FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-3081

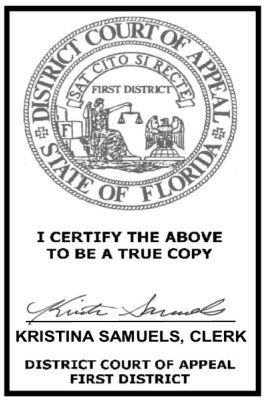
FLORIDA PREPAID COLLEGE BOARD,

Appellant,

v.

INTUITION COLLEGE SAVINGS SOLUTIONS, LLC,

Appellee.



On appeal from the Division of Administrative Hearings.
Lynne A. Quimby-Pennock, Administrative Law Judge.

October 13, 2021

LEWIS, J.

The Florida Prepaid College Board appeals a final order from the Division of Administrative Hearings ("DOAH") declaring Florida Administrative Code Rules 19B-14.001, 19B-14.002, and 19B-14.003 an invalid exercise of delegated legislative authority. For the reasons that follow, we agree with the Board that the Administrative Law Judge ("ALJ") erred in finding the rules invalid.

BACKGROUND

The Board and Appellee, Intuition College Savings Solutions, LLC, have entered into a series of contracts over the past twenty-five years, most recently in July 2019, pursuant to which Intuition is to provide customer service and records administration services to the Board. The parties' contract provides that "[t]he sole and exclusive manner of resolution of all claims, disputes or controversies related to or arising under or from this Contract shall be pursuant to Rules 19B-14.001, 19B-14.002, 19B-14.003, Florida Administrative Code, as amended from time to time." The possibility of an upcoming contract dispute involving $700,000 prompted Intuition to file a Petition to Determine the Invalidity of Florida Administrative Code Rules 19B-14.001, 19B-14.002, and 19B-14.003, in which it argued that the rules are an invalid exercise of delegated legislative authority under sections 120.52(8)(b)-(e), Florida Statutes (2020). The ALJ agreed and entered a final order declaring that each rule is an invalid exercise of delegated legislative authority. The ALJ specifically concluded that the Board exceeded its grant of rulemaking authority, that the rules enlarge, modify, and/or contravene the law implemented, and that the rules are arbitrary and capricious. This appeal followed.

ANALYSIS

We review the ALJ's findings of fact for competent, substantial evidence, but we review her conclusions of law and statutory interpretations *de novo*. *MB Doral, LLC v. Dep't of Bus. & Prof'l Regulation, Div. of Alcoholic Beverages & Tobacco*, 295 So. 3d 850, 853 (Fla. 1st DCA 2020); *see also* § 120.68(7)(b), (d), (10), Fla. Stat. (2020). "Whether an agency exceeded its rulemaking authority or enlarged the specific provisions of law implemented is reviewed *de novo*." *MB Doral, LLC*, 295 So. 3d at 853 (noting that "[w]ith the passage of article V, section 21 of the Florida Constitution, the previously afforded deference to the agency's interpretation of the statutes it implements has been abolished").

The Board and the Challenged Rules

The Board was established by section 1009.971, Florida Statutes, to administer the Stanley G. Tate Florida Prepaid College Program and the Florida College Savings Program set forth in sections 1009.98 and 1009.981, Florida Statutes. §§ 1009.971(1), 1009.97(3)(d), (n), Fla. Stat. (2020). The Board was created "as a body corporate" that "shall perform essential governmental functions as provided in ss. 1009.97-1009.988" and "shall independently exercise the powers and duties specified in ss. 1009.97-1009.988." § 1009.971(1), Fla. Stat. "The board shall have the powers and duties necessary or proper to carry out the provisions of ss. 1009.97-1009.988, including, but not limited to, the power and duty to" sue and be sued, solicit proposals and contract, "[e]stablish other policies, procedures, and criteria to implement and administer the provisions of ss. 1009.97-1009.988," and "[a]dopt procedures to govern contract dispute proceedings between the board and its vendors." § 1009.971(4)(c), (*l*), (w), (x), (y), (5), Fla. Stat. In 1996, the Board adopted rules 19B-14.001, 19B-14.002, and 19B-14.003, which cite sections 1009.971(1), (4), and (6) as the authority and section 1009.971 as the law implemented. Fla. Admin. Code R. 19B-14.001, 19B-14.002, 19B-14.003.

Rule 19B-14.001 defines the scope of the rules and provides in relevant part that "[t]hese rules shall apply to the resolution of all claims, disputes or controversies related to or arising from contracts, including any extensions of contracts, entered by the [Board]" and "shall constitute the sole procedure for the resolution of all claims under all such contracts." Fla. Admin. Code R. 19B-14.001.

Rule 19B-14.002 governs the initiation of proceedings related to contracts with the Board and states:

> (1) Any person or firm that has entered into a contract with the Board and has been adversely affected by a decision of the Board or its employees concerning such contract shall file a written petition to contest the decision with the Board within 21 days of the date of the receipt by such person or firm of the decision. The notice

of the decision shall be provided in writing to the person or firm by the Executive Director. The date of receipt of the notice shall be either the date on which the notice is received by the person or firm if the notice is sent by registered mail or by other means of delivery which results in a receipt for delivery or the date of the decision plus five days if the notice is sent by regular mail. Any person or firm who receives such written notice of the decision and who fails to request a hearing within twenty-one days, shall have waived his right subsequently to request a hearing on such matters.

(2) The petition shall include the following:

(a) The name and business address of the person or firm which claims to be adversely affected by a decision of the Board or its employees;

(b) A concise statement of the ultimate facts upon which the claim arose;

(c) The date and subject of the contract under which the claim arose;

(d) A statement of all disputed issues of material fact upon which the claim is based or, if there are none, the petition shall so indicate;

(e) A concise statement which explains how the substantial interests of the person or firm are affected by the decision of the Board or the Board's employees;

(f) A concise statement of the provisions of the contract together with any federal, state and local laws, ordinances or code requirements or customary practices and usages in the industry asserted to be applicable to the questions presented by the claim;

(g) The demand for relief sought by the claimant;

(h) The date of the occurrence of the event or events which gave rise to the claim and the date and manner of the Contractor's compliance with the contract; and

(i) Any other material information the person or firm contends is material to its claim.

(3) The written petition shall be printed, typewritten or otherwise duplicated in legible form. The petition shall include copies of all documents which support the claim.

Fla. Admin. Code R. 19B-14.002.

Finally, rule 19B-14.003 governs the resolution of claims and provides in part:

> (1) Upon receipt of a formal written petition, the Executive Director shall attempt to resolve the matters that are the subject of the petition by mutual agreement within fifteen (15) days, excluding Saturdays, Sundays, and legal holidays.
>
> (2) If the petition is not resolved by mutual agreement within fifteen (15) days, excluding Saturdays, Sundays and legal holidays, the Executive Director shall deliver, within forty-five (45) days from the date such petition was filed, to the person or firm that filed the petition a determination that indicates the Board's written response to the claims or [sic] such person or firm.
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> (3) Unless the person or firm who filed the petition agrees to the determination of the Board and a consent order adopting the determination is entered within thirty (30) days from the receipt by the person or firm of the Board's determination, the Executive Director, if no disputed issues of material fact are involved, shall designate a hearing officer who shall conduct an informal proceeding pursuant to Section 120.57(2), F.S., and applicable Board rules. The hearing officer designated by the Executive Director shall be either a person who is a member in good standing of the Florida Bar or a person knowledgeable by virtue of education or practical experience with the subject matter of similar contracts involving state agencies.
>
> (4) If there is a disputed issue of material fact, the Executive Director shall refer the petition to the Division of Administrative Hearings of the Department of Management Services for proceedings under Section 120.57(1), F.S.

> (5) Once the Executive Director has referred the dispute to a hearing officer pursuant to subsection (3) or (4), no further information or amendment of the claims shall be permitted.
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> (6) The statements, facts, documents and materials contained in the petition filed pursuant to Rule 19B-14.002, F.A.C., or which are submitted to and received by the Executive Director prior to the determination made pursuant to subsection 19B-14.003(2), F.A.C., shall constitute the entire factual record submitted by a person or firm on which a claim against the Board may be sustained in any hearing under this Rule. A person or firm making a claim against the Board shall not be allowed to submit to a hearing officer any statements, facts, documents or materials to support any claim against the Board which were not submitted to the Executive Director by the person or firm making the claim prior to the Executive Director's determination pursuant to subsection 19B-14.003(2), F.A.C. The Board may submit statements, facts, documents or materials in response to the factual record submitted by a person or firm making a claim against the Board or to sustain the decision of the Executive Director which was made pursuant to subsection 19B-14.003(2), F.A.C.

Fla. Admin. Code R. 19B-14.003. The parties stipulated below that no petition has ever been filed by a vendor pursuant to these rules.

Validity of the Rules

Duly promulgated rules are presumptively valid until invalidated, and the party challenging an administrative rule bears the burden to prove by a preponderance of the evidence that the rule is an invalid exercise of delegated legislative authority. *Goodman v. Fla. Dep't of Law Enf't*, 238 So. 3d 102, 108 (Fla. 2018). A challenge to the adequacy of a rule, as opposed to noncompliance with a rule, amounts to a facial challenge to the rule. *Id.* at 110. "'Invalid exercise of delegated legislative authority' means action that goes beyond the powers, functions, and duties delegated by the Legislature." § 120.52(8), Fla. Stat. (2020). An existing rule is

an invalid exercise of delegated legislative authority if "[t]he agency has exceeded its grant of rulemaking authority," "[t]he rule enlarges, modifies, or contravenes the specific provisions of law implemented," "[t]he rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency," or "[t]he rule is arbitrary or capricious." § 120.52(8)(b)-(e), Fla. Stat. We now turn to the ALJ's conclusions that the Board exceeded its grant of rulemaking authority, that the rules enlarge, modify, and/or contravene the law implemented, and that the rules are arbitrary and capricious.

Sections 120.52(8)(b) and (c): Whether the Board exceeded its grant of rulemaking authority or the rules enlarge, modify, or contravene the law implemented

"'Rulemaking authority' means statutory language that explicitly authorizes or requires an agency to adopt, develop, establish, or otherwise create any statement coming within the definition of the term 'rule,'" and "'[l]aw implemented' means the language of the enabling statute being carried out or interpreted by an agency through rulemaking." §§ 120.52(9), (17), Fla. Stat. "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." *MB Doral, LLC*, 295 So. 3d at 854 (internal citation omitted). "[T]he 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." *Id.* (internal citation omitted).

Rules 19B-14.001, 19B-14.002, and 19B-14.003 each cite sections 1009.971(1), (4), and (6) as the rulemaking authority and section 1009.971 as the law implemented, and section 1009.971(4)(y) specifically authorizes the Board to "[a]dopt procedures to govern contract dispute proceedings between the board and its vendors." The ALJ recognized the Board's authority to adopt rules that govern contract dispute proceedings, but she found that section 1009.971(4)(y) does not authorize the Board to impose its procedures on another state agency that is governed by different statutes and rules. She reasoned that an ALJ is required

to conduct proceedings pursuant to the Administrative Procedure Act ("APA") and the Uniform Rules of Procedure, whereas the Board's rules do not comply with those procedures. The ALJ focused on rule 19B-14.003(6), which defines what constitutes "the entire factual record" and allows only the Board to submit further evidence to the hearing officer, and she found this procedure unfair and contrary to the *de novo* procedures of DOAH. *See* § 120.57(1)(k), Fla. Stat. (2020) ("All proceedings conducted under this subsection shall be de novo."); § 120.54(5)(a)1., Fla. Stat. (2020) (stating that "the uniform rules shall be the rules of procedure for each agency subject to this chapter unless the Administration Commission grants an exception to the agency under this subsection").

Rule 19B-14.003(6) prohibits the vendor from submitting to a hearing officer evidence that it did not present to the Board before the Executive Director made a determination, while it allows the Board to submit evidence in response to the vendor's factual record or along with the Executive Director's determination to sustain the decision. As such, each party has the opportunity to submit evidence, with the vendor as the petitioner presenting its evidence first, and then the Board presenting evidence in response to that of the vendor or to support its determination of the vendor's claim. Significantly, the rule does not allow the Board to submit additional evidence during the proceedings before a hearing officer, while precluding the vendor from doing so, which is made more evident by rule 19B-14.003(5), which states that once the dispute has been referred to a hearing officer, "no further information or amendment of the claims shall be permitted," and by its plain language applies to both parties. We disagree with the ALJ and do not find it fundamentally unfair that the rule limits the record to the evidence that was before the Board because the hearing officer serves to review the correctness of the Board's determination. *Cf. Moore v. State, Dep't of Health & Rehab. Servs.*, 596 So. 2d 759, 761 (Fla. 1st DCA 1992) ("*De novo* consideration is ordinarily appropriate in a section 120.57(1) hearing, as the proceeding is used to formulate, rather than to review, agency action.").

Although it is true that the Board's rules do not set forth a de novo proceeding before the hearing officer, as would be required

under section 120.57(1), and they do not comply with all the uniform rules, nothing in section 1009.971, the authorizing statute, required the Board to adopt the APA procedures or follow the uniform rules for contract dispute resolution. Nor did the authorizing statute require the Board to adopt a non-exclusive set of procedures or mandate resolution in circuit court. Instead, the Legislature granted the Board broad authority to "[a]dopt procedures to govern contract dispute proceedings," without any limitations or guidelines. Further, as the Board points out, section 120.65(6), Florida Statutes (2020), authorizes DOAH "to provide administrative law judges on a contract basis to any governmental entity to conduct any hearing not covered by this section," and thus contemplates procedures before an ALJ that are not in conformity with the APA.

Intuition misplaces its reliance on rule 19B-14.003(4)'s reference to proceedings under section 120.57(1) because the question is not whether the procedures the Board adopted in its rules are unauthorized by or inconsistent with section 120.57, but whether the Board exceeded its grant of rulemaking authority under sections 1009.971(1), (4), and (6). The Board adopted procedures that incorporated some features of section 120.57(1) proceedings and altered others. Because section 1009.971 created the Board and granted it broad powers that specifically includes the adoption of procedures to govern contract dispute proceedings between the Board and its vendors, and in rules 19B-14.001, 19B-14.002, and 19B-14.003 the Board set forth the procedures to govern such contract dispute proceedings, we conclude that the Board did not exceed its grant of rulemaking authority and the rules are valid under section 120.52(8)(b). For the same reasons, we conclude that the rules do not enlarge, modify, or contravene the law implemented and are valid under section 120.52(8)(c).

Section 120.52(8)(e): Whether the rules are 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." § 120.52(8)(e), Fla. Stat.; *see also State v. Fla. Senior Living Ass'n, Inc.*, 295 So. 3d 904, 912 (Fla. 1st DCA

2020) (concluding that a reasonable reading of the rule demonstrated that it was logical and reasoned).

With regard to section 120.52(8)(e), the ALJ concluded as follows:

> The rules state a written petition is to be filed when an adverse action has occurred and notice given, but fails to include when the notice is to be provided to the affected vendor, or what details are required to be in the notice. Yet the vendor must somehow specify all disputes in its written petition with no procedure to obtain the information, and no right to seek amendment. Taken together, these provisions are irrational, creating an impossible one-sided stacked deck against the vendor seeking to challenge an adverse decision or action. Add to that the lack of details as to what the notice is to provide to the affected vendor is most troublesome.

As the ALJ found, rule 19B-14.002(1) does not establish a time frame in which the Board must issue notice of adverse decision and does not specify any content requirements for the notice. However, we conclude that those omissions do not render the rule irrational. Invalidation of rule 19B-14.002 as arbitrary or capricious would require us to assume that the Board will not issue notice of its decision in a timely manner and will not provide sufficient information concerning the basis of its decision. We decline to speculate that the Board will act arbitrarily and capriciously when the rule does not mandate such result and can be applied reasonably. *See Hasper v. Dep't of Admin.*, 459 So. 2d 398, 400 (Fla. 1st DCA 1984) (adopting the ALJ's conclusions that the fact that an agency may wrongfully or erroneously apply a rule in a situation does not invalidate the rule and the rule being challenged did not mandate an application contrary to the enabling statute); *Fairfield Communities v. Fla. Land & Water Adjudicatory Com'n*, 522 So. 2d 1012, 1015 (Fla. 1st DCA 1988) (affirming the denial of the appellant's petition for determination of the invalidity of certain administrative rules and noting that the appeal concerned only the facial validity of the rules and the Court would not speculate whether the agency will act arbitrarily or capaciously). Also, nothing in the rule prohibits a vendor from filing a petition

before the issuance of notice; the receipt of the Board's written decision simply triggers the 21-day period within which a vendor must file a petition to contest the Board's decision or waive that right.

The ALJ further found that without specific information from the Board, it is impossible for a vendor to satisfy the pleading requirements in rule 19B-14.002(2) that a vendor shall provide a "concise statement of the ultimate facts upon which the claim arose," a "statement of all disputed issues of material fact upon which the claim is based," and a "concise statement which explains how the substantial interest of the person or firm are affected by the decision of the Board or the Board's employees." We disagree because the rules govern a narrow set of circumstances that are of such nature that each party is likely to possess the necessary information. The rules govern only the resolution of disputes related to contracts with the Board, and a vendor who has a contract dispute with the Board likely has knowledge of the ultimate facts upon which its claim arises, any disputed issues of material fact upon which its claim is based, and how its substantial interests are affected by the Board's decision based on the terms of the contract and the parties' dealings. As the Board's representative explained at the hearing below, the vendor and the Board have a day-to-day relationship and interact regularly, and the vendor is in a position to know what services it has delivered, what payments it has not received, and how it interprets the contract. In fact, Intuition's representative acknowledged below that the vendor is in the best position to know how it is affected by the Board's decision, and Intuition knows that its substantial interests are affected in that the Board has withheld approximately $700,000 under the parties' contract.

Moreover, nothing in the rules precludes the vendor from amending its claim before the Board refers its determination on the matter to a hearing officer, which is preceded by a fifteen-day reconciliation period during which the vendor will inevitably receive information about the dispute. *See* Fla. Admin. Code R. 19B-14.003(1). Given such, we cannot say that rule 19B-14.002 was adopted without thought or reason or is irrational, and the ALJ erred in concluding that the rule is arbitrary or capricious.

Therefore, we reverse the ALJ's final order declaring rules 19B-14.001, 19B-14.002, and 19B-14.003 an invalid exercise of delegated legislative authority.

REVERSED.

MAKAR and BILBREY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Andy V. Bardos, George T. Levesque, and Ashley Lukis of GrayRobinson, P.A., Tallahassee; Jason A. Zimmerman of GrayRobinson, P.A., Orlando, for Appellant.

J. Stephen Menton and Tana D. Storey of Rutledge Ecenia, P.A., Tallahassee, for Appellee.