

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHELLEY KAY HILL, R.N.,

Petitioner,

vs.

Case No. 14-4511RU

DEPARTMENT OF HEALTH, BOARD OF
NURSING,

Respondent.

_____ /

FINAL ORDER

Pursuant to notice, a hearing was conducted in this case on January 27, 2015, by video teleconference at sites in Orlando and Tallahassee, Florida, before Administrative Law Judge F. Scott Boyd of the Division of Administrative Hearings (DOAH).

APPEARANCES

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For Respondent: Lee Ann Gustafson, Esquire
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STATEMENT OF THE ISSUE

Whether the statement that "The injection of Botox is not within the scope of practice for registered nurses and does not

constitute the administration of medication," ("the Botox statement") constitutes an unadopted rule in violation of section 120.54(1), Florida Statutes (2014).^{1/}

PRELIMINARY STATEMENT

Petitioner, Shelley Kay Hill, a licensed registered nurse, filed this unadopted rule challenge on September 24, 2014. Respondent, the Department of Health, Board of Nursing, filed a Motion for Summary Final Order on October 7, 2014, which was denied. The case was set for hearing on October 15, 2014.

Petitioner filed eight requests for official recognition, which were not timely opposed by Respondent. All requests were granted, with the exception of the fifth request, which was granted in part and denied in part; and the seventh and eighth requests, which were denied.

Petitioner served Respondent with 12 Requests for Admission on October 17, 2014. Additional and amended requests were filed on October 20, 2014, bringing the total to 23 Requests for Admission. Respondent timely provided responses to the original 12 requests on November 6, 2014. Respondent did not timely respond to the additional amended requests.

After continuance, the hearing was conducted on January 27, 2015. At hearing, the parties stipulated to several facts, which were accepted and have been incorporated into the Findings of Fact below. Petitioner offered 15 exhibits at hearing, but

14 of these were not accepted, as they were the cases and materials already officially recognized.^{2/} A copy of the Administrative Complaint was accepted into evidence as Exhibit P-8. Notwithstanding Respondent's failure to respond to Petitioner's Amended Requests for Admission, Respondent disputed some of these admissions at hearing. In the interest of hearing the case on the merits, and because Petitioner failed to show any prejudice, Respondent was permitted to withdraw the default admissions and to deny some of the Amended Requests for Admission at hearing. Respondent also moved for reconsideration of the Orders granting official recognition because Respondent did not receive timely notice under section 90.203(1), Florida Statutes. The motion was denied, as further discussed below. Respondent offered no exhibits. Neither party offered any witnesses.

The one-volume Transcript was filed on February 25, 2015. Proposed final orders were timely submitted by both parties and were carefully considered.

FINDINGS OF FACT

The following facts are found, as stipulated, admitted, or officially recognized (duplicates have been set forth only once):

Stipulated Facts

1. Ms. Shelley Kay Hill is a registered nurse in the state of Florida, license number RN 9317251.

2. The Department of Health (DOH) is a state agency charged with regulating the practice of nursing pursuant to section 20.43, chapter 456, and chapter 464, Florida Statutes.

3. Section 464.018(1)(h) provides that unprofessional conduct as defined by Board of Nursing rule constitutes grounds for disciplinary action.

4. Florida Administrative Code Rule 64B9-8.005(13) provides that unprofessional conduct includes practicing beyond the scope of the licensee's license, educational preparation or nursing experience.

5. Ms. Hill is licensed pursuant to chapter 464 and is a health care practitioner as defined in section 456.001(4).

6. Botox is a medication.

7. It is within the scope of practice for registered nurses in the state of Florida to administer medication.

8. As of October 17, 2014, the Florida Board of Nursing website located at <http://floridasnursing.gov/general-faqs> states that a practical or registered nurse may not inject Botox as it is not within the scope of practice for practical or registered nurses.

9. As of October 17, 2014, the Florida Board of Nursing website located at <http://floridasnursing.gov/general-faqs> states that Botox injection does not constitute the administration of medication.

10. Petitioner's Requests for Admission served on Respondent DOH on October 17, 2014, in this case include an Exhibit "A" which is a printout of the "General FAQs" from the Board of Nursing's website on October 17, 2014.

11. The scope of practice for a registered nurse licensed in the state of Florida includes the administration of medications.

12. Injection is a form of administration of medication.

13. Registered nurses are allowed to inject medications within the scope of nursing practice in the state of Florida.

14. As of October 17, 2014, the Florida Board of Nursing website (located at <http://floridasnursing.gov/general-faqs>), under the section "General FAQs," states:

Can a practical or registered
nurse inject Botox?

The injection of Botox is not within the scope of practice for practical or registered nurses and does not constitute the administration of medication.

15. Petitioner's Amended Requests for Admission include Exhibit RFA-1, served on Respondent DOH on October 20, 2014, which is an accurate copy of a printout from the Florida Board

of Nursing's website (<http://floridasnursing.gov/general-faqs>) under the Section "General FAQs," as it existed on October 17, 2014.

16. Proposed Exhibit P-5, a copy of the proposed exhibit attached to Petitioner's Amended Requests for Admission as "RFA-1" that was served on Respondent DOH on October 20, 2014, is authentic.

17. Proposed Exhibit P-5, the exhibit attached to the Petitioner's Amended Requests for Admission as "RFA-1" that was served on Respondent DOH on October 20, 2014, is admissible.

18. Injection is one of the methods of administration of a medication.

19. There has been no Florida Law Weekly notice regarding rulemaking as it relates to the injection of Botox by nurses.

20. The definition of "registered nurse," as stated in section 464.003(22), is as follows: "'Registered nurse' means any person licensed in this state to practice professional nursing."

21. Botox is a drug.

22. The Florida Department of Health and the Florida Board of Nursing have disciplined registered nurses for administering Botox by injection, as indicated in Final Order No. DOH 12-2134-S-MQA in Department of Health vs. Debra Ann Leckron, R.N., DOH

Case No. 2012-01979, filed October 11, 2012. (Order entered Nov. 20, 2014).

23. The Florida Department of Health and the Florida Board of Nursing have disciplined registered nurses for administering Botox by injection, as indicated in Final Order No. DOH 14-0617-S-MQA in Department of Health vs. Maritza Novas, R.N., DOH Case Nos. 2013-05848 and 2013-06561, filed April 18, 2014. (Order entered Nov. 20, 2014).

24. The Board of Nursing's statements regarding the injection of Botox by nurses are statements of general applicability to nurses.

Admissions

25. There is no Florida Administrative Code rule that specifically prohibits the administration of Botox.

26. The Florida Board of Nursing has made no declaratory statements regarding the administration of Botox by nurses.

Officially Recognized Facts

27. On October 24, 2014, the official website of the Florida Board of Nursing, on its "General FAQs" (Frequently Asked Questions) web page, contained the following question and answer:

Can a practical or registered nurse
inject Botox?

The injection of Botox is not within the scope of practice for practical or

registered nurses and does not constitute the administration of medication.

28. On October 24, 2014, the official website of the Florida Board of Nursing, on its Search Results web page, when the term "Botox" was searched, yielded the following results:

Can a practical or registered nurse
inject Botox?

The injection of Botox is not within the scope of practice for practical or registered nurses and does not constitute the administration of medication.

29. On October 28, 2014, the official website of the Florida Board of Nursing, in its "Help Center" web page, contained the following question and answer:

Help Center/Can a practical or registered
nurse inject Botox?

The injection of Botox is not within the scope of practice for practical or registered nurses and does not constitute the administration of medication.

30. Botox is approved by the U.S. Food and Drug Administration (FDA).

Ultimate Facts

31. The Botox statement constitutes a rule within the definition of section 120.52(16).

32. The Botox statement, or a substantially similar statement, has not been adopted as a rule under chapter 120 procedures.

33. The Board of Nursing did not show that it is not practicable or feasible to adopt the Botox statement as a rule.

CONCLUSIONS OF LAW

Standing and Jurisdiction

34. In administrative proceedings, standing is a matter of subject matter jurisdiction. Abbott Labs. v. Mylan Pharms., Inc., 15 So. 3d 642, 651 n.2 (Fla. 1st DCA 2009). Section 120.56(4) provides that "[a]ny person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a)."

35. In order to establish standing, a challenger must show an immediate "injury in fact" within the protected "zone of interest." See, e.g., Fla. Medical Ass'n, Inc. v. Dep't of Prof'l Reg., 426 So. 2d 1112, 1114 (Fla. 1st DCA 1983).

36. Respondent did not contest Petitioner's standing to challenge the Botox statement. Petitioner is a registered nurse and so is bound by the scope of practice established for registered nurses. The Botox statement declares that certain activity is not within the scope of practice of a registered nurse. Petitioner has standing to challenge the Botox statement as an unadopted rule. See Ward v. Bd. of Trs. of the Int. Imp. Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995) (standing is recognized where rule directly regulates the challenger's occupational field).

37. Respondent argues, however, based on United Wisconsin Life Insurance Co. v. Department of Insurance, 831 So. 2d 239 (Fla. 1st DCA 2002), that because an Administrative Complaint has been filed against Petitioner, she has a remedy through her defenses in that case, and the unadopted rule challenge here is an impermissible collateral attack.

38. Respondent reads United Wisconsin too broadly. While the unadopted rule challenge in that case was brought against a statement of charges in an administrative complaint, the basis for the court's opinion was more narrow. Specifically, the United Wisconsin court first found no showing that the charges--directed only to United Wisconsin and alleging facial violation of statutory provisions--were in any way statements of "general applicability." The court specifically noted that the issues raised by the administrative complaint arose for the first and only time as a result of United Wisconsin's actions. The court then went on to state that, "on the present facts," the unadopted rule challenge also constituted a collateral challenge.

39. While Petitioner here does challenge the Botox statement appearing in the Administrative Complaint against her, she also challenges the same and similar statements as they appear on Respondent's website. The Botox statement by its own terms is applicable to both practical and registered nurses. In

fact, the parties stipulated that the Botox statement was a statement of general applicability to nurses. Were United Wisconsin to be read so broadly as to preclude an unadopted rule challenge to such generally applicable statements just because administrative charges have also been filed, the provisions of section 120.56(4) would be eviscerated, and the unique legislative policy goals^{3/} of that statutory section would not be achieved. Petitioner has standing and her unadopted rule challenge should not be dismissed under the doctrine of United Wisconsin.

40. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. § 120.56(4), Fla. Stat.

Burden and Standard of Proof

41. The burden is on Petitioner to show that the Botox statement constitutes a rule within the meaning of section 120.52(16) and that Respondent has not adopted it under applicable rulemaking procedures. § 120.56(4)(a), Fla. Stat. If Petitioner succeeds, the burden then shifts to Respondent to prove that rulemaking is not feasible or practicable. § 120.56(4)(b), Fla. Stat.

42. The standard of proof is by a preponderance of the evidence. § 120.56(1)(e), Fla. Stat.

Official Recognition

43. Although Respondent did not timely respond to any of Petitioner's several requests for official recognition, Respondent belatedly asserted at hearing that these requests did not technically comply with section 90.203(1), Florida Statutes, because timely written notice was not given to Respondent and filed in this proceeding.

44. A technical failure to comply with section 90.203(1) notice provisions is not fatal to a motion to take judicial notice, as long as there has been reasonable notice and an opportunity to be heard. Scripps Research Inst., Inc. v. Scripps Research Inst., 916 So. 2d 988, 990 (Fla. 4th DCA 2005) (court may take judicial notice of a matter on its own motion or may excuse the failure of a party requesting judicial notice to comply with written notice provisions).

45. In Rogers v. State, 413 So. 2d 1270, 1271 (Fla. 1st DCA 1982), it was held that a criminal defendant was not prejudiced by lack of sufficient notice even though the administrative rule he was charged with violating had been judicially noticed only three days before his trial, because the court found he had been furnished the text of the rule by the information three months earlier. Similarly in this rule challenge case, the text of the statements on Respondent's website were set forth in the original Petition filed by

Petitioner on September 24, 2014, and a printout of the website page was attached as an exhibit.

46. In any event, Respondent can hardly claim to need an extended period of time to verify whether or not information appears on its own website. The only other item officially recognized in this proceeding that was not also a matter of stipulation was the fact that Botox has been approved by the U.S. Food and Drug Administration.^{4/} Respondent was given seven days to respond to each of these requests for official recognition. This was ample time to determine the accuracy of all of these statements.

47. At hearing, when asked what prejudice Respondent had suffered by the granting of official recognition, none was alleged, other than that "the rules of evidence are not being followed." Respondent demonstrated no prejudice. Official recognition was appropriate.

Definition of "Rule"

48. Section 120.52(16), in relevant part, defines the term "rule" as follows:

"Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or

solicits any information not specifically required by statute or by an existing rule.

This definition contains several overlapping elements.

Agency Statement

49. A petition challenging a statement as an unadopted rule must include the text of the statement or a description of it. A statement may be in any form, and does not need to be in writing. Dep't of High. Saf. & Motor Veh. v. Schluter, 705 So. 2d 81, 84 (Fla. 1st DCA 1997). Petitioner sufficiently identified the text of the Botox statement in her petition.

50. The statement must be shown to be an "agency" statement, that is, an expression of the agency as an institution, not merely the position of an employee acting on her own. It must be properly attributable to the agency head or some duly-authorized delegate. Id. at 87 (Benton, J., concurring and dissenting). The parties stipulated that the Botox statement appears in several places on the Board of Nursing website. There has been no contention that it is not attributable to the Board.

51. Respondent notes that an agency statement explaining how an existing rule of general applicability will be applied in a particular set of facts is not itself a rule. Respondent correctly asserts that it has a duty to enforce the statutory scope of nursing practice and that an agency is not forced to

adopt a rule for "every possible variation on a theme."

Respondent notes that this level of detail is left for the adjudication process, citing Environmental Trust v. Department of Environmental Protection, 714 So. 2d 493, 498 (Fla. 1st DCA 1998).

52. However, the evidence and argument in this case has not identified any statute or existing rule of general applicability that could be enforced to prohibit the injection of Botox. In fact, the "practice of professional nursing" is defined in section 464.003(20) as:

The performance of those acts requiring substantial specialized knowledge, judgment, and nursing skill based upon applied principles of psychological, biological, physical, and social sciences which shall include, but not be limited to:

(a) The observation, assessment, nursing diagnosis, planning, intervention, and evaluation of care; health teaching and counseling of the ill, injured, or infirm; and the promotion of wellness, maintenance of health, and prevention of illness of others.

(b) The administration of medications and treatments as prescribed or authorized by a duly licensed practitioner authorized by the laws of this state to prescribe such medications and treatments.

(c) The supervision and teaching of other personnel in the theory and performance of any of the acts described in this subsection.

A professional nurse is responsible and accountable for making decisions that are based upon the individual's educational preparation and experience in nursing. (Emphasis added.)

53. The parties stipulated that Botox is a medication, that injection is one of the methods of administration of a medication, and that registered nurses are allowed to inject medications within the scope of nursing practice in the state of Florida. Thus, the Botox statement is not just a simple application of statutory language to a particular set of facts. In fact, the blanket statement prohibiting the injection of Botox, at least superficially,^{5/} seems to be completely contrary to the expressed statutory policy. Cf. St. Francis Hosp., Inc. v. Dep't of HRS, 553 So. 2d 1351, 1354 (Fla. 1st DCA 1989) (statement which expands upon statutory policy or gives it an interpretation not readily apparent from its literal reading represents agency policy.) The Botox statement is, therefore, a statement of Board policy.

General Applicability

54. The requirement that a statement must be one of general applicability has several facets. It involves first the field of operation of the statement. Dep't of Commerce v. Matthews Corp., 358 So. 2d 256 (Fla. 1st DCA 1978) (wage rates applicable to public works contracts held not to be rules because they applied only to the construction of a particular

public building and did not establish wages elsewhere in the state into the future). The Botox statement by its own terms is applicable to all practical and registered nurses in the state, now and into the future for an indefinite period.

55. The concept of general applicability also involves the force and effect of the statement itself. An agency statement that requires compliance, creates or adversely affects rights, or otherwise has the direct and consistent effect of law is a rule. State Bd. of Admin. v. Huberty, 46 So. 3d 1144, 1147 (Fla. 1st DCA 2010). The Botox statement requires compliance by nurses, expressly restricts the ability of nurses to perform certain tasks, and has the direct effect of law. The evidence showed no other provision of the Florida Statutes or Florida Administrative Code which has the effect of prohibiting the injection of Botox. It was stipulated that nurses have been disciplined for actions inconsistent with the Botox statement.

56. An agency statement must also be consistently applicable. In Department of Highway Safety and Motor Vehicles v. Schluter, 705 So. 2d 81, 82 (Fla. 1st DCA 1997), the court found three of the challenged policies not to be generally applicable because an employee's supervisor was not required to apply them, and therefore they could not be considered to have the "direct and consistent effect of law." See also Coventry First, LLC, v. Office of Ins. Reg., 38 So. 3d 200, 205 (Fla. 1st

DCA 2010) (examination manual provided to examiners of the Office of Insurance Regulation not generally applicable because examiners had discretion not to follow it). Practical and registered nurses do not have the discretion to choose to follow or not follow the Botox statement.

Implements, Interprets, or Prescribes

57. The Botox statement goes beyond the general statutory provisions of chapter 464 to establish an express blanket prohibition against the injection of Botox. It prescribes policy. The Botox statement meets the definition of a rule under section 120.52(16).

Rule Not Adopted

58. As stipulated, there is no rule in the Florida Administrative Code that specifically prohibits the administration of Botox. The Botox statement specifically does so. The Botox statement has not been adopted under the procedures of section 120.54. Petitioner alleged that Florida Administrative Code Rule 64B9-8.005 was the specific rule that should have been amended, though she was not required to identify any specific rule. In response, Respondent contends that it cannot adopt the Botox statement as part of rule 64B9-8.005, because it has no authority to define nursing scope of practice. This argument is discussed as an "affirmative defense" that rulemaking is not feasible or practicable.

Feasible and Practicable

59. Rulemaking is not a matter of agency discretion. Section 120.54(1)(a) requires that statements meeting the definition of a rule be formally adopted as soon as feasible and practicable. The burden is upon Respondent to show that rulemaking is not feasible or practicable under section 120.54(1)(a).

60. The scope of nursing practice set forth in section 464.003(2) was quoted above. Section 456.003(6) provides:

Unless expressly and specifically granted in statute, the duties conferred on the boards do not include the enlargement, modification, or contravention of the lawful scope of practice of the profession regulated by the boards. This subsection shall not prohibit the boards, or the department when there is no board, from taking disciplinary action or issuing a declaratory statement.

61. Respondent notes that, based upon these statutes, it has been determined in Florida Medical Association, Inc. v. Department of Health, Board of Nursing, Case No. 12-1545RP (Fla. DOAH Nov. 2, 2012), aff'd 132 So. 3d 225 (Fla. 1st DCA 2014), that the Board of Nursing has no authority to promulgate standards or scope of practice.

62. Contrary to Respondent's argument, however, it does not follow that because the Board of Nursing cannot adopt a rule

establishing scope of practice, it is therefore free to craft and apply an unadopted rule which has the same effect.

63. Rulemaking is a delegated legislative function, not an inherent executive one. Whiley v. Scott, 79 So. 3d 702, 710 (Fla. 2011) (agency promulgating a rule acts in place of the legislature; rulemaking is a legislative function). An agency without a statutory grant of power to issue rules cannot dispense with that fundamental requirement by the simple expedient of avoiding the rulemaking procedures of section 120.54. The definition of a rule under section 120.52(16) is a broad, functional one, which includes not only rules that have been adopted following prescribed statutory procedures, but rules that have not been, which are thus defined as "unadopted rules" in section 120.52(20). The Board of Nursing, without statutory rulemaking authority to establish the scope of nursing practice, cannot issue a rule of either variety. The Administrative Procedure Act does not restrict any organic agency authority to adopt rules, rather, it and other statutes grant agencies legislative authority to adopt them.

64. Lack of authority to adopt a rule does not render it "not feasible" or "not practicable" to adopt the rule as these terms are defined in section 120.54(1)(a). Respondent has not met the burden of showing that rulemaking is not feasible or practicable.

65. The Botox statement violates section 120.54(1) (a).

Attorneys' Fees

66. Petitioner requested attorneys' fees and costs. Section 120.595(4) (a) provides that if an administrative law judge determines that all or part of any agency statement violates section 120.54(1) (a), an order shall be entered against the agency for reasonable costs and reasonable 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 to receipt of federal funds.

FINAL ORDER

Upon consideration of the above Findings of Fact and Conclusions of Law, it is

ORDERED that:

1. The statement that "[t]he injection of Botox is not within the scope of practice for registered nurses and does not constitute the administration of medication," meets the definition of a rule. It has not been adopted pursuant to rulemaking procedures, in violation of section 120.54(1) (a), Florida Statutes. Section 120.56(4) (d) provides that the Department of Health, Board of Nursing, must immediately discontinue all reliance upon that statement, or any substantially-similar statement, as a basis for agency action.

2. Jurisdiction is retained for the purpose of considering the award of attorneys' fees and costs to Petitioner for her successful challenge under section 120.56(4). If the parties are unable to resolve the issue, a written request for hearing on attorneys' fees and costs shall be filed with the Division of Administrative Hearings. Any such request for hearing must be filed no later than 60 days after the date of this Final Order.

DONE AND ORDERED this 10th day of March, 2015, in Tallahassee, Leon County, Florida.



F. SCOTT BOYD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of March, 2015.

ENDNOTES

^{1/} All references to statutes and rules are to the versions in effect at the time of the challenge, except as otherwise indicated.

^{2/} See Amos v. Moseley, 74 Fla. 555, 564, 77 So. 619, 622 (1917) (things of which a court takes judicial notice require no proof).

^{3/} Unadopted rule challenges serve to enforce the rulemaking requirements of chapter 120, an important public interest distinct from that of a single respondent charged in an administrative complaint. As stated in McDonald v. Department of Banking and Finance, 346 So. 2d 569, 580 (Fla. 1st DCA 1977):

The APA does not in terms require agencies to make rules of their policy statements of general applicability, nor does it explicitly invalidate action taken to effectuate policy statements of that character which have not been legitimated by the rulemaking process. But that is the necessary effect of the APA if the prescribed rulemaking procedures are not to be atrophied by nonuse.

The requirement to adopt rules was subsequently codified. § 120.535, Fla. Stat. (1991). The attorneys' fees provisions of section 120.595(4) encourage affected parties to undertake this "private attorney general" function, and so encourage agencies to engage in rulemaking when appropriate.

^{4/} The fact that Botox has been given FDA approval was ultimately not found relevant to this case.

^{5/} The issue of whether or not the Botox statement substantively contravenes a statutory provision is not at issue in this 120.56(4) proceeding, and its apparent contravention of the statutory language is considered solely for purposes of determining whether the statement constitutes a "rule."

COPIES FURNISHED:

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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.