STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

REBECCA COLEMAN CURTIS,

Petitioner,

vs. Case No. 16-6167

DEPARTMENT OF HEALTH, BOARD OF PSYCHOLOGY,

Respondent.
_____/

AMENDED RECOMMENDED ORDER

On February 1, 2017, Administrative Law Judge Lisa Shearer Nelson of the Division of Administrative Hearings conducted a hearing pursuant to section 120.57(1), Florida Statutes (2016), in Tallahassee, Florida.

APPEARANCES

For Petitioner: Edwin A. Bayó, Esquire
Paul Drake, Esquire
Grossman, Furlow & Bayó, LLC
2022-2 Raymond Diehl Road
Tallahassee, Florida 32308

For Respondent: Rachel W. Clark, Esquire
Administrative Law Bureau
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The Capitol, Plaza Level 01
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STATEMENT OF THE ISSUES

The first issue to be determined is whether Petitioner, Rebecca Coleman Curtis ("Petitioner" or "Dr. Curtis"), is

entitled to licensure as a psychologist in the State of Florida by virtue of the "deemer" provision in section 120.60(1). The second issue to be determined is whether the Florida Board of Psychology (the "Board") used an unadopted rule in violation of section 120.54(1)(a), with respect to its decision to deny Dr. Curtis's application for a license.

PRELIMINARY STATEMENT

On October 11, 2016, the Board issued a Notice of Intent to Deny Petitioner's application for licensure as a psychologist in the State of Florida. On October 13, 2016, Petitioner filed a Petition for Hearing Involving Disputed Issues of Fact and Petition to Determine Validity of Agency Statements with the Board. On October 21, 2016, the matter was referred to the Division of Administrative Hearings for assignment of an administrative law judge, and was assigned to Administrative Law Judge E. Gary Early.

Judge Early originally scheduled the case for hearing to be conducted on December 20, 2016. At the joint request of the parties, the matter was rescheduled for February 1, 2017, and proceeded as rescheduled. On January 18, 2017, the case was transferred to Administrative Law Judge Lisa Shearer Nelson.

The parties filed a Joint Pre-hearing Stipulation on January 27, 2017, which included stipulated facts for which no evidence would be required at hearing. Those facts have been

incorporated into the Findings of Fact below. Petitioner also filed a Motion to Deem Matters Admitted, based upon Respondent's answers to Requests for Admissions, which was granted at the commencement of the hearing. Those facts, where relevant, also have been incorporated into the Findings of Fact.

At the hearing, the parties called Allen Hall, executive director of the Board of Psychology, as a joint witness. Petitioner's Exhibits numbered 1 through 6 and Respondent's Exhibits numbered 1 through 6 were admitted into evidence without objection. The one-volume Transcript of the hearing was filed with the Division of Administrative Hearings on February 8, 2017, and both parties timely filed their Proposed Recommended Orders on February 20, 2017, which have been carefully considered in the preparation of this Recommended Order.[1/] Statutory references are to the 2016 codification, which is identical to the version in effect in 2014.

FINDINGS OF FACT

1. Section 490.006(1), Florida Statutes, presents three avenues for a psychologist to obtain licensure by endorsement.

2. Petitioner applied to the Board of Psychology for licensure as a psychologist on September 30, 2014. She applied under the category of licensure authorized by section 490.006(1)(c), which allows for licensure to persons who possess a doctoral degree in psychology as described in section 490.003

and have at least 20 years of experience as a licensed psychologist in any jurisdiction or territory of the United States within 25 years preceding the date of the application.

3. Petitioner's application was deemed complete by the Board office on October 17, 2014. Ninety days from Petitioner's completed application was January 15, 2015. The Department of Health sent Petitioner a letter regarding her application dated October 17, 2014, which states in pertinent part:

> Dear Dr. Curtis:
>
> Psychology board staff has reviewed your application. You have been authorized for the Florida laws and rules exam. You have been approved for licensure upon passage of your exam. Please note that that you have 24 months, from the date of this letter, to verify completion of these requirements or your application will be administratively closed as required in Section 490.005(3)(a), Florida Statutes. (emphasis added).

4. Petitioner was included in a list of applicants (the APA List) to be ratified by Respondent at a telephone conference call on November 21, 2014. The Board approved all of the candidates on the list. Both the letter authorizing Petitioner to take the laws and rules examination and the Board's action ratifying approval of Petitioner's application for licensure occurred within 90 days of her completed application.

5. The top of the first page of the APA List contains a statement which reads: "regardless of the application method, if

board staff becomes aware of any issues of concern, approved applicants will be brought back before the Board for reconsideration prior to issuance of a license." Respondent has not cited any authority for this statement.

6. This statement was applicable to all candidates on the APA List, including Petitioner, and was applicable to similar candidates on previous lists on which the Board has acted. Applicants for licensure are not made aware that the Board will reconsider an application previously approved by the Board.

7. Petitioner took and passed the required laws and rules examination in August 2016, and her score was reported to the Board office.

8. Respondent sent Petitioner a letter dated August 9, 2016, which stated that her application would be considered by the Board of Psychology's Credentials Committee at its meeting September 9, 2016, despite that she was advised previously that she was approved for licensure. That same day, Michelle Branch from the Board office sent Dr. Curtis an email which stated, in part:

> We have received your Laws and Rules exam score and it appeared you were ready for licensure, however, after further review of your file, there is a question on whether you received your doctorate degree from a program that was accredited by the American Psychological Association.
>
> To obtain a psychology license under the Endorsement of 20 Years of Licensed Psychology Experience method, you must have

> received your doctorate degree from an APA accredited program. I have provided Section 490.005, F.S., for your reference: . . . .
>
> Your transcripts indicated that you received your PhD from the Social Psychology program at the Teachers College, Columbia University, New York City, which is not listed as an accredited program on APA's website. I have contacted APA to verify and am waiting on a reply. Please request a letter from the university indicting [sic] your major. This letter can be emailed to me. Your application and transcripts will then go before the September 9, 2016 Credentials Committee for review. Please find the attached meeting notice. (emphasis added).

Ms. Branch's request for additional information was more than 30 days from the Board's receipt of Petitioner's application, and well after the application had been deemed complete, and well after the application was approved by the Board.

9. On August 24, 2016, Petitioner submitted to Respondent's agency clerk a Notice of Intent to Rely upon Default License Provision.

10. A memo provided to the Board regarding Dr. Curtis's application contained the following information for the Board's consideration.

> Dr. Curtis applied for licensure under the Endorsement of 20 Years of Licensed Psychology Experience method, however, her doctoral psychology program completed at the Teachers College, Columbia University, New York City in 1973, did not hold programmatic accreditation by the American Psychological Association (APA). Although Dr. Curtis went on to complete studies in Clinical Psychology

> at the APA-accredited Adelphi University in 1988, the transcript indicates it was a non-degree program.
>
> In the initial review of Dr. Curtis' application by former staff, these issues were not addressed and the staff erroneously approved Dr. Curtis to sit for the laws and rules examination. Upon the receipt of Dr. Curtis' exam score, current staff performed a final review for license issuance and these issues were discovered. Dr. Curtis was subsequently notified that her application would require review by the Board's Credentials Committee before further action could be taken.

11. The author of this memo is not identified, and did not testify at hearing. While it is admissible for the purpose of demonstrating what the Board considered in its second review of Dr. Curtis's application, it is hearsay.

12. Dr. Curtis's unrefuted testimony is that she holds two separate doctoral degrees in psychology, the first from Teachers College at Columbia University, and one from Adelphi University. Both schools are located in New York. According to Dr. Curtis, because New York would not issue a second doctoral degree in the same field, her degree from Adelphi is listed as non-degree seeking, despite her completing the requirements for a degree and being issued a diploma. Dr. Curtis has been licensed in the State of New York since 1983, and her application file does not include any indication that her license has ever been disciplined.

13. The only evidence other than the memo cited above that would indicate that Dr. Curtis's education did not qualify her for licensure in Florida are copies of emails, which appear to be the source of the Board staff's information. Neither the person who received the email nor the person who sent them testified at hearing, and, although included in Petitioner's licensure file, the contents of the emails are also hearsay.

14. During the September 9, 2016, meeting, the Committee voted to deny Petitioner's application for licensure. Petitioner received a Notice of Intent to Deny from Respondent on or about October 11, 2016, notwithstanding the Board's prior approval of her application nearly two years before.

15. The Board has not promulgated any rule that provides for "re-screening" or a "second review" or "final review" of an application that has been previously approved by the Board. Nor has the Board promulgated any rule that provides for "reconsideration" of an application that has been previously approved by the Board.

16. The Board delegates to office staff the review of applications to see if applications meet the requirements specified in chapter 490 and the Board's rules.

17. Petitioner provided notice to the Board on September 12, 2016, pursuant to section 120.595(4)(b), regarding possible unadopted rules. The Board has not commenced any rulemaking

proceedings regarding the subjects addressed in the September 12, 2016, notice to the Board of Psychology.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.56(4), 120.569, 120.57(1) and 120.60, Florida Statutes.

19. Respondent is the state agency charged with regulating the practice of psychology in the State of Florida, pursuant to section 20.43 and chapters 456 and 490, Florida Statutes.

20. As an applicant, Petitioner bears the burden of demonstrating that she is entitled to licensure. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 934 (Fla. 1996). While the ultimate burden remains with Petitioner, it is the Board's responsibility to provide specific reasons for the denial and to produce competent, substantial evidence to support those reasons. Comp. Med. Access, Inc. v. Off. of Ins. Reg., 983 So. 2d 45, 46-47 (Fla. 1st DCA 2008); N.W. v. Dep't of Child. & Fam. Servs., 981 So. 2d 932, 600 (Fla. 3d DCA 2008); Mayes v. Dep't of Child. & Fam. Servs., 801 So. 2d 980 (Fla. 1st DCA 2001).

The Requirements of Section 120.60(1)

21. The process for obtaining a license from a state agency is outlined in section 120.60(1), which states:

(1) Upon receipt of a license application, an agency shall examine the application and, within 30 days after such receipt, notify the applicant of any apparent errors or omissions and request any additional information the agency is permitted by law to require. An agency may not deny a license for failure to correct an error or omission or to supply additional information unless the agency timely notified the applicant within this 30-day period. The agency may establish by rule the time period for submitting any additional information requested by the agency. For good cause shown, the agency shall grant a request for an extension of time for submitting the additional information. If the applicant believes the agency's request for additional information is not authorized by law or rule, the agency, at the applicant's request, shall proceed to process the application. An application is complete upon receipt of all requested information and correction of any error or omission for which the applicant was timely notified or when the time for such notification has expired. An application for a license must be approved or denied within 90 days after receipt of a completed application unless a shorter period of time for agency action is provided by law. The 90-day time period is tolled by the initiation of a proceeding under ss. 120.569 and 120.57. Any application for a license which is not approved or denied within the 90-day or shorter time period, within 15 days after conclusion of a public hearing held on the application, or within 45 days after a recommended order is submitted to the agency and the parties, whichever action and timeframe is latest and applicable, is considered approved unless the recommended order recommends that the agency deny the license. Subject to the satisfactory completion of an examination if required as a prerequisite to licensure, any license that is considered approved shall be issued and may include such reasonable conditions as are authorized by law. Any

> applicant for licensure seeking to claim licensure by default under this subsection shall notify the agency clerk of the licensing agency, in writing, of the intent to rely upon the default license provision of this subsection, and may not take any action based upon the default license until after receipt of such notice by the agency clerk. (emphasis added).

22. While an agency must take action within 90 days of a completed application, that action need not be reduced to writing within that time frame. Sumner v. Dep't of Prof'l Reg., Bd. of Psychological Exam'rs, 555 So. 2d 919, 921 (Fla. 1st DCA 1990) (while section 120.60(3) requires that written notice be given to an applicant, only the decision to approve or deny need be accomplished within 90 days). Here, Petitioner was notified in writing and the Board voted to approve her licensure within the 90-day period. At that point, the only requirement left for Petitioner to receive her license was for her to pass the Florida laws and rules examination, which she did within the required 24-month period. Petitioner was and is entitled to licensure.

23. The Board contends that it could not issue the license once staff discovered what they perceived to be a deficiency in Petitioner's application. However, staff's discovery occurred long after the statutorily-established time frame for reviewing the application, but more to the point, the Board had already voted to approve the license. Moreover, section 456.013(2) provides that the "department shall issue a license to any person

certified by the appropriate board" as having met the licensure requirements. (emphasis added). It was obligated to do so here.

24. Moreover, once they discovered the perceived error, a staff member wrote to Dr. Curtis and asked her for more information to clarify the issue. This action clearly contravenes the requirements of section 120.60(1). While the agency may request information within 30 days after receiving an application, section 120.60(1) expressly provides that "[a]n agency may not deny a license for failure to correct an error or omission or to supply additional information unless the agency timely notified the applicant within this 30-day period." To the extent that the Board's decision was based on Petitioner's failure to correct an error or omission, or to supply additional information in response to Board staff's request, the Board was prohibited from doing so. It could not alter its course and refuse to issue the license at this late juncture, or place conditions on her licensure. Krakow v. Dep't of Prof'l Reg., 586 So. 2d 1271 (Fla. 1st DCA 1991).

The Board's Basis for Denial

25. As noted above, the Board is required in this proceeding to provide competent substantial evidence for the basis of its denial of Petitioner's license. It did not do so.

26. The Board submitted without objection the licensure application file for Petitioner as an exhibit at the hearing. The application file included the email and the memo upon which the

Board relied. No other evidence was submitted to substantiate the grounds for denial.

27. While the application file may be admissible as a public record pursuant to section 90.803(8), Florida Statutes, its admissibility does not automatically transform the nature of hearsay documents contained within it. Johnson v. Dep't of HRS, 546 So. 2d 741, 743 (Fla. 1st DCA 1989) ("While the documents themselves might qualify as the DPAF's business records, the statements contained in the documents relating to Turner House Restaurant's business are simply hearsay within hearsay and would only be admissible if they, too, conformed to the requirements of the business records exception to the hearsay rule."); Harris v. Game & Fresh Water Fish Comm'n, 495 So. 2d 806, 808-809 (Fla. 1st DCA 1986).

28. The Board also contends that it could "recall" its decision to approve Petitioner's application based on Bronson v. Schulten, 104 U.S. 410 (1881), which states, "[i]t is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court."

29. While the Board asserts that the Bronson decision is directly applicable to the facts of this case, it has no

application at all. The Board is not a court, it is an executive branch agency exercising quasi-judicial powers. Agencies, unlike courts, have only those powers that the Legislature has granted to them. Schindelar v. Fla. Unemplmt. App. Comm'n, 31 So. 3d 903, 905 (Fla. 1st DCA 2010); State, Dep't of Envtl. Reg. v. Falls Chase Special Taxing Dist., 424 So. 2d 787, 793 (Fla. 1st DCA 1982), rev. denied, 436 So. 2d 98 (Fla. 1983) ("An agency has only such power as expressly or by necessary implication is granted by legislative enactment. An agency may not increase its own jurisdiction and, as a creature of statute, has no common law jurisdiction or inherent power such as might reside in, for example, a court of general jurisdiction.").

30. Here, the Board's authority is expressly circumscribed by the process outlined in section 120.60(1), and the Board has provided no exception that would allow it to vary from the statutorily-mandated process for evaluating licensure applications.

Whether the Board's Reconsideration is an Unadopted Rule

31. Section 120.57(1)(e) provides in pertinent part:

> (e)1. An agency or an administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule or a rule that is an invalid exercise of delegated legislative authority. This subparagraph does not preclude application of valid adopted rules and applicable provisions of law to the facts.

2. In a matter initiated as a result of agency action proposing to determine the substantial interests of a party, the party's timely petition for hearing may challenge the proposed agency action based on a rule that is an invalid exercise of delegated legislative authority or based on an alleged unadopted rule. For challenges brought under this subparagraph:

a. The challenge may be pled as a defense using the procedures set forth in s. 120.56(1)(b).

b. Section 120.56(3)(a) applies to a challenge alleging that a rule is an invalid exercise of delegated legislative authority.

c. Section 120.56(4)(c) applies to a challenge alleging an unadopted rule.

d. This subparagraph does not preclude the consolidation of any proceeding under s. 120.56 with any proceeding under this paragraph.

* * *

4. The recommended and final orders in any proceeding shall be governed by paragraphs (k) and (l), except that the administrative law judge's determination regarding an unadopted rule under subparagraph 1. or subparagraph 2. shall not be rejected by the agency unless the agency first determines from a review of the complete record, and states with particularity in the order, that such determination is clearly erroneous or does not comply with essential requirements of law. In any proceeding for review under s. 120.68, if the court finds that the agency's rejection of the determination regarding the unadopted rule does not comport with this subparagraph, the agency action shall be set aside and the court shall award to the prevailing party the reasonable costs and a reasonable attorney fee for the initial proceeding and the proceeding for review.

32. Section 120.56(4)(c) provides:

> (4) CHALLENGING AGENCY STATEMENTS DEFINED AS UNADOPTED RULES; SPECIAL PROVISIONS.—
> (a) Any person substantially affected by an agency statement that is an unadopted rule may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state facts sufficient to show that the statement constitutes an unadopted rule.
>
> * * *
>
> (c) If a hearing is held and the petitioner proves the allegations of the petition, the agency shall have the burden of proving that rulemaking is not feasible or not practicable under s. 120.54(1)(a).
> (d) The administrative law judge may determine whether all or part of a statement violates s. 120.54(1)(a). . . .
> (e) If an administrative law judge enters a final order that all or part of an unadopted rule violates s. 120.54(1)(a), the agency must immediately discontinue all reliance upon the unadopted rule or any substantially similar statement as a basis for agency action.
>
> * * *
>
> (g) All proceedings to determine a violation of s. 120.54(1)(a) shall be brought pursuant to this subsection. A proceeding pursuant to this subsection may be consolidated with a proceeding under subsection (3) or under any other section of this chapter. This paragraph does not prevent a party whose substantial interests have been determined by an agency action from bringing a proceeding pursuant to s. 120.57(1)(e).

33. While section 120.57(1)(e) contemplates a type of proceeding that a party may file, it also serves as a restriction

on the administrative law judge's authority: "[a]n agency or an administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule or a rule that is an invalid exercise of delegated legislative authority." (emphasis added). Petitioner alleges that the Board's action in denying Dr. Curtis's application is based on its practice of conducting a "final review" or "reconsideration" of an applicant's qualifications prior to issuing the license. Therefore, it must be determined whether the Board's practice meets the definition of a rule, and, if so, whether it has been adopted through the rulemaking process outlined in section 120.54.

34. Section 120.52(16) defines a rule as "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of any agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule." An "unadopted rule" is defined as 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. § 120.52(20), Fla. Stat.

35. In this proceeding, Petitioner bears the burden of demonstrating by a preponderance of the evidence that the Board's

statements regarding the "reconsideration" or "final review" of applications by Board staff meets the definition of a rule and that the Board has not adopted the statement by rulemaking procedures. S.W. Fla. Water Mgmt. Dist. v. Charlotte Cnty., 774 So. 2d 903, 908 (Fla. 2d DCA 2001); § 120.56(4)(a) and (c), Fla. Stat.

36. A statement is considered to be "generally applicable" if it is intended by its own effect to create rights, to require compliance, or to otherwise have the direct and consistent effect of law. State Bd. of Admin. v. Huberty, 46 So. 3d 1144, 1147 (Fla. 1st DCA 2010) (use of telephone hotline to allow employees to make a switch in their pension plan did not meet definition of a rule; simply provided a means of exercising an election consistent with the statute); Coventry First, LLC v. Off. of Ins. Reg., 38 So. 3d 200, 204-205 (Fla. 1st DCA 2010) (statements not unadopted rules because discretionary in their application); Ag. for Health Care Admin. v. Custom Mobility, Inc., 995 So. 2d 984, 986 (Fla. 1st DCA 2008) (sampling formula just one of several permitted under statute, and therefore does not have the direct and consistent effect of law); and Dep't of Rev. v. Vanjaria Enter., Inc., 675 So. 2d 252, 255 (Fla. 5th DCA 1996) (tax assessment procedures in DOR training manuals not simply a direct application of statute; procedures afford no discretion to

auditors and creates DOR's entitlement to taxes while adversely affecting property owners).

37. An agency statement need not be in writing, or need to be expressed publically in words. Dep't of High. Saf. & Motor Veh. v. Schluter, 705 So. 2d 81, 84 (Fla. 1st DCA 1997). An unadopted rule may be established based on agency conduct, where the conduct manifests an underlying policy of general applicability having the force and effect of law. Fla. Quarter Horse Track Ass'n v. Dep't of Bus. & Prof'l Reg., 133 So. 3d 1118 (Fla. 1st DCA 2014).

38. In this case, it is undisputed that on the APA List which provides the names of the applicants for action by the Board, there was a statement reading, "regardless of the application method, if board staff becomes aware of any issues of concern, approved applicants will be brought back before the Board for reconsideration prior to issuance of a license." Similarly, on the memorandum regarding Petitioner's application that was presented to the Board in 2016, it referenced a "final review for license issuance" conducted by staff. Both statements contemplate an additional layer of review after the Board's consideration of applications for licensure. It is also without dispute that this "reconsideration" or "final review for license issuance" process was routinely applied, not only with respect to Petitioner, but applicants in general.

39. In Department of Business and Professional Regulation v. Harden, 10 So. 3d 647 (Fla. 1st DCA 2009), Harden challenged the procedure by which license applications were reviewed by the Construction Industry Licensing Board ("CILB"). The CILB used a process whereby applications were reviewed by an application committee appointed by the CILB chair. There was neither a statute nor rule expressly authorizing the application review committee. The administrative law judge determined that the committee procedure met the definition of a rule because it was an agency statement of general applicability implementing section 120.60(1). The Department appealed and the First District affirmed, stating, "we cannot agree that the procedure utilizing the application review committee does not affect any private interests. The application review committee is responsible for reviewing pending licensure applications. . . . [I]t seems clear that private interests were affected by this CILB procedure." 10 So. 3d at 649.

40. The same can be said with respect to the "reconsideration" or "final review" procedure utilized by the Board. The executive director acknowledged that the notice on the APA List was applicable to all applicants on the list and was applicable to similar candidates on previous lists upon which the Board had acted. The procedure establishing a second review of applications prior to issuing a license meets the definition of

an unadopted rule. Moreover, the process, as applied in this case, contravenes the express requirements of section 120.60(1).

41. The Board presented no evidence to establish that rulemaking was not feasible or was impracticable.

42. The Board also states the following:

> Finally, a matter of practicality should be discussed by this Court. It does not appear to be in the best interest of Petitioner nor the public to direct the issuance of a default license when the Department is statutorily authorized to prosecute and discipline Petitioner for obtaining a license through an error of the Department or Board pursuant to §§ 490.009(1)(a) and 456.072(1)(h). As discussed above, the penalty for obtaining a license in this matter is "[r]evocation or permanent denial of licensure and a $10,000 fine." 64B19-17.002(1)(a), Fla. Admin. Code.

43. Clearly, the disciplinary provisions in chapter 490 authorize discipline for obtaining a license by fraud, misrepresentation, or error of the Board. However, as noted by Judge Van Laningham in Dep't of Health v. Diamond, Case No. 12-3825PL (DOAH Apr. 9, 2013; DOH Aug. 21, 2013), the Board's "unilateral error" theory is inconsistent with the general procedure for licensing in section 120.60. While the "error of the board" language has been included in section 490.009 since 1976,[2/] the procedure in section 120.60(1) has been amended numerous times to reinforce the requirement that agencies act in a timely manner on license applications, and to limit the time in

which an agency can seek additional information. To allow the agency later to revoke a license pursuant to section 456.072(1)(h) based solely on a purported deficiency in the licensee's application when the agency has failed to comply with section 120.60(1), not only would erode the protection that section 120.60 affords license applicants, but also would undermine the integrity of the licensing process.

44. Basic canons of statutory interpretation require that related statutes be read together, "based on a realistic assessment of what the legislature ought to have meant." De La Osa v. Wells Fargo Bank, N.A., 2016 Fla. App. LEXIS 18361 pp. 12-13 (Fla. 3d DCA Dec. 14, 2016). "Statutes must be read with other related statutes and other related portions of the same statute. Where possible, courts must give effect to all statutory provisions and construe related statutory provisions in harmony with one another." Abbott Labs. v. Mylan Pharms. Inc., 15 So. 3d 642, 657 (Fla. 1st DCA 2009) (citations omitted). To allow the Board to revoke a license because of its error when section 120.60 mandates that the license be issued, would essentially make the mandate in section 120.60(1) a nullity. It is a cardinal rule of statutory construction that statutes should not be read in a manner that would render a statutory provision meaningless. Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 455-456 (Fla. 1992). The Board's

statement regarding its statutory authority to seek disciplinary action against Petitioner would clearly violate this rule of statutory construction.

45. Petitioner also contends that the statement in the Notice of Intent to Deny that the Board has delegated the duty of reviewing applications to Board staff, whereby those applications are approved and then subsequently ratified by the Board, is also one of general applicability that has been applied to Petitioner, has not been adopted as a rule, and meets the definition of a rule in section 120.52(16). However, as Respondent points out, section 456.013(2) provides:

> (2) Before the issuance of any license, the department shall charge an initial license fee as determined by the applicable board or if there is no board, by rule of the department. Upon receipt of the appropriate license fee, the department shall issue a license to any person certified by the appropriate board, or its designee, as having met the licensure requirements imposed by law or rule. (emphasis added).

Delegating the review of licenses to staff would be consistent with this provision, and a rule is not necessary to implement this provision. Unlike the reconsideration or second review process, the statute itself contemplates a delegation. Envtl. Trust v. Dep't of Envtl. Prot., 714 So. 2d 493 (Fla. 1st DCA 1998).

46. Section 120.56(4)(e) requires that where an administrative law judge determines that all or part of an

unadopted rule violates section 120.54(4)(1)(a), then the agency must immediately discontinue all reliance upon the adopted rule or any substantially similar statement as a bases for agency action. In this case, the Board must discontinue the practice of conducting a second review, or reconsideration, of license applications after the initial decision has been ratified by the Board.

47. Section 120.595(4)(a) provides that if an appellate court or an administrative law judge determines that all or part of any agency statement violates section 120.54(1)(a), or that the agency must immediately discontinue reliance on the statement or any substantially similar statement, then a judgement or order shall be entered against the agency for reasonable costs and attorney's fees, unless the agency demonstrates that the statement is required by the federal government to implement or retain a delegated or approved program, or to meet a condition for receipt of federal funds. No such assertion that the statement is required has been made in this case.

48. Because the agency statements providing for reconsideration or a second review of approved applications for licensure after the receipt of examination scores and before the issuance of the license meet the definition of a rule, Petitioner is entitled to recover fees and costs in this action pursuant to section 120.595(4)(a). Jurisdiction is retained to determine the

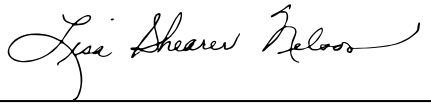
amount of fees and costs pursuant to section 120.595(4), upon entry of a final order. Petitioner shall file a motion to determine the fee amount within 60 days of the entry of the final order.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Psychology enter a final order that: 1) acknowledges Petitioner's application for licensure is approved, pursuant to the procedure in section 120.60(1); and 2) directs the issuance of Petitioner's license as a psychologist.

With respect to Petitioner's claims pursuant to section 120.57(1)(e), it is further RECOMMENDED that: 1) the statements related to reconsideration or a second review of approved applications for licensure after the receipt of examination scores and before the issuance of the license meet the definition of a rule and constitute an unpromulgated rule; 2) the Board must immediately discontinue all reliance on these statements or any substantially similar statement as a basis for agency action; and 3) Petitioner is entitled to an award of reasonable attorney's fees and costs, in an amount to be determined after the entry of the final order.

DONE AND ENTERED this 13th day of March, 2017, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of March, 2017.

ENDNOTES

[1/] Respondent initially filed its Proposed Recommended Order on February 20, 2017. The following day, a Motion to File Correct Version of Proposed Recommended Order was filed, indicating that the wrong version was filed initially due to a computer error. There was no objection to Respondent substituting the correct version, and the Motion to File Correct Version of Proposed Recommended Order is granted.

[2/] § 10, ch. 76-131, Laws of Fla.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.