STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CATHERINE ANNE WALTON, D.C., AND
THE SOCIETY FOR CLINICAL AND
MEDICAL HAIR REMOVAL, INC.,

Petitioners,

vs. Case No. 15-0002RX

BOARD OF MEDICINE,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on February 3, 2015, by video-teleconference in Tallahassee and Tampa, Florida, before June C. McKinney, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: Jon M. Pellett, Esquire
Debra M. Metzler, Esquire
Barr, Murman & Tonelli, P.A.
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Tampa, Florida 33602

For Respondent: Edward A. Tellechea, Esquire
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The Capitol, Plaza Level 01
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STATEMENT OF THE ISSUES

1. Whether Florida Administrative Code Rules 64B8-50.003(2) and 64B8-56.002(2)(a) are invalid exercises of delegated legislative authority in violation of section 120.52(8), Florida Statutes (2014).

2. Whether the following four statements are unadopted rules as defined by section 120.52(20):

> (i.) The Electrolysis Council is a *de facto* party to a petition *for declaratory statement filed with the Board of Medicine* concerning the practice of electrology and need not intervene in the proceeding before the Board when considering rules and statutes related to the practice of electrology;
>
> (ii.) The Electrolysis Council is a *de facto* party to a petition to adopt, amend, or repeal an agency rule filed with the Board of Medicine concerning the practice of electrology and need not intervene in the proceeding before the Board when the rules concern the practice of electrology;
>
> (iii.) No additional materials can be submitted to the Board of Medicine prior to the meeting of the full Board for consideration of a draft order on a petition for declaratory statement; and
>
> (iv.) The Board of Medicine will not consider any materials submitted for consideration within 48 hours of a full Board of Medicine meeting unless the Board Chair allows their distribution to the members.

PRELIMINARY STATEMENT

This rule challenge proceeding was initiated on January 5, 2015, when Petitioners Catherine Walton, D.C. ("Walton"), and the

Society for Clinical and Medical Hair Removal ("SCMHR" or "Society")(collectively "Petitioners") filed a "Petition for Determination of Invalidity of Existing Administrative Rules 64B8-50.003(2) and 64B8-56.002(2)(a), Florida Administrative Code, and Non-Rule Policy" ("Petition") with the Division of Administrative Hearings.

The Petitioners challenge rule 64B8-50.003 as an invalid exercise of delegated legislative authority, which exceeds the grant of rulemaking authority provided to the Board of Medicine. Petitioners contest the rule requiring "petitions for declaratory statements" and "petitions to adopt, amend, or repeal rules" for matters related to the practice of electrology filed with the Board of Medicine first be considered by the Electrolysis Council for their consideration and recommendations. In the Petition, Petitioners also challenge rule 64B8-56.002(2)(a) as an invalid exercise of delegated legislative authority that exceeds its grant of rulemaking authority. Petitioners further assert that four statements are unadopted rules as defined by section 120.52(20).

On January 7, 2015, a Notice of Hearing was issued scheduling the hearing for February 3, 2015, in Tallahassee, Florida. On the same date, an Order of Prehearing Instructions was issued directing the parties to file a pre-hearing stipulation. A joint pre-hearing statement was filed by the

parties on January 30, 2015, which contains a stipulation regarding agreed-upon facts that, where relevant, have been incorporated in the Findings of Fact below.

The final hearing was held as scheduled by video-teleconference on February 3, 2015, with one site of the hearing in Tampa and the other in Tallahassee, Florida. At the hearing, the undersigned granted Petitioners' request for official recognition without objection. The Petitioners presented the testimonies of the following witnesses: Allen Hall, Executive Director of the Florida Electrolysis Council; Crystal Sanford, Program Administrator for the Board of Medicine; Catherine Walton, D.C.; William Allen Moore, President of SCMHR; Allison Dudley, former Executive Director for the Board (via deposition--Exhibit X); and Joy Tootle, Consumer Member of the Board (via late-filed deposition--Exhibit VV). Petitioners offered Exhibits A through VV that were admitted at the hearing without objection.

Respondent presented the testimony of Allen Hall, Crystal Sanford, William Moore, Catherine Walton, and Joy Tootle (via late-filed deposition--Exhibit VV). Respondent offered Exhibits 1 through 8 that were received into evidence without objection.

On February 18, 2015, Petitioners gave notice of filing late Exhibit VV and included a late-filed attachment to the February 5, 2015, deposition.

Post hearing, the parties jointly moved to supplement additional stipulated facts, which the undersigned granted on February 19, 2015.

The parties were each given 15 days from the date of filing the transcript to file proposed final orders, written arguments, and closing statements. On February 16, 2015, the Transcript was filed. The parties' Proposed Final Orders were timely filed and have been considered in the preparation of this Final Order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2014 Florida Statutes.

FINDINGS OF FACT

1. SCMHR is an international non-profit organization with members that include persons licensed as electrologists in the State of Florida. There are currently 177 certified electrologists in the State of Florida who are also members of SCMHR.

2. SCMHR supports all methods of hair removal and is dedicated to the research of new technology that will keep its members at the pinnacle of their profession, offering safe, effective hair removal to their clients.

3. SCMHR advocates for its members. SCMHR also serves the public by providing information on the newest technology in hair removal. SCMHR offers the only national certification for electrologists to gauge and/or show their knowledge of

electrology including the use of laser and light-based devices for hair removal and reduction.

4. SCMHR offers four certifications to qualified practitioners. Pertinent to its Petition for electrologists licensed in Florida, there are two certifications: (1) the "Certified Clinical Electrologist" ("CCE"), for those electrologists using the needle modality in hair removal and reduction; and (2) the next certification, to which the CCE is a prerequisite, the "Certified Medical Electrologist" ("CME"), for those using laser and light-based devices for hair removal and reduction. SCMHR also offers two other certifications: "Certified Laser Hair Removal Professional" ("CLHRP") and the "Certified Pulse Light Hair Removal Professional" ("CPLHRP"). Both of these certifications are designed for allied health practitioners; including physicians, nurses, electrologists and others authorized in the jurisdiction where they reside to practice either laser or light-based hair removal. These certifications are for practitioners who may not personally practice electrology using needle hair removal modalities or who may practice in jurisdictions where an electrology license is not required to use the lasers or light-based devices.

5. An individual electrologist is not required to be a member of the Society in order to obtain certification or maintain certification. Membership in the Society is voluntary.

6. As of December 4, 2014, there were 954 electrologists who hold certification through the Society but are not members of the Society. One hundred and forty-six of the Florida electrologists who are members of the Society hold CCE/CME certification.

7. Members of the Society who are licensed in Florida who wish to use laser and light-based devices in their practices must comply with rule 64B8-56.002.

8. As an organization that advocates for its members, the Society will from time to time seek guidance on the rules and regulations affecting the practice of electrology for its members. It will also seek to lobby on behalf of its members' interests.

9. Petitioner Walton is a Florida licensed chiropractic physician, a licensed practical nurse, a licensed massage therapist, and a licensed electrologist under the provisions of chapters 456, 460, 464, 478, and 480, Florida Statutes. Walton was issued License Number EO2363. She is a CME/CCE and holds a current certificate with the Society. She is also a member of the Society.

10. As part of her electrology training, Walton asserts that she took the 30-hour course in laser and light-based hair removal set forth in rule 64B8-56.002(2)(a) and completed the course on or about October 25, 2011. She claims, however, to be

uncertain as to whether she has to take the aforementioned 30-hour course again despite the fact that no one from the Council or the Board has ever told her, verbally or in writing, that she has to take the course again, nor has she attempted to ask anyone from the Council or the Board if she has to take the course again. Council staff routinely advises callers that the 30-hour course in laser and light-based hair removal only has to be taken once.

11. As of the date of the hearing, Walton had neither performed permanent hair removal on any person with an epilator or laser, did not possess a hair reduction laser, nor did she have any electrology clients. She also did not have immediate plans to perform such services.

12. Respondent is the Board of Medicine ("Board"). The Electrolysis Council ("Council") is statutorily created by chapter 478 under the Board. Council members are appointed by the Board.

13. On March 5, 2014, the Society filed a Petition for Declaratory Statement with the Board on behalf of its membership and pursuant to section 120.565. It was scheduled to be heard by the Board at their meeting scheduled for April 4, 2014.

14. On March 6, 2014, the Society filed an Amended Petition for Declaratory Statement with the Board.

15. At the Board's meeting of April 4, 2014, the Board took up both the March 5, 2014, Petition for Declaratory Statement and the March 6, 2014, Amended Petition for Declaratory Statement. The Board determined that pursuant to its rule 64B8-50.003(2), the Petition for Declaratory Statement could not be heard at its meeting. Instead, the Board decided that pursuant to Board rule, the petition should have been first presented to the Council for its recommendation on the petition. Consequently, the Society withdrew its request.

16. On April 29, 2014, the Society filed its Petition for Declaratory Statement with the Board along with a Petition for Variance or Waiver of rule 64B8-50.003(2) that were both copied to the Council.

17. On June 6, 2014, at the Board meeting, the Board considered SCMHR's Petition for Variance or Waiver and denied SCMHR's request. At the same meeting, the Board then declined to hear the April 29, 2014, Petition for Declaratory Statement relying on its rule 64B8-50.003(2), and referred the Petition for Declaratory Statement to the Council for consideration and recommendations.

18. The Council considered the April 29, 2014, Petition for Declaratory Statement at its meeting of July 7, 2014.

19. Assistant Attorney General Marlene Stern ("Stern"), who appeared on behalf of the Council, attended the April 3-4, 2014;

June 6, 2014; August 1, 2014; and October 10, 2014, meetings of the Board and the April 14, 2014, and July 7, 2014, meetings of the Council where the Petition for Declaratory Statement was either considered or discussed by the Board or Council.

20. At the August 1, 2014, Board meeting, the Council's attorney, Stern, at the direction of the Council provided the Council's recommendation to the Board verbally in person. The Board ruled on the Society's April 29, 2014, Petition for Declaratory Statement and directed Board counsel to draft a final order reflecting the Board's decision, which was to be presented for approval at the Board's October 2014 meeting.

21. On August 4, 2014, SCMHR filed a request for it to be permitted to withdraw the request for declaratory statement, which Board staff failed in error to include in the original meeting materials for October 10, 2014.

22. On September 24, 2014, SCMHR submitted via electronic correspondence additional materials for consideration by the Board at its October 10, 2014, meeting.

23. The same day, Board staff placed the additional information SCMHR submitted into the addendum materials for consideration by the Board at their meeting of October 10, 2014. The materials included the transcript of the April 3, 2014, Rules and Legislative Committee discussion regarding electrolysis rules and the issue of certification by SCMHR.

24. Crystal Sanford ("Sanford"), the Board's Program Operations Administrator, who works in the Board's office is responsible for preparing and coordinating the agenda materials. Sanford follows the time frame for website electronic agenda deadlines of seven days before the board meeting as set forth in section 120.525(2). If materials are received after the deadline, the protocol is to submit the request to the Board counsel for a recommendation and then to the Board Chair for a determination as to whether the materials should be placed on the agenda and disseminated to the Board members.

25. On October 3, 2014, SCMHR submitted via electronic correspondence more materials for consideration by the Board consisting of a letter from an insurance carrier and a journal article on laser claims.

26. On October 6, 2014, SCMHR sent the Board Staff office another request to withdraw the Petition for Declaratory Statement by electronic correspondence after being informed that the original request provided on August 4, 2014, was not included in the materials.

27. For the October 10, 2014, Board meeting, on the recommendation of Board Counsel and the Chair's decision, SCMHR's materials submitted on October 3, 2014, were not disseminated to the members of the Board for consideration because the Board had already ruled on the Society's Petition for Declaratory Statement

on August 1, 2014, and the record was closed on that matter. The draft order was being presented to the Board for approval as previously instructed.

28. At the October 10, 2014, Board meeting, the Board considered SCMHR's request to withdraw the Petition for Declaratory Statement and denied the request. The Board also denied the request by SCMHR to table consideration of the draft order, and then approved the draft order on the Petition for Declaratory Statement.

29. At or prior to the Board's October 10, 2014, meeting, the Society did not submit either a written or an ore tenus motion seeking rehearing or reconsideration of the Board's August 1, 2014, ruling on the Petition for Declaratory Statement.

30. At the October 10, 2014, Board meeting, the Board also had a lengthy discussion about materials regarding PRN and certification being difficult to review and prepare because of last-minute submissions. The Board voted to preclude the submission of additional Board materials submitted within 48 hours prior to the Board meeting. However, if submissions come in within 48 hours, Sanford still checks with the Chair to determine whether to distribute the late-submitted materials.

31. The Order on the Petition for Declaratory Statement was filed on October 20, 2014, and SCMHR took a timely appeal of that Order.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.56, 120.569 and 120.57(1), Florida Statutes.

33. Petitioners challenge rules 64B8-50.003(2) and 64B8-56.002(2)(a) as "invalid exercise[s] of delegated legislative authority" contrary to section 120.52(8), which provides in pertinent part:

> (8) "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.

34. Petitioners have "the burden of proving by a preponderance of the evidence that the existing rule[s are] an invalid exercise of delegated legislative authority as to the objections raise[d]." § 120.56(3)(a), Fla. Stat. The standard of review is de novo. § 120.56(1)(e), Fla. Stat.

Standing

35. No dispute exists that Walton and the Society have standing to challenge rule 64B8-50.003(2)

36. No dispute exists that SCMHR has standing to challenge rule 64B8-56.002(2)(a). However, Respondent disputes Walton has standing to challenge rule 64B8-56.002(2)(a).

37. Section 120.56(1)(a) establishes the test for standing in a rule challenge and states in pertinent part:

> a. Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.

38. The "substantially affected" test in section 120.56 is a two-part test: Petitioner must establish that (1) the agency statement will result in a real or immediate injury in fact; and (2) the asserted interest is arguably within the "zone of interest" intended to be protected or regulated by the statutory scheme at issue. Jacoby v. Fla. Bd. of Med., 917 So. 2d 358, 360 (Fla. 1st DCA 2005).

39. In order to establish standing, Walton must show that she will suffer a real or immediate injury in fact. The requisite injury must be injury in fact and cannot be based on speculation or conjecture. Office of Ins. Reg. and Fin. Servs. Comm. v. Secure Enterprises, LLC., 124 So 3d. 332, 336 (Fla 1st DCA 2013.)

40. Walton's claim that she is unsure whether she must repeat the 30-hour course that she has already successfully

completed even though no one from the Council or Board has informed her verbally or in writing that she has to retake the course is speculative. Moreover, Walton has not even inquired to clarify her uncertainty. Even though Walton, a licensee, is in the zone of interest to be protected and regulated, Walton has failed to demonstrate she is suffering any immediate impact because of the rule. Thus, at this time, Walton's alleged "injury," which is based on nothing more than speculation and conjecture, does not meet the "substantially affected" threshold and Walton does not have standing to challenge rule 64B8-56.002(2)(a).

Florida Administrative Code Rule 64B8-50.003(2)

41. Petitioners claim that rule 64B8-50.003(2) is an invalid exercise of delegated legislative authority in violation of section 120.52(8) on two grounds.

42. Rule 64B8-50.003(2) provides in pertinent part:

> (2) Rulemaking proposals, petitions for declaratory statement and petitions to adopt, amend or repeal rules, which relate to the practice of electrology shall first be presented to the Council. The Council shall consider the matter and make recommendations to the Board as to the appropriate action to be taken.

43. Rule 64B8-50.003(2) lists specific authority as section 478.43(1) and the law implemented as section 478.43(3). Section 478.43 provides in pertinent part:

> (1) The board, with the assistance of the Electrolysis Council, is authorized to establish minimum standards for the delivery of electrolysis services and to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this chapter.
>
> * * *
>
> (3) The board may delegate such powers and duties to the council as it may deem proper.

44. Petitioners first challenge the section of the rule "petitions for declaratory statement." Petitioners contend that the challenged section is invalid because there is no specific law that authorizes the Board to delegate to the Council the authority to first consider petitions for declaratory statement and make a recommendation to the Board prior to the Board making a final determination. Petitioners further assert the Legislature did not authorize the Board to add a layer to the declaratory statement statutory process set forth in section 120.565.

45. Section 120.565 states in pertinent part:

> (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.
> (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

> (3) The agency shall give notice of the filing of each petition in the next available issue of the Florida Administrative Register and transmit copies of each petition to the committee. The agency shall issue a declaratory statement or deny the petition within 90 days after the filing of the petition. The declaratory statement or denial of the petition shall be noticed in the next available issue of the Florida Administrative Register. Agency disposition of petitions shall be final agency action.

46. Second, Petitioners challenge the section of rule 64B8-50.003 "petitions to adopt, amend, or repeal rules." Petitioners contend that no authority exists for the Board to create separate rules of procedure in rule 64B8-50.003(2) for rulemaking and by setting up a Council recommendation the procedure is outside of sections 120.54 and 120.536. Petitioners also assert the Board does not have specific authority to delegate to the Council first consideration of petitions to adopt, amend or repeal rules for matters related to the practice of electrology.

47. Respondent counters that the Legislature has allowed the Board to delegate its powers and duties under chapter 478 to the Council so that both entities can carry out their shared regulatory responsibilities. Section 478.43(1) and (3) together provide the requisite specific grant of legislative authority for rule 64B8-50.003(2).

48. The Administrative Procedures Act ("Act") provides that "[a]n agency may adopt only rules that implement or interpret the

specific powers and duties granted by the enabling statute." § 120.52(8), Fla. Stat. However, as used in the Act, the term "specific" is not a synonym for "detailed." See SW Fla. Water Mgmt. Dist. v. Save the Manatee Club Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000). "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*." Smith v. Dep't of Corr., 920 So. 2d 638, 641 (Fla. 1st DCA 2005)(quoting Save the Manatee Club, 773 So. 2d 594 (Fla. 1st DCA 2000)).

49. "If the enabling statute had to be as detailed as the rules themselves, the point of rulemaking would be defeated entirely." Consolidated-Tomoka Land Co. v. Dep't of Bus. and Prof'l Reg., 717 So. 2d 72 (Fla. 1st DCA 1998).

50. The Legislature statutorily created the Council under the Board and designated them as collaborative bodies so that the Council may provide the subject matter expertise for electrology. Section 478.43(1) constructs the two tiered system and mandates the Board, "with the assistance of the Electrolysis Council," do certain things including "adopt rules pursuant to ss. 120.536(1) and 120.54."

51. Section 120.536(1) provides in pertinent part:

> (1) 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.

52. Section 120.54(7)(a) provides in pertinent part:

> (a) Any person regulated by an agency or having substantial interest in an agency rule may petition an agency to adopt, amend, or repeal a rule or to provide the minimum public information required by this chapter. The petition shall specify the proposed rule and action requested. Not later than 30 calendar days following the date of filing a petition, the agency shall initiate rulemaking proceedings under this chapter, otherwise comply with the requested action, or deny the petition with a written statement of its reasons for the denial.

53. Section 478.43(1) contains the specific grant of legislative authority for the Board to "adopt rules" "with the assistance of the Electrolysis Council." The Legislature did not limit the Board to any particular method for adopting rules in the enabling statute. In fact, the portion of the challenged rule "petitions to adopt, amend or repeal rules" mirrors the language in section 120.54(7)(a). Accordingly, the

aforementioned section of the challenged rule 64B8-50.003(2) is a valid exercise of legislative authority.

54. However, the Legislature did not explicitly authorize the Board to consult the Council regarding petitions for declaratory statement. Applying the test of Save the Manatee, there is simply no language within the text of section 478.43(1) which suggests a "specific grant of legislative authority for the rule." Therefore, the language contained in rule 64B8-50.003(2), which states "petitions for declaratory statement," impermissibly exceeds the authority granted under the enabling statute, and is an invalid exercise of legislative authority.

Florida Administrative Code Rule 64B8-56.002(2)(a)

55. Petitioner SCMHR also challenges rule 64B8-56.002(2)(a) as an invalid exercise of delegated legislative authority in violation of section 120.52(8) because it exceeds the grant of rulemaking authority provided to the Board.

56. Rule 64B8-56.002(2)(a) provides in pertinent part:

> (2) An electrologist may not use laser or light-based devices for hair removal or reduction unless they:
>
> (a) Have completed training in laser and light-based hair removal and reduction that meets the requirements set forth in subsections 64B8-52.004(2) and (3), F.A.C.;

57. Rule 64B8-52.004 provides in pertinent part:

> (2) The course consists of thirty (30) hours of instruction, which may include 15 hours of

> home-study didactic training, in the use of laser and light-based hair removal or reduction devices, including:
>
> * * *
>
> (3) The instructors of each laser and light-based hair removal course have one year of post-certification experience. Verifiable documentation of this experience must be submitted to the Council with the application.

58. Rule 64B8-56.002 identifies as specific authority section 478.43 and the law implemented sections of the challenged rule are 458.331(l)(v), 458.348(3), 478.42(5), and 478.43(4).

59. Petitioner maintains that the challenged rule 64B8-56.002(2)(a) requires electrologists and instructors who wish to use laser and light-based devices for hair removal or reduction to complete 30 hours of education under the requirements of rules 64B8-52.004(2) and (3).

60. Petitioner also contends that there is no express authority for the Board to set a number of training hours required for licensed electrologists to use laser and light-based devices in their practices. Petitioner argues that the Board only has authority regarding training required for an electrologist seeking licensure pursuant to section 478.50(4), which limits continuing education hours to 20 for license renewal, and section 478.45(1)(e), which provides a maximum of 120 classroom hours for initial licensure. Petitioner also

maintains neither section 478.50 nor section 478.45 allows the Board to require an additional 30 hours of education in the use of laser and light-based devices and therefore the rule is invalid.

61. Petitioner further contends that sections 458.348(3) and 459.025(2) prohibit rule 64B8-56.002(2)(a) and restrictive language exists to preclude the challenged rule in sections 458.348(6) and 459.025(5).

62. Section 458.348(3) provides in pertinent part:

> (3) Protocols requiring direct supervision. — All protocols relating to electrolysis or electrology using laser or light-based hair removal or reduction by persons other than physicians licensed under this chapter or chapter 459 shall require the person performing such service to be appropriately trained and work only under the direct supervision and responsibility of a physician licensed under this chapter or chapter 459.

63. Section 459.025(2) provides in pertinent part:

> (2) Protocols requiring direct supervision. — All protocols relating to electrolysis or electrology using laser or light-based hair removal or reduction by persons other than osteopathic physicians licensed under this chapter or chapter 458 shall require the person performing such service to be appropriately trained and to work only under the direct supervision and responsibility of an osteopathic physician licensed under this chapter or chapter 458.

64. Sections 458.348(6) and 459.025(5) state:

> LIMITATION ON RULEMAKING-This section is self-executing and does not require or provide authority for additional rulemaking.

65. Respondent correctly points out in its Proposed Final Order that section 478.43(4) provides the authority for the Board to adopt "rules related to the curriculum" and rules "related to . . . continuing education requirements."

66. Section 478.43(4) provides in pertinent part:

> (4) The board, in consultation with the council, shall recommend proposed rules, and the board shall adopt rules for a code of ethics for electrologists and rules related to the curriculum and approval of electrolysis training programs, sanitary guidelines, the delivery of electrolysis services, continuing education requirements, and any other area related to the practice of electrology.

67. The undersigned rejects Petitioner's argument because Petitioner's basis for the position, sections 458.348(3) and 459.025(2), each address supervising protocols for physicians and physician extenders. However, neither section is dealing with the challenged rule's subject matter regarding protocols of laser or light-based devices.

68. Likewise, Petitioner's challenge of rule 64B8-56.002(2)(a) regarding the 30-hour course is also misplaced. Rule 64B8-56.002(2)(a) fails to have any language mandating 30 hours. The challenged rule refers to rule 64B8-52.004, the rule

which contains the language "30 hours curriculum" in section two. If Petitioner was concerned about the 30-hour curriculum, the proper solution would have been to challenge the actual rule requiring 30 hours, rule 64B8-52.004, not the rule that incorporates such. Challenging 64B8-56.002(2)(a), standing alone, leaves the requirements for the course specified in 64B8-52.004 intact.

69. Accordingly, Petitioner has not met the burden to establish by a preponderance of the evidence that rule 64B8-56.002(2)(a) is an invalid exercise of delegated legislative authority.

Challenged "non-rule" agency policies (i) through (iv)

70. Petitioners maintain in its Proposed Final Order that the Board has the following four agency statements that are unadopted rules.

> (i.) The Electrolysis Council is a *de facto* party to a petition *for declaratory statement filed with the Board of Medicine* concerning the practice of electrology and need not intervene in the proceeding before the Board when considering rules and statutes related to the practice of electrology;
>
> (ii.) The Electrolysis Council is a *de facto* party to a petition to adopt, amend, or repeal an agency rule filed with the Board of Medicine concerning the practice of electrology and need not intervene in the proceeding before the Board when the rules concern the practice of electrology;

(iii.) No additional materials can be submitted to the Board of Medicine prior to the meeting of the full Board for consideration of a draft order on a petition for declaratory statement; and

(iv.) The Board of Medicine will not consider any materials submitted for consideration within 48 hours of a full Board of Medicine meeting unless the Board Chair allows their distribution to the members.

71. Section 120.56(4)(a) provides:

> Any person substantially affected by an agency statement may seek an administrative determination that the statement violates section 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 section 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by section 120.54.

72. Petitioners demonstrated that they are "substantially affected" and have standing to contest the four challenged statements. Although Petitioners did demonstrate standing, Petitioners failed to adequately provide the proper foundation to establish the challenged statements (i), (ii), or (iii). Labeling a paragraph an agency statement does not make it one. Petitioners' general reference to Exhibit B, a 26-page document[1/] attached to the Petition, does not provide a proper foundation for the alleged Board statements. Additionally, Petitioners' Proposed Final Order fails to clarify any further details demonstrating the Board making the alleged statements (i), (ii),

and (iii). Hence, Petitioners have not met their burden to show alleged agency statements (i), (ii), and (iii) were created by the Board. However, even if alleged statements (i), (ii), and (iii) were proper agency statements, none would constitute unadopted rules.

73. Section 120.52(16) defines "rule" and provides in pertinent part:

> "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.

74. Section 120.52(20) defines unadopted rule and provides in pertinent part:

> "Unadopted rule" means an agency statement that meets the definition of the term "rule," but that has not been adopted pursuant to the requirements of section 120.54.

75. Section 120.54(1)(a) provides, in relevant part:

> Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by section 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.

76. Petitioners assert in its Proposed Final Order that each of the Board's statements (i) through (iv) are rules under section 120.52(16) because the statements are of general applicability that implement, interpret, or prescribe law or policy or describe the procedure or practice requirements of an agency.

77. As to the first two unadopted rule challenges, (i) and (ii), both pose the same threshold question regarding the Council's status for "petitions for declaratory statement" and "petitions to adopt, amend, or repeal an agency rule." Hence, both can be considered together as Petitioners maintain the Council has a "de facto party" status in each procedure and "need

not intervene in the proceeding before the Board" when considering rules and/or statutes related to the practice of electrology.

78. Under the APA, section 120.52(13) provides five categories defining "party" status. In order to establish "party" status, one has to have some type of substantial interest being affected by the decision proposed by the agency action. Contrary to Petitioners' position, the two-tiered bifurcated system that already exists defines the Council's status and mandates that the Board allow the Council to participate in a limited manner. Section 478.43(1) mandates collaboration between the Board "with the assistance of the Electrolysis Council."

79. Additionally, rule 64B8-50.003(2) further designates the Council's limited status by specifying that the Council provide only a recommendation for petitions of declaratory statement and petitions to adopt, amend or repeal an agency rule filed with the Board relating to the practice of electrology. Hence, Petitioners' contention that the Council is a de facto party is not persuasive because the Council's role is advisory and the Council is required to participate. As such, it need not move to intervene. Additionally, the Council is not a party because it neither has substantial interests nor any rights and the Board's decision does not affect the Council as a regulatory body. Therefore, Petitioners fail to demonstrate challenges (i) and (ii)

are unpromulgated rules and the Council's status has already been adopted in rule 64B8-50.003(2) defining its right to participate.

80. As to challenged statement (iii), the series of events including the Board declining to accept additional documentary evidence at the October 10, 2014, meeting after the Society's April 29, 2014, Petition for Declaratory Statement had already been ruled on at the August 1, 2014, Board meeting, but before the final draft order was presented at the October 10, 2014, Board meeting is a singular factual situation. The additional submitted documentation being denied consideration under such circumstances was a one-time event and the facts in this matter are too specific to support a finding of general applicability. See State, Dep't of Com., Div. of Labor v. Matthews Corp., 358 So. 2d 256, 257 (Fla. 1st DCA 1978)(wage rate guidelines applicable only to the construction of a particular public building was not a statement of general applicability); Dep't of High. Saf. & Motor Veh. v. Schluter, 705 So. 2d 81, 82 (Fla. 1st DCA 1997)(agency statements that applied only under "certain circumstances" and did not have the "consistent effect of law" were not statements of general applicability). Accordingly, statement (iii) is narrowly focused, not of general applicability, and does not constitute an unadopted rule.

81. As to the final alleged unadopted rule, (iv), the record demonstrates that the Board follows the seven day deadline

for setting the "agenda, along with any meeting materials" and allows the Chair to determine any changes as mandated by section 120.525(2), which provides in pertinent part:

> An agenda shall be prepared by the agency in time to ensure that a copy of the agenda may be received at least 7 days before the event by any person in the state who requests a copy and who pays the reasonable cost of the copy. The agenda, along with any meeting materials available in electronic form excluding confidential and exempt information, shall be published on the agency's website. The agenda shall contain the items to be considered in order of presentation. After the agenda has been made available, a change shall be made only for good cause, as determined by the person designated to preside, and stated in the record. Notification of such change shall be at the earliest practicable time.

82. The record also shows that the Board adopted a policy that it will not automatically consider any materials submitted for consideration within 48 hours of a full Board meeting unless the Board Chair allows distribution to the members. The internal operating procedure in this matter is not a policy of general applicability because the late-filed material cutoff of 48 hours prior to the Board meeting does not apply to all material submissions but only to those who submit late, which means such a procedure would only apply under certain circumstances. See Ag. for Health Care Admin. v. Custom Mobility, Inc., 995 So. 2d 984, 986 (Fla. 1st DCA 2008)(The court found the formula for the cluster sampling, which the agency used in some cases to

calculate Medicaid overpayments was not a statement of general applicability because it did not apply to all Medicaid providers but rather only to some of the providers being audited, which is too specific to support a finding of general applicability). Hence, the 48-hour submission procedure is not an unadopted rule.

83. Accordingly, Petitioners did not meet their burden of proving that the four statements, (i), (ii), (iii), and (iv), constitute unadopted rules in this proceeding.

ORDER

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

1. The section of Florida Administrative Code Rule 64B8-50.003(2) which states "petitions for declaratory statement" constitutes an invalid exercise of delegated legislative authority in violation of section 120.52(8).

2. The section of Florida Administrative Code Rule 64B8-50.003(2) which states "petitions to adopt, amend or repeal rules" is a valid exercise of delegated legislative authority as defined by section 120.52(8), and the challenge is DISMISSED.

3. Florida Administrative Code Rule 64B8-56.002(2)(a) is a valid exercise of delegated legislative authority as defined by section 120.52(8), and the challenge is DISMISSED.

4. Petitioners' Petition seeking an administrative determination of the four agency statements, (i), (ii), (iii), and (iv), is hereby DISMISSED.

DONE AND ORDERED this 1st day of May, 2015, in Tallahassee, Leon County, Florida.

June C. McKinney

JUNE C. MCKINNEY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of May, 2015.

ENDNOTE

[1/] Exhibit B consists of the October 10, 2014, Board meeting minutes and transcript. The Board allowed the Council's attorney to make comments even though Petitioner objected. However, the undersigned is not persuaded that Petitioners demonstrated that the Board's deliberations and/or votes formulate alleged agency statements (i), (ii), and (iii).

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.