STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NICOLE YONTZ, O.D., AND TAMMY JOHNSON, O.D.,

Petitioners,

vs. Case No. 16-6663RX

DEPARTMENT OF HEALTH, BOARD OF OPTOMETRY,

Respondent,

and

FLORIDA OPTOMETRIC ASSOCIATION,

Intervenor.
_____/

FINAL ORDER

This cause is before Administrative Law Judge Lisa Shearer Nelson on Petitioners' and Respondent's Joint Motion to Cancel Hearing and Submit Documentary Evidence and Proposed Orders. At their request, this Final Order is being issued based upon consideration of a stipulated record and the Proposed Final Orders.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue to be determined is whether Florida Administrative Code Rule 64B13-4.001 (the Rule), adopted by the Florida Board of Optometry (the Board), is an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On November 14, 2016, Petitioners, Nicole Yontz, O.D., and Tammy Johnson, O.D., filed a Petition to Invalidate Florida Board of Optometry Rule 64B13-4.001, Florida Administrative Code (the Petition), asserting that the Rule is invalid because it violates section 120.52(8), Florida Statutes (2016). The Petition challenges the requirement in the Rule that in order for an applicant to be eligible for licensure as an optometrist in Florida, the applicant must have passed the National Board of Examiners in Optometry Examination (NBEO exam) within a seven-year period immediately preceding the application for licensure.

On November 16, 2016, the case was assigned to Administrative Law Judge Lynne A. Quimby-Pennock, who promptly

scheduled it for hearing on December 9, 2016. That same day, the Florida Optometric Association (Intervenor) filed a Motion to Intervene and asserted that its position is aligned with that of the Board. On November 17, 2016, Judge Quimby-Pennock granted the Motion to Intervene and stated that the Intervenor would take the case as it found it.

On November 21, 2016, Petitioners filed an Unopposed Motion for Continuance. On November 22, 2016, Petitioners filed a Motion to Consolidate, requesting that this case be consolidated with Tammy Johnson v. Florida Board of Optometry, Case No. 16-5655, and Nicole Yontz v. Florida Board of Optometry and the Florida Optometric Association, Case No. 16-6123, cases in which Petitioners individually were challenging the Board's denial of their requests for waiver of the Rule. After a telephonic motion hearing conducted on November 22, 2016, Judge Quimby-Pennock granted the request for continuance, and the case was rescheduled for February 21, 2017. On November 30, 2016, she entered an Order denying the Motion to Consolidate.

On February 9, 2017, the case was transferred to Administrative Law Judge Lisa Shearer Nelson, and the parties were notified of the transfer. On February 17, 2017, Intervenor filed a unilateral Pre-hearing Statement. Petitioners and Respondent filed a Joint Pre-hearing Stipulation that contained stipulated findings of fact for which no additional evidence was

required, and those findings have been incorporated into the findings below.[1/] That same day, Petitioners and Respondent filed a Joint Motion to Cancel Hearing and Submit Documentary Evidence and Proposed Final Orders. In this motion, Petitioners and the Board agreed that there are no material facts in dispute which require proof by live hearing, and that therefore, there is no need to conduct the hearing as scheduled. They agreed that all evidence and exhibits, along with proposed final orders, would be submitted no later than March 10, 2017.

Intervenor did not join in the motion. In its separate Pre-hearing Statement, it stated that it "believes that, while there is no dispute as to the sources of relevant evidence, the proposed stipulation of fact does not address the universe of evidence to be derived from the agreed upon documentary sources." Intervenor did not identify any witnesses or exhibits that it was seeking to introduce that were not already identified as being witnesses or exhibits presented by Petitioners and the Board. Accordingly, on February 20, 2017, an Order Granting Joint Motion to Cancel Hearing and Submit Documentary Evidence and Proposed Final Orders was entered, and the parties were given, as requested, until March 10, 2017, to submit documentary evidence and their proposed final orders.

The exhibits for both parties were filed on March 8, 2017, consisting of Joint Exhibits 1 through 29, and the depositions of

Jack Terry and Terrance Naberhaus. The two depositions were not pre-numbered, but for the sake of clarity, are considered as Joint Exhibits 30 and 31, respectively. Proposed Final Orders were timely filed on March 10, 2017, with Petitioners filing a Corrected Proposed Final Order on March 13, 2017.

On March 16, 2017, Intervenor filed a Motion to Strike and for Partial Dismissal, contending that those portions of Petitioners' Proposed Final Order referencing section 120.52(8)(b) should be stricken because no reference to this particular subsection was included in the Petition. Petitioners responded in opposition to the motion, and Intervenor sought leave to file a reply (to which Petitioners also responded in opposition). On March 22, 2017, an Order on Pending Motions was issued denying both the motion to strike and the motion for leave to file a reply.

All of the Proposed Final Orders have been considered in the preparation of this Final Order. All references to the Florida Statutes are to the 2016 codification unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner Nicole Yontz, O.D. (Dr. Yontz), is a graduate of the Inter-American University of Puerto Rico, School of Optometry. Dr. Yontz passed all parts of the NBEO exam in 2007, and has practiced as an optometrist in Nevada for approximately eight years.

2. Petitioner Tammy Johnson, O.D. (Dr. Johnson), graduated from Indiana University and passed all parts of the NBEO exam in 1998. She practiced in Michigan from 1998 through 2003, and in Indiana from 2003 through 2016.

3. The Board is the state agency charged with the regulation of the practice of optometry in the State of Florida pursuant to chapter 463, Florida Statutes.

4. Intervenor, Florida Optometric Association (FOA), is a non-profit organization of approximately 3,300 members. Approximately 1,700 Florida-licensed optometrists are members of FOA, and the parties do not dispute that FOA has standing to participate in this proceeding.

5. Petitioners each desire to practice optometry in the State of Florida. For purposes of this rule challenge, Petitioners are "substantially affected" by the challenged rule, as required by section 120.56(1)(a).

6. Each of the Petitioners sought a waiver from the requirements of the Rule in order to proceed through the licensure process. The Board considered Dr. Johnson's Petition for Waiver on February 26, 2016, and despite its counsel's recommendation to approve the request for waiver, the Board denied the Petition. It issued a Notice of Petition for Waiver and Variance to that effect on March 14, 2016, stating that Dr. Johnson had failed to establish that the purpose of the Rule

would be achieved by other means; that application of the Rule would cause a substantial hardship; or that requiring adherence to the Rule would violate the principles of fairness.

7. The Board considered Dr. Yontz's Petition for Waiver on August 19, 2016, and denied it as well. A Notice of Petition for Waiver and Variance was filed to that effect on September 16, 2016, citing the same reasons that were included in the Notice addressing Dr. Johnson's Petition for Waiver, which are the statutory criteria for consideration of a waiver or variance pursuant to section 120.542. The position taken by the Board is consistent with its resolution of a number of other petitions for variance or waiver of the Rule considered by the Board.

8. In order to be eligible to practice optometry in Florida, under the terms of the Rule as it now exists, both Petitioners would be required to retake the NBEO exam.

9. The rule at issue in this proceeding is Florida Administrative Code Rule 64B13-4.001, quoted below, with the language that is the subject of the challenge underlined:

> (1) The licensure examination authorized in Section 463.006(2), F.S., shall consist of the following parts:
> (a) Part I – the Applied Basic Science (ABS) portion of the examination developed by the National Board of Examiners in Optometry (NBEO);
> (b) Part II – the Patient Assessment and Management (PAM) portion of the examination developed by the NBEO which includes an embedded Treatment and Management of Ocular

Disease (TMOD) examination. An applicant for licensure in Florida must obtain a passing score on the TMOD section of the examination;
(c) Part III – the Clinical Skills (CSE) portion of the examination developed by the NBEO. In addition to an overall passing score on the CSE portion, an applicant for licensure in Florida must obtain a score of 75 percent (75%) or better on each of the Biomicroscopy, Binocular Indirect Ophthalmoscopy, and Dilated Biomicroscopy and Non-Contact Fundus Lens Evaluation skills individually; and
(d) Part IV – a written examination on applicable Florida laws and rules governing the practice of optometry developed yearly by Florida Board of Optomety approved consultants in conjunction with NBEO, and administered by NBEO. The Board shall review and approve the content of the laws and rules examination annually.
(2) An applicant for licensure must achieve a passing score on all four parts of the licensure examination. For Part III, an applicant must receive an overall passing score on the CSE, as well as the required score of 75 percent (75%) or better on each of the three (3) individually identified skills, on the same test attempt. A score of 84 percent (84%) or better must be obtained in order to achieve a passing score on Part IV of the licensure examination. Passing scores for Part I, Part II, and Part III of the licensure examination are established by the NBEO. Given constant advances in research, developing knowledge in the area of basic and clinical science as applied to the diagnosis, correction, remedy, and relief of insufficiencies or abnormal conditions of the human eyes and their appendages, variances the scope of optometric practice among the states, and the importance of fundamental clinical skills to patient health and safety, passing scores on Part I, Part II, Part III and Part IV of the licensure examination must be obtained within the seven (7) year period immediately preceding licensure application.

> (3) Certification Examination. A licensee applying for certification must obtain a passing score on either the TMOD examination embedded in the Patient Assessment and Management portion of the examination developed by the NBEO or a passing score on the stand alone TMOD examination developed by the NBEO.

10. The Rule requires that an applicant for licensure must achieve passing scores on Parts I, II, III, and IV of the licensure examination within the seven-year period immediately preceding licensure application. The seven-year requirement is referred to as the "look-back period."

11. Petitioners are not challenging the authority of the Board to require passage of Part IV of the examination. The challenge is directed to the authority of the Board to require the look-back period.

12. The Rule has contained a look-back period since at least 1979. It has been, at various times, eight years, seven years, and five years.

The Licensure and Examination Process for Optometry in Florida

13. There is no statutory provision in chapter 463 that authorizes licensure of optometrists who are licensed in other states to obtain a license in Florida by endorsement.

14. In order for a person to practice optometry in Florida, he or she must apply for licensure under the process required by section 463.006. This provision expressly requires those who

desire to become licensed in Florida "shall apply to the department to take the licensure and certification examinations." (emphasis added). Applicants must be at least 18 years of age, graduate from an accredited school or college of optometry approved by rule of the Board, be of good moral character, have completed at least 110 hours of transcript-quality course work and clinical training in general and ocular pharmacology under certain delineated requirements, and have completed at least one year of supervised experience. With respect to the examination, section 463.006 provides that the Board may by rule substitute a national examination, and may by rule offer a practical examination in addition to the written examination. Section 463.006(3) provides that "[e]ach applicant who successfully passes the examination and otherwise meets the requirements of this chapter is entitled to be licensed as a practitioner."

State or National Examination

15. Section 463.006 allows the Board to adopt a rule that provides for the substitution of a national examination as all or part of the examination. Section 456.017(1)(c)4., Florida Statutes, which is included in the provision that governs the Department of Health's responsibilities with respect to examinations, specifies that it is the intent of the Legislature

to reduce the costs associated with state examinations and to encourage the use of national examinations whenever possible.

16. Consistent with this legislative directive, the Department of Health has certified a national examination, and no longer supports a state-developed practical examination for optometry. The Board has designated Parts I, II, and III of the National Board Examinations offered by the NBEO as three of the four parts of the Florida licensure examination. Part IV is an examination on Florida laws and rules and also is offered by NBEO, but is only taken by applicants for licensure in Florida. The Rule was amended, effective February 27, 2014, to establish this change in examinations.

17. The NBEO was established in 1951 and is an independent, non-governmental, non-profit organization that administers the standard National Board Examinations, which are designed to test minimum competency of students. Since August 2011, students taking the clinical portion of the exam (Part III) take the examination in a controlled environment in North Carolina at NBEO's testing location, as opposed to various locations across the country. Students may begin taking the examinations in their third or fourth year of optometry school. The NBEO national examinations are not really "geared" for individuals who are already practicing optometry.

18. Parts I, II, and III of the National Board Examinations offered by the NBEO are a "national examination" as that term is used in section 456.017(1). Because of the way the NBEO Part III is administered in North Carolina, the Department has, in effect, delegated both the development and the administration of the examination to NBEO.

19. Although the Board required passage of a Florida-specific practical examination prior to 2014, neither the Board nor the Department of Health currently offers a State of Florida specific practical examination.

The Statutory Authority for the Rule

20. The Rule cites as its rulemaking authority sections 456.017(1), 463.005, and 463.006(2).

21. The Rule cites as its law implemented sections 456.017(1) and 463.006(2).

22. Section 456.017(1) provides:

> (1)(a) The department shall provide, contract, or approve services for the development, preparation, administration, scoring, score reporting, and evaluation of all examinations, ...
> (b) For each examination developed by the department or contracted vendor, to the extent not otherwise specified by statute, the board, or the department when there is no board, shall by rule specify the general areas of competency to be covered by each examination, the relative weight to be assigned in grading each area tested, and the score necessary to achieve a passing grade. . . . If a practical examination is deemed

to be necessary, the rules shall specify the criteria by which examiners are to be selected, the grading criteria to be used by the examiner, the relative weight to be assigned in grading each criterion, and the score necessary to achieve a passing grade. When a mandatory standardization exercise for a practical examination is required by law, the board, or the department when there is no board, may conduct such exercise. . . .

(c) The board, or the department when there is no board, shall approve by rule the use of one or more national examinations that the department has certified as meeting requirements of national examinations and generally accepted testing standards pursuant to department rules.

1. Providers of examinations seeking certification shall pay the actual costs incurred by the department in making a determination regarding the certification. The name and number of a candidate may be provided to a national contractor for the limited purpose of preparing the grade tape and information to be returned to the board or department; or, to the extent otherwise specified by rule, the candidate may apply directly to the vendor of the national examination and supply test score information to the department. The department may delegate to the board the duty to provide and administer the examination. Any national examination approved by a board, or the department when there is no board, prior to October 1, 1997, is deemed certified under this paragraph.

2. Neither the board nor the department may administer a state-developed written examination if a national examination has been certified by the department. The examination may be administered electronically if adequate security measures are used, as determined by rule of the department.

3. The board, or the department when there is no board, may administer a state-developed practical or clinical examination, as

required by the applicable practice act, if all costs of development, purchase, validation, administration, review, and defense are paid by the examination candidate prior to the administration of the examination. If a national practical or clinical examination is available and certified by the department pursuant to this section, the board, or the department when there is no board, may administer the national examination.

4. It is the intent of the Legislature to reduce the costs associated with state examinations and to encourage the use of national examinations whenever possible.

(d) Each board, or the department when there is no board, shall adopt rules regarding the security and monitoring of examinations. The department shall implement those rules adopted by the respective boards. In order to maintain the security of examinations, the department may employ the procedures set forth in s. 456.065 to seek fines and injunctive relief against an examinee who violates the provisions of s. 456.018 or the rules adopted pursuant to this paragraph. . . .

* * *

(f) The department may adopt rules necessary to administer this subsection.

(emphasis added).

23. Section 463.005 provides in pertinent part:

(1) The Board of Optometry has authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this chapter conferring duties upon it. Such rules shall include, but not be limited to, rules relating to:

(a) Standards of practice, including but not limited to, those provided for in s. 463.0135.

(b) Minimum equipment which a licensed practitioner shall at all times possess to engage in the practice of optometry.
(c) Minimum procedures which shall constitute a visual examination.
(d) Procedures for the safekeeping and transfer of prescription files or case records upon the discontinuation of practice.
(e) Supervision of supportive personnel.
(f) Courses and procedures for continuing education.
(g) Administration and prescription of ocular pharmaceutical agents.

24. Section 463.006(2) provides:

> The examination shall consist of the appropriate subjects, including applicable state law and rules and general and ocular pharmacology with emphasis on the use and side effects of ocular pharmaceutical agents. The board may by rule substitute a national examination as part or all of the examination and may by rule offer a practical examination in addition to the written examination.

25. There is nothing in any of these statutory provisions that expressly authorizes the Board to specify a time frame for taking the national examination prior to the time an application for licensure is filed.

26. The Rule cites as a rationale for requiring the look-back period: constant advances in research; developing knowledge in the area of basic and clinical science as applied to the diagnosis, correction, remedy, and relief of insufficiencies or abnormal conditions of the human eyes and their appendages; variances in the scope of optometric practice among the states;

and the importance of fundamental clinical skills to patient health and safety.

27. In addition to the bases enunciated in the Rule, the purpose of the Rule is to ensure applicants are minimally competent to practice optometry with reasonable skill and safety. When the Board has been faced with petitions for variance and waiver seeking a waiver of the Rule's look-back provision, Board members have consistently focused on their desire to protect the health, safety, and welfare of the public by ensuring that optometrists in Florida are well qualified and up to date in their skills.

28. Since 2007, the Board has held multiple workshops and public hearings regarding the Rule, with the most recent occurring on May 13, 2016. The Rule is currently open for development, although the Board has not yet proposed any additional language.

29. The Rule's adoption history indicates that it has been amended multiple times over the years, most recently in 1999, 2002, 2004, 2010, 2011, 2012, 2014, and 2015. During the review of these amendments, the evidence presented did not indicate that the Joint Administrative Procedures Committee staff ever questioned the look-back language. While this information is evidence that can be considered in determining the validity of the look-back period, it is not dispositive. Two different

attorneys serving as Board counsel have, by contrast, advised the Board that they did not believe that the Board has statutory authority for the look-back period contained in the Rule. Moreover, Terrance Nuberhaus, a former Board member now serving on the Board's probable cause panel, could not identify any statute expressly providing authority for the Board to limit the acceptability of NBEO scores to any particular time frame.

Equivalency Standards for the NBEO Exam

30. NBEO exams have been revised over time. A copy of the NBEO equivalency statement is identified as Petitioners' Exhibit 17, and Petitioners and Respondent agreed that this statement is considered an "adjunct to the deposition of Dr. Jack Terry."

31. The NBEO takes into account the revisions when determining whether a revised examination is equivalent to prior versions of the NBEO exams.

32. The Board has recognized that the Part I and Part II National Board Examinations administered in 1991 are comparable to the Part I and Part II National Board Examinations administered today.

33. The NBEO has developed equivalency statements which apply to any candidate who is attempting to complete the current three-part sequence of the NBEO exam, but who began the sequence under an earlier format. The purpose of equivalency is to keep

the examinations equivalent, regardless of when the test was administered, and to reduce confusion and create a level of consistency, so that people can easily interpret and compare the results.

34. The fact that NBEO has developed equivalency statements does not mean that the content of the examinations has remained static over time. Dr. Jack Terry, the Executive Director of NBEO, also testified that the skills evaluated in Part III of the test have changed over the years:

> Q. As to Part III, basically since 1993, am I correct that the main thing that has been added is a section dealing with injections?
>
> A. No. Since 1993, there have been many changes to the skills that have been added and some that have been taken away. I don't have a full comprehensive list of those changes and when they occurred.
>
> For example, binocular ophthalmoscopy, I think, was added at some later point. Blood pressure measurements, I think, were added. A fundus contact lens evaluation was added. Punctal plugs and punctal plug insertion removal was added later on. Injections, as you indicated, was added later on. So there have been – and the purpose of the Part III Committee and Council is to look every year at the skills, currently there are 20 different skills, and to make sure that the Committee, the groups that give the National Board input are still comfortable with the 20 skills. Should it be increased. Should it be decreased.
>
> A few years ago, visual fields, confrontational visual fields were added. Just a small change. A few years ago

saccadic eye movements were added to the exam. So there have been changes to the exam.

It's hard for me to say which one has been the biggest or the most or most profound. I think the changes have all been important.

Q. But as far as the changes with additions or deletions, that has all been taken into account when the NBEO has determined its equivalency?

* * *

A. Yes, that's all been taken into consideration in terms of the equivalence.

CONCLUSIONS OF LAW

35. 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.

Standing

36. Petitioners and Intervenor have standing to participate in this case. Section 120.56 allows a person who is substantially affected by a rule or agency statement to initiate a challenge. To establish standing under the "substantially affected" test, generally a party must demonstrate that: 1) the rule will result in a real and immediate injury in fact, and 2) the alleged interest is within the zone of interest to be protected or regulated. Jacoby v. Fla. Bd. of Med., 917 So. 2d 358 (Fla. 1st DCA 2005); see also Fla. Bd. of Med. v. Fla. Acad.

of Cosmetic Surgery, 808 So. 2d 243, 250 (Fla. 1st DCA 2002), superseded on other grounds, Dep't of Health v. Merritt, 919 So. 2d 561 (Fla. 1st DCA 2006).

37. Petitioners have established that they are both optometrists who are licensed in other states, but are precluded from licensure in Florida unless they take and pass the NBEO exam a second time because their passing scores are more than seven years old. Petitioners are, therefore, substantially affected by the look-back period contained in the Rule.

38. With respect to associational standing, the Supreme Court of Florida has stated that to meet the requirements of section 120.56(1), an association must demonstrate that a substantial number of its members, although not necessarily a majority, are "substantially affected" by the challenged rule. The subject matter of the rule must be within the association's general scope of interest and activity, and the relief requested must be of the type appropriate for a trade association to receive on behalf of its members. NAACP, Inc. v. Bd. of Regents, 863 So. 2d 294, 298 (Fla. 2003); Fla. Home Builders Ass'n v. Dep't of Labor & Emp. Sec., 412 So. 2d 351 (Fla. 1982). That standard has been met here, and the parties do not dispute Intervenor's standing to participate in this proceeding.

39. Petitioners are challenging an existing, as opposed to a proposed, rule. Section 120.56(3) requires Petitioners to

prove by a preponderance of the evidence that the existing rule is an invalid exercise of delegated legislative authority as to the objections raised.

The Scope of Petitioners' Challenge to the Rule

40. As a preliminary matter, it is necessary to determine the scope of Petitioners' challenge to the Rule.

41. Section 120.52(8) defines "invalid exercise of delegated legislative authority." It provides:

> (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.

42. It is clear that Petitioners are challenging the Rule on the basis of subsections (c), (d), and (e), as those subsections are expressly cited in the Petition. What must be determined from the face of the Petition is whether Petitioners are also challenging the Rule on the basis of subsection (b). It is found that a challenge under subsection (b) is included within the Petition.

43. The Petition does not expressly cite to subsection (b), which provides that it is an invalid exercise of delegated legislative authority where "[t]he agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1." While the Petition does not expressly cite to subsection (b), the allegations clearly reflect the language of

the subsection. For example, the heading at page 7 states, "The Board has Exceeded its Rulemaking Authority." Other portions of the Petition state, in pertinent part:

> 20. While the Board has the authority to substitute a national exam and can offer a practical exam in addition, there is no authority for the Board to add additional conditions that the national examination be taken within any particular time frame. . . . Importantly, the Florida Legislature did not give the Board the authority to set those parameters. . . . Accordingly, the Rule is an invalid exercise of delegated legislative authority.
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> * * *
>
> 25. By enacting a rule that creates a requirement that the NBEO exam be passed within seven years immediately preceding the application for licensure . . . the Board has exceeded its rulemaking authority because there is no specific law being implemented and the Rule does not implement or interpret any specific power or duties.
> 26. . . . [n]one of the statutory provisions identified by the Board grant or authorize the Board to exclude a passing score on the NBEO, which is the national examination that has been accepted as a substitute for the examination. Again, the absence of a statutory directive clearly demonstrates that there is no authority for the Board to add additional conditions that mandate the national examination be taken within any particular time frame. . . .
>
> * * *
>
> 31. . . . The ultimate facts of which Petitioners are aware at this time include, but are not limited to:
> a) Whether the Board had rulemaking authority to enact the Rule.

> b) Whether the Rule is an invalid exercise of delegated legislative authority.

(emphasis added).

44. Petitioners and Respondent also participated in the preparation of a Joint Pre-hearing Stipulation which identifies the concise statement of the nature of the controversy and the issues of law to be determined. Intervenor filed a separate Pre-hearing Statement, notwithstanding that the Order of Pre-hearing Instructions did not authorize unilateral statements, and was served with the Joint Pre-hearing Stipulation prepared by Petitioners and Respondent. In the Pre-hearing Stipulation filed by Petitioners and Respondent, the Issues of Law to be determined are as follows:

> 1. Whether the Board has exceeded its rulemaking authority by enacting the Rule that creates a requirement that the NBEO exam be passed within seven years immediately preceding the application for licensure [to] the Board.
> 2. Whether the Rule, which creates a requirement that the NBEO exam be passed within seven years immediately preceding the application for licensure [to] the Board, implements or interprets any specific power or duties granted to the Board.
> 3. Whether the Rule gives effect to a specific law to be implemented.
> 4. Whether the Rule implements or interprets specific powers and duties granted to the agency.
> 5. Whether Rule 64B13-4.001 enlarges, modifies, or contravenes the specific provisions of the rulemaking authority or law implemented.

> 6. Whether Rule 64B13-4.001 is vague, fails to establish adequate safeguards for agency decisions, or vests unbridled discretion in the agency.
> 7. Whether Rule 64B13-4.001 is arbitrary or capricious.

(emphasis added).

45. Intervenor contends that Petitioners did not allege that the Rule violates section 120.58(2)(b), and that any assertion in Petitioners' Proposed Final Order should be stricken.

46. Intervenor's argument is premised upon the failure to specifically cite to section 120.52(8)(b), notwithstanding repeated references to the specific language of subsection (b) noted above. Clearly, an express citation to section 120.53(8)(b) would have simplified matters for all. However, given the allegations in the Petition and the statement of issues for consideration contained in Petitioners' and Respondent's Pre-hearing Stipulation, it cannot be said that any party, including Intervenor, is embarrassed in its defense to the allegation that the Board exceeded its rulemaking authority in adopting the look-back period. Fla. Bd. of Pharmacy v. Levin, 190 So. 2d 768, 770 (Fla. 1966) (reference to statutory section that did not exist not fatal: technical niceties based upon obvious mistakes and mis-references that do not mislead or result in manifest unfairness are not grounds for overturning administrative

determinations); Sanabria v. Pennymac Mortg. Inv. Trust Holdings I, LLC, 197 So. 3d 94, 97 (Fla. 2d DCA 2016) (whether under a general or heightened standard of pleading, Defendants' defense that the signature on a note was not authentic was adequately pleaded); Werner v. Dep't of Ins. & Treas., 689 So. 2d 1211 (Fla. 1st DCA 1997) (where Administrative Complaint alleged factual chronology of transaction at issue, cannot say licensee was embarrassed in the preparation of her defense); Univ. Cmty. Hosp. v. Dep't of Health & Rehabilitative Servs., 610 So. 2d 1342, 1346 (Fla. 1st DCA 1992) (while failure to plead an issue usually precludes a ruling on the issue, rules of pleading are not applied in administrative proceedings as strictly as they are in court proceedings); but see, Aloha Utils., Inc. v. Pub. Serv. Comm'n, 723 So. 2d 919, 921 (Fla. 1st DCA 1999) (pleading that failed to identify the specific statements of procedure subject to challenge was fatal to challenge pursuant to section 120.56(4)(a)); and Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996) (where Administrative Complaint did not allege any facts to support statutory references, it did not afford reasonable notice of the facts or conduct at issue). Here, the allegations clearly included the facts to support a violation of section 120.52(8)(b), as well as parroting the language of the subsection itself. The issue is adequately presented to place all parties on notice that whether the Board

exceeded its statutory authority is at the heart of Petitioners' challenge.

47. While this Final Order contains analysis with respect to a violation of section 120.52(8)(b), much of that discussion applies equally to a violation of section 120.52(8)(c). Inasmuch as the conclusion is the same with respect to both subsections, an argument that one is pleaded and the other is not makes no difference in the result reached in this Final Order.

Whether the Rule Exceeds the Board's Rulemaking Authority

48. Petitioners assert that the Rule is invalid because it exceeds the Board's grant of rulemaking authority, citation to which is required by section 120.54(3)(a)1., by attempting to limit the length of time an applicant's scores for the NBEO exam may be accepted.

49. The crux of Petitioners' argument with respect to section 120.52(8)(b), is that the grant of rulemaking authority pursuant to sections 456.017(1), 463.005, and 463.006(2), is not sufficient authority to establish the look-back period with respect to the NBEO exam. Respondent and Intervenor, on the other hand, insist that there is "ample statutory authority" for the Rule.

50. One of the more recent cases interpreting the standards related to rulemaking authority is United Faculty of Florida v. Florida State Board of Education, 157 So. 2d 514, 516-517 (Fla.

1st DCA 2015). In that case, the State Board of Education adopted a rule that established standards and criteria for continuing contracts with full-time faculty members employed by Florida College System institutions. The First District stated:

> A rule is invalid under section 120.52(8)(b) if the agency "exceed[s] its grant of rulemaking authority." A grant of rulemaking authority is the "statutory language that explicitly authorizes or requires an agency to adopt [a rule]." § 120.52(17), Fla. Stat. The scope of an agency's rulemaking authority is constrained by section 120.536(1) and the so-called "flush-left paragraph" in section 120.52(8), which provide that an agency may only adopt rules to "implement or interpret the specific powers and duties granted by the [agency's] enabling statute"; that an agency may not adopt rules to "implement statutory provisions setting forth general legislative intent or policy" or simply because the rule "is reasonably related to the purpose of the enabling legislation and is not arbitrary or capricious or is within the agency's class of powers and duties"; and that "[s]tatutory 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."
>
> Section 120.536(1) and the flush-left paragraph in section 120.52(8) require a close examination of the statutes cited by the agency as authority for the rule at issue to determine whether those statutes explicitly grant the agency authority to adopt the rule. As this court famously stated in [Southwest Florida Water Management District v.] Save the Manatee Club[, Inc.], 773 So. 2d 594 (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. Either the enabling statute authorizes the rule at issue or it does not." 773 So. 2d at 599 (emphasis in original). Accord Bd. of Trs. of the Internal Improvement Trust Fund v. Day Cruise Ass'n, Inc., 794 So. 2d 696, 700 (Fla. 1st DCA 2001) ("[A]gencies have rulemaking authority only where the legislature has enacted a specific statute, and authorized the agency to implement it. . . ."); see also Fla. Elections Comm'n v. Blair, 52 So. 3d 9, 12-13 (Fla. 1st DCA 2010) (explaining that the definition of "rulemaking authority" in section 120.52(17) does not further restrict agency rulemaking authority beyond what is contained in the flush-left paragraph in section 120.52(8), as construed by this court in Save the Manatee Club and subsequent cases.

51. With these principles in mind, the Rule cites to sections 456.017(1), 463.005, and 463.006(2) as its rulemaking authority, and sections 456.017(1) and 463.006(2) as the law the Rule seeks to implement. Section 456.017 contains very specific grants of rulemaking authority to both the Department of Health and the various boards housed within the Department with respect to the selection and administration of licensing examinations. Section 456.017(1)(b) authorizes boards to specify "by rule the general areas of competency to be covered by each examination, the relative weight to be assigned in grading each area tested, and the score necessary to achieve a passing grade" in those instances where an examination is developed by the department or a contracted vendor. Section 456.017(1)(c) also authorizes the

boards to "approve by rule the use of one or more national examinations that the department has certified as meeting the requirements of national examinations and generally accepted testing standards." Boards also are authorized in subsection (3) to develop rules regarding the security and monitoring of examinations. However, nothing in section 456.017(1) allows the Board to adopt a national examination, but provides for a limited time frame in which an applicant may take the examination prior to his or her application.

52. Section 463.005 provides rulemaking authority for the Board in a variety of areas, including standards of practice, minimum equipment requirements to practice, minimum procedures required for a visual examination, procedures for the safekeeping and transfer of prescription files or case records, supervision of supportive personnel, courses and procedures for continuing education, and administration and prescription of ocular pharmaceutical agents. Nothing in section 463.005 authorizes the Board to provide for a limited time frame in which an applicant may take the examination prior to his or her application.

53. Section 463.006(2) provides that with respect to the examination for licensure, the Board "may by rule substitute a national examination as part or all of the examination and may by rule offer a practical examination in addition to the written examination." Nothing in section 463.006(2) authorizes the Board

to provide for a limited time frame in which an applicant may take the examination prior to his or her application. Indeed, nothing in section 463.006 provides authority for the Board to allow for the acceptance of scores for an examination taken prior to application for licensure in Florida at all.

54. Petitioners have demonstrated that the look-back period in the Rule exceeds the Board's grant of rulemaking authority, in violation of section 120.52(8)(b).

Whether the Rule Enlarges, Modifies, or Contravenes the Specific Provisions of the Law Implemented

55. Petitioners also contend that the Rule is invalid pursuant to section 120.52(8)(c), because it enlarges, modifies, or contravenes the specific provisions of the law implemented. As noted by the First District in Day Cruise Ass'n, while subsections (b) and (c) are "interrelated, two different issues are involved." 794 So. 2d at 701.

56. Any determination concerning the validity of the Rule as an invalid delegation of legislative authority under this subsection must consider the interplay between section 463.006, which specifically addresses the licensing of optometrists, and section 456.017, which addresses the selection and/or development of examinations for licensure for professions within the Department of Health. Section 463.006 provides in pertinent part:

> (1) Any person desiring to be a licensed practitioner pursuant to this chapter shall apply to the department to take the licensure and certification examinations. The department shall examine each applicant who the board determines has: . . . .
> (2) The examination shall consist of the appropriate subjects, including applicable state laws and rules . . . . The board may by rule substitute a national examination as part or all of the examination and may by rule offer a practical examination in addition to the written examination.
> (3) Each applicant who successfully passes the examination and otherwise meets the requirements of this chapter is entitled to be licensed as a practitioner and to be certified to administer and prescribe ocular pharmaceutical agents in the diagnosis and treatment of ocular conditions.

(emphasis added).

57. The plain language of section 463.006(1) contemplates that in every case, the application for licensure would precede taking the examination. Certification of national examinations by the Department, as authorized and encouraged pursuant to section 456.017(1)(c), appears to conflict with the requirement that the Department "shall examine" applicants for licensure. However, when section 456.017 is read in its entirety, it provides that once a national examination is certified, the Department or the applicable board would administer the national examination. See, e.g., § 456.017(1)(c)3., Fla. Stat. ("If a national practical or clinical examination is available and certified by the department pursuant to this section, the board,

or the department when there is no board, may administer the national examination.").

58. The Rule, both in its current form and in prior iterations, appears to ignore the language in section 463.006(1) that the Board is to certify an applicant as eligible prior to the applicant taking an examination. By the terms of section 463.006, the Board is supposed to be certifying the applicant to take the examination. In fact, the plain language of section 463.006(1) would prohibit the Board from considering any scores from the NBEO exam taken before an applicant files an application in Florida. Respondent and Intervenor have noted this statutory requirement, yet still assert that the look-back period is necessary to give effect to the statute without having the "unreasonable or ridiculous conclusion" that every applicant would be required to take the first three parts of the NBEO exam after application for licensure. Indeed, Intervenor states:

> If one attempts to interpret the statute literally, the language of the statute requires that the examinations must be taken after the application. This interpretation follows logically from the fact that the application mentioned in the statute is not an application for a license, but is an application for permission to take the exam. Viewed literally, the statute requires an applicant to take and pass a current Florida examination, and to do so only after having filed the necessary application documents and having paid the necessary fees. A strict literal interpretation of the statute leads naturally to a conclusion that any

> examinations passed before applying in Florida are not a valid basis for Florida licensure. So how can a rule that allows applicants to rely on certain exams taken prior to their application to practice in Florida be valid when the statute facially requires the exams to be taken after the application is filed? Because under the existing facts and circumstances that is the only reasonable way to achieve the legislative intent to require all applicants to, by examination, demonstrate current competency, without imposing a very burdensome, inconvenient, expensive, and unnecessary requirement that each applicant retake a series of three national examinations they had just recently taken and passed.

59. The fallacy in Respondent and Intervenor's position is that, even within the Department of Health, the Legislature has chosen for some professional boards to require an examination after application and for others to simply require a passing score on a named examination. See, e.g., § 457.105, Fla. Stat. (acupuncture allows completion of a board-approved national certification process); § 458.311(1)(h), Fla. Stat. (medicine allows submission of a passing score from identified examinations); § 459.0055(1)(m), Fla. Stat. (osteopathic medicine permits passing scores of a national examination received no more than five years before making application in Florida), compared to § 460.406(1), Fla. Stat. ("any person desiring to be licensed as a chiropractic physician must apply to the department to take the licensure examination."); § 461.006(1), Fla. Stat. (with

respect to podiatrists, same requirement); and § 465.007(1), Fla. Stat. (with respect to pharmacists, same requirement).

60. Reading statutes in pari materia requires that "statutes relating to the same subject or object be construed together to harmonize the statutes and give effect to the Legislature's intent." Lamar Outdoor Advert. v. Dep't of Transp., 17 So. 3d 799, 803-804 (Fla. 1st DCA 2009) (quoting Fla. Dep't of State v. Martin, 916 So. 2d 763, 768 (Fla. 2005)); Ortiz v. Dep't of Health, Bd. of Med., 882 So. 2d 402, 404 (Fla. 1st DCA 2004). The Legislature has clearly intended different standards for different professions. As stated by the Supreme Court of Florida:

> When the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent. In such instance, the statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent. When the statutory language is clear, "courts have no occasion to resort to rules of construction – they must read the statute as written, for to do otherwise would constitute an abrogation of legislative power." Nicoll v. Baker, 989 So. 2d 990-91 (Fla. 1996).

Daniels v. Fla. Dep't of Health, 898 So. 2d 61, 64-65 (Fla. 2005) (citations omitted).

61. The premise underlying rule challenges in general requires an examination of what the Legislature actually

authorized compared to what the agency charged with implementing a program has done pursuant to the statutory authority granted to it. As section 120.536 and the flush-left language of section 120.52(8) make clear, everything must flow from the language of the statute being implemented. Where the statute is unworkable, the answer is not gained through rulemaking that goes beyond the reach of the statutory grant. Consistent with the view stated by the Court in Daniels, the undersigned "decline[s] to look beyond the plain language of the statute, and leave[s] expansion of the rights conferred under the statute to the Legislature." 898 So. 2d at 69.

62. Moreover, the issue here is not with the statutory framework, but with the examination process associated with the national examination certified by the Department. Even so, as stipulated by the parties, the look-back period has been in the Rule long before the certification of the NBEO for the practical examination, having been in the Rule in some form since at least 1979. Its lengthy tenure means that it was originally adopted at a time when the standards for rulemaking were vastly different than what emerged with the creation of section 120.536 and the amendments to the rulemaking standards passed by the Legislature in 1996. While the look-back period might have survived under the prior standards, it cannot survive under the rulemaking standards governing rules today.

63. In terms of the look-back period, the Rule does not give effect to a specific law to be implemented because section 463.006 does not authorize licensure by endorsement, but only authorizes licensure by examination--examination taken after an application is filed with the Board.

64. Similarly, the Rule does not implement or interpret a specific power or duty granted to the agency, because the Legislature has not granted to the Board the authority to authorize licensure by endorsement, but only authorizes licensure by examination taken after an application has been filed.

65. Section 120.52(8)(c) provides that a rule is an invalid exercise of delegated authority if the rule "enlarges, modifies, or contravenes the specific provisions of law implemented." Here, the Rule enlarges the specific statute implemented, not because it only allows a look-back period for a seven-year period prior to application, but because it allows a look-back period at all. Here, the Board has essentially created a limited pathway of licensure by endorsement when the Legislature has not authorized one. While the Board's motives may be admirable, the pathway created by the look-back period is not authorized by statute and extends the Rule beyond the specific powers and duties conferred by the enabling statutes.

66. If it is assumed, as the Rule does, that scores from examinations taken prior to application can be considered for

licensure, the Rule then contravenes the provisions of section 463.006. In Moreland v. Agency for Persons with Disabilities, 19 So. 3d 1009 (Fla. 1st DCA 2009), the First District examined the proposed tier rules for Medicaid-waiver services provided to persons with disabilities. The proposed rules were challenged, and an administrative law judge found them to be valid. On appeal, the First District found that the administrative law judge erred in determining that proposed rule 65G-4.0024 was valid because it placed an age limit on eligibility for one of the tiers in contravention of the statute it was supposed to implement. Section 393.0661(3)(c), Florida Statutes, which the rule implemented, contained no age limitation. While the administrative law judge found that APD had justified its age limitation, the First District determined that pursuant to section 120.52(8), a rule is invalid if it contravenes the statute which it implements, regardless of whether the agency was justified in contravening the statute. 19 So. 3d at 1012. The same can be said here.

67. Petitioners have noted that when the Legislature wants to impose time limitations on the passage of an examination or to put in place other conditions for licensure, it knows how to do so. Petitioners have identified a number of statutory provisions where the Legislature has in fact included time limitations for licensing requirements. They correctly state, "[c]learly, the

Legislature could have provided the Board with the authority to implement such time limitations as it has done with other professions, but it chose not to do so with optometry. . . . When interpreted in conjunction with each other, the implemented statutes allow the Board to use a national examination, which cover(s) specific topics, whenever possible. However, there is no grant of authority or directive related to any particular time frame that would authorize the Board to exclude a passing score on the NBEO."

68. Petitioners are correct that the Rule contravenes the statute, but their interpretation would require nullification of the directive that "the department shall examine each applicant who the board certifies" contained in section 463.006. It is not within the province of the Board, or this administrative law judge, to write this language out of the statute. A "statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts." Fla. Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC, 986 So. 2d 1260, 1265 (Fla. 2008).

69. Petitioners have demonstrated that the look-back provision in the Rule enlarges, modifies, or contravenes the statute it seeks to implement, in contravention of section 120.52(8)(c).

Whether the Rule is Vague

70. Petitioners' Proposed Final Order presents no argument in the Conclusions of Law to support its contention that the Rule is vague, but concludes that it violates section 120.52(8)(d). Section 120.52(8)(d) provides that a rule is an invalid exercise of delegated legislative authority where the rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency. A rule is considered vague in violation of section 120.52(8)(d) if it requires performance of an act in terms that are so vague that people of common intelligence must guess as to its meaning. State v. Peter R. Brown Constr., Inc., 108 So. 3d 723, 728 (Fla. 1st DCA 2013); S.W. Fla. Water Mgmt. Dist. v. Charlotte Cnty., 774 So. 2d 903, 915 (Fla. 2d DCA 2001).

71. Petitioners have not demonstrated that the Rule is invalid for these reasons. To the contrary, the Rule is straightforward and, although defective for other reasons, draws a "bright-line" directive that is easily understood and enforced.

Whether the Rule is Arbitrary and Capricious

72. Section 120.52(8)(e) also declares that a rule is an invalid exercise of delegated legislative authority when it is arbitrary and capricious. The statute recognizes the long-standing definitions of the terms, stating that 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." See Dravo Basic Materials Co. v. Dep't of Transp., 602 So. 2d 632, 634 (Fla. 1st DCA 1992).

73. The evidence indicates that the look-back period in the Rule is a provision that has been in the Rule for many years, most likely long before the current members of the Board were appointed. Its effect has been considered by the Board, not only in terms of rulemaking, but when considering the many requests for variance or waiver that the Board has received. From the Board's perspective, the look-back period is an attempt to protect the safety of the public and to make sure that optometrists have received the appropriate and up-to-date training, given the changes in optometry.

74. The Rule contains at least part of the rationale for the look-back period on its face. Those reasons are reasonable and well-intentioned. Petitioners have not demonstrated a violation based upon section 120.52(8)(e).

75. In summary, the look-back period in rule 64B13-4.001 is an invalid exercise of delegated legislative authority as defined in section 120.52(8)(b) and (c), but not as defined in subsections (e) and (f).

76. The undersigned is aware that adhering to the plain language of section 463.006 mandates a result clearly not favored by any party. However, the language of the statute is clear and

unambiguous, and should this result be onerous, the answer is a legislative change. Daniels, 898 So. 2d at 69. The Board is a creature of statute, and can only exercise the powers given to it, no matter how well-intentioned its actions may be. Agencies 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.").

77. Here, the Board's authority is expressly circumscribed by the terms of sections 463.006 and 456.017, and the Board has provided no authority that would allow it to vary from the statutorily-mandated process for evaluating licensure applications and approving candidates to take the licensure examination. While Petitioners were successful in demonstrating that the Rule is an invalid exercise of delegated legislative authority, the result of this proceeding is most likely not what Petitioners desire. However, to ignore the express terms of section 463.006 would be to elevate one impermissible extension

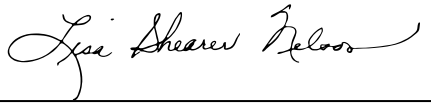
of the statute over another. Sections 120.52(8) and 120.536 do not countenance that alternative.

78. Petitioners have requested attorney's fees and costs pursuant to section 120.595(3). Inasmuch as this Final Order determines that the proposed rule is an invalid exercise of delegated legislative authority as defined in section 120.52(8)(b) and (c), Petitioners are entitled to a hearing as to entitlement and, if entitled, the amount of any reasonable fees and costs.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that rule 64B13-4.001 is an invalid exercise of delegated legislative authority. Jurisdiction is retained for the purpose of determining whether attorney's fees and costs are warranted and, if so, the amount. Any motion to determine fees and costs shall be filed within 60 days of the issuance of this Final Order.

DONE AND ORDERED this 14th day of April, 2017, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of April, 2017.

ENDNOTE

[1/] In its Proposed Final Order, Intervenor joined in the stipulation with respect to these findings set forth in paragraphs 1 through 22 from the Joint Pre-hearing Stipulation, along with providing additional proposed findings of fact.

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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.