follows that without any provision for a legal presumption in the disciplinary statutes, the agency lacks authority to adopt a legal presumption that effectively relieves it of having to prove specific acts of misconduct and shifts the burden of proving innocence to the licensee.").

26. The undersigned finds no grant of authority in the statutes behind the Control of Others Rule that empowers the Council to adopt a presumption which lifts from the Department the burden of proving that the licensee in fact permitted his

agent to commit a disciplinable offense and thereby shifts to the licensee the burden of disproving that such permission was given. It is concluded, therefore, that the Imputed Responsibility Provision does not implement a specific power or duty delegated by the enabling statutes.

27. Because the Imputed Responsibility Provision does not meet the criteria specified in the flush-left paragraph, the Council has exceeded its grant of rulemaking authority. It follows that the presumption at issue is an invalid exercise of delegated legislative authority. § 120.52(8)(b), Fla. Stat.

28. Whether the Rule Enlarges the Law Implemented

Blanco contends that the Imputed Responsibility Provision enlarges the statutory grounds for imposing discipline by making a licensee vicariously liable for the acts of another. The undersigned agrees.

29. The foundational principle is that disciplinary statutes such as those behind the Control of Others Rule are penal in nature and therefore must be strictly construed against the enforcing authority. See, e.g., McDonald, 582 So. 2d at 664. From this it follows that

> without a clear, unambiguous provision in the statute indicating legislative intent to hold the licensee responsible for the negligent or wrongful acts committed by another, the administrative agency is not

> authorized to extend the effect of the statute.

Id. at 669 (Zehmer, J., specially concurring).

30. To subject a licensee to discipline based on another's misconduct, an "unambiguous [statutory] provision" would need to be exceptionally clear with regard to the legislative intent; merely authorizing the imposition of penalties for an agent's violation of law is insufficient. For example, Section 569.29(1)(a), Florida Statutes, explicitly provides authority to discipline a liquor licensee upon a finding of a "[v]iolation by the licensee or his or her or its agents, officers, servants, or employees . . . of any of the laws . . . in regard to . . . alcoholic beverages . . . ." (Emphasis added.) Although a "literal reading of [the statute] would indicate that a liquor licensee is under the onus of suspension or revocation of his license for any violation of law committed by his employees on the premises, irrespective of his own personal fault in connection therewith," Pic N' Save Central Fla., Inc. v. Department of Business Regulation, Div. of Alcoholic Beverages & Tobacco, 601 So. 2d 245, 251 (Fla. 1st DCA 1992), the courts consistently have declined to read Section 561.29(1)(a) as a warrant for imposing discipline under the *respondeat superior* doctrine. See, e.g., id. at 249-56; Brother J. Inc. v. Dep't of

Bus. and Prof. Regulation, Div. of Alcoholic Bevs. & Tobacco, 962 So. 2d 1037 (Fla. 1st DCA 2007).

31. Under Section 569.29(1)(a) as judicially construed, the prosecuting agency must clearly and convincingly prove misconduct personal to the licensee to suspend or revoke his beverage license. Pic N' Save, 601 So. 2d at 249-56. This means that a liquor licensee cannot be punished unless it is shown that he personally committed, or is personally culpable for, a disciplinable offense. Personal culpability attaches, for example, when a licensee knows, or should know, about the misconduct of his employees; negligently fails to train or supervise employees; negligently overlooks, condones, or fosters the wrongdoing of employees; or fails to exercise due diligence in preventing misconduct. Id. at 250.

32. The undersigned finds nothing in the applicable disciplinary statutes which unambiguously expresses a legislative intent to hold a community association manager responsible, in the absence of personal culpability on the part of the licensee, for the negligent or wrongful acts committed by another.[2] To the contrary, in defining offenses for which a licensee might be disciplined as a result of someone else's misconduct, the provisions of law being implemented through the Control of Others Rule make clear that the licensee must be personally culpable for responsibility to attach. See, e.g.,

§ 455.227(1)(j), Fla. Stat. (defining the offense of "aiding, assisting, procuring, employing, or advising any unlicensed person" to engage in unlawful practices); § 455.227(1)(p), Fla. Stat. (making it an offense to delegate professional responsibilities to, or to enter into a contract with, a person whom the licensee "knows, or has reason to know," is unqualified).

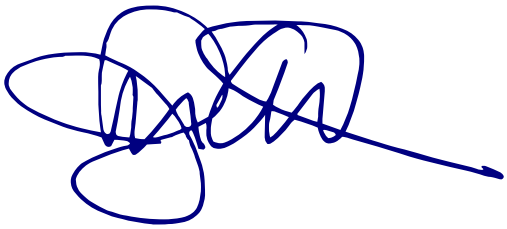
33. The Imputed Responsibility Provision impermissibly extends the effect of the relevant disciplinary statutes. It is, therefore, an invalid exercise of delegated legislative authority pursuant to Section 120.52(8)(c), Fla. Stat.

34. Having determined that a portion of Florida Administrative Code Rule 61E14-2.001 is invalid, the undersigned is required, pursuant to Section 120.595(3), Florida Statutes, to award Blanco reasonable costs and reasonable attorney's fees (up to $50,000), unless the Department "demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust." If Blanco timely requests such relief, the undersigned will conduct further proceedings to determine whether such an award must be made, and if so in what amount.

ORDER

Based on the foregoing Conclusions of Law, it is ORDERED that the Imputed Responsibility Provision which comprises the second sentence of Florida Administrative Code Rule 61E14-2.001(5) is an invalid exercise of delegated legislative authority. It is further ORDERED that Blanco shall have 30 days from the date of this Final Order within which to file a motion for attorney's fees and costs, to which motion (if filed) Blanco shall attach appropriate affidavits (e.g. attesting to the reasonableness of the fees) and essential documentation in support of the claim, such as time sheets, bills, and receipts.

DONE AND ORDERED this 21st day of September, 2010, in Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
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 21st day of September, 2010.

ENDNOTES

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

[2]/ Indeed, the relevant statutes do not even contain a provision analogous to that of § 569.29(1)(a), Fla. Stat., which, despite being seemingly unambiguous with regard to the power to impose vicarious liability on a licensee, has been found consistently *not* to have such an effect.

COPIES FURNISHED:

Howard J. Hochman, Esquire
Law Offices of Howard J. Hochman
7695 Southwest 104th Street, Suite 210
Miami, Florida 33156

Thomas E. Dennis, Esquire
Dror Lewy, Esquire
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399

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

Anthony B. Spivey, Executive Director
Regulatory Council of Community
Association of Managers
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

F. Scott Boyd, Executive Director
Joint Administrative Procedure Committee
120 Holland Building
Tallahassee, Florida 32399-1300

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.