



Newsletter

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Jowanna N. Oates and Elizabeth W. McArthur, Co-Editors

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Closing the Justice Gap: Qualified Representatives?

by Suzanne Van Wyk, Administrative Law Judge, Division of Administrative Hearings

In recent years, the legal community has sharpened its focus on the failure of our legal system to provide access to civil justice across the nation. Recent ABA studies report that as many as four out of five residents with legal problems never reach legal help.¹

According to The Justice Index, Florida ranks 32nd in access to civil and criminal justice.² Florida's legal aid system reaches approximately ten percent of residents who are poor

enough to qualify for free civil legal assistance. What about Floridians who are not poor enough for legal aid? Court clerks are overwhelmed by litigants seeking assistance to navigate the civil legal system without a lawyer. According to the American Bar Foundation, people employed self-help for 46 percent of their civil justice situations.³ In the remaining situations, about half were assisted by family or friends, and in only 22 percent of all cases did the person

address the legal matter with the assistance of a third party, such as a lawyer.⁴

In an effort to address the ever-widening justice gap in Florida, Chief Justice Jorge Labarga created the Florida Supreme Court Commission on Access to Civil Justice (the Commission) on November 24, 2014. The Commission was tasked to identify barriers impeding access to civil justice in Florida, not only for

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From the Chair

by Jowanna N. Oates

Technology has dramatically changed the practice of law over the past two decades. The Florida Bar has recognized this, as evidenced by the new three-hour technology continuing legal education (CLE) requirement effective January 1, 2017. Most administrative lawyers are familiar with subscription-based research engines such as Lexis-Nexis, Westlaw, and Florida Administrative Law Reports (FALR). However, many attorneys may not be familiar with the free online resources pertaining to administrative law. The Administrative Law Section has a long-standing tradition of providing assistance to its members in navigating

the information superhighway. In the spirit of that tradition, this column will identify resources that even veteran researchers may be unfamiliar with using.

Department of State www.flrules.org

The Department of State's website is the first place many attorneys visit when researching administrative rules. This website is the home of the *Florida Administrative Code (Code)*, which compiles all rules adopted by agencies. An individual may search for a rule in the *Code* by number, rule division, agency name, or keyword. The *Code* is updated weekly.

The *Florida Administrative Register (Register)* is also located on the Department of State's website. Items in the *Register* may be searched for

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by date, rule number, agency, or keyword. The *Register* is published daily and contains notices of proposed rule development, proposed rulemaking, proposed rule changes and corrections, emergency rulemaking, and notices of intent to adopt federal standards. Additionally, notices of petitions for rule waivers, rule variances, and declaratory statements are published in the *Register*. Other notices published in the *Register* include notices of dispositions of administrative rule challenges; notices of agency public meetings, hearings, and workshops; notices regarding bid proposals and purchasing; and Joint Administrative Procedures Committee announcements and rule objections. In addition, the “Miscellaneous” section of the *Register* contains a daily index of rules filed for adoption in the previous seven days.

The Department of State’s website also contains links to past issues of the *Register* (formerly known as the *Florida Administrative Weekly*) dating back to 1999. The website also allows individuals to review material incorporated by reference in rules adopted after December 31, 2010. The website also has other links related to administrative practice, worth browsing to see what may be of interest to each individual’s practice.

Florida Administrative Law Central Online Network www.japc.state.fl.us

The Joint Administrative Procedures Committee (JAPC) website, also known as the Florida Administrative Law Central Online Network (FALCON), is a good place to begin research on proposed rules and historical changes to the Administrative Procedure Act. FALCON allows an individual to track the progress of a proposed rule, by providing information concerning notices of proposed rule development, proposed rulemaking, and changes; dates of correspondence sent to and received from the

agency concerning its proposed rule; and filing deadlines. Additionally, for proposed rules published after 2006, the website contains links to the rule-making notices and correspondence. A user may search for a rule by number or agency. FALCON also features publications such as JAPC’s annual report and the *Pocket Guide to the Administrative Procedure Act*.

A highlight of FALCON is a legal research section that includes an annotated database of the Administrative Procedure Act, chapter 120, Florida Statutes. The annotated database is organized by statutory provisions. For each provision, citations are given to applicable Attorney General Opinions, Division of Administrative Hearings (DOAH) orders, Florida Supreme Court cases, District Court of Appeal cases, and law review articles. The legal research portion of the website also has a summary of amendments to chapter 120, along with legislative staff analyses from 1974 to 2016. A table is included in this portion of the website to cross-reference the Administrative Procedure Act as reorganized in 1996 with the former Administrative Procedure Act, which is useful when reviewing older case law and articles.

Administrative Law Section www.fladminlaw.org

The Administrative Law Section’s website contains resources such as an archive of the Section’s newsletters and agency snapshots, which provide an overview of the structure of the selected agency. The Section’s website also contains a chart summarizing the results of its survey of over 40 agencies concerning access to agency final orders and how those orders are indexed. This resource may be useful to locate final orders rendered before July 1, 2015. Additionally, the Section’s website has a section dedicated to “Hot Topics in Administrative Law.”

State University System of Florida Board of Governors www.flbog.edu

The Board of Governors has authority to adopt regulations

instead of rules when acting pursuant to its constitutional authority. Additionally, the Board of Governors is permitted to adopt regulations when “expressly authorized or required by law.” See § 1001.706(2)(b), Fla. Stat. (2016). Pursuant to chapter 2010-78, Laws of Florida, the Department of State has removed from the *Code* rules that have been replaced by Board of Governors and university regulations. The regulations for the Board of Governors and links to regulations for the universities comprising the state university system are found on the Board of Governors’ website.

Division of Administrative Hearings www.doah.state.fl.us/FLAIO

In the past, locating agency final orders could be quite a challenge as there was no central place where individuals could go to find such orders. As a practical matter, individuals would have to use FALR, access an agency’s website, or make a public records request. During the 2015 legislative session, House Bill 985 was passed to address the perennial problem of locating agency final orders. Section 120.53, Florida Statutes, requires agencies to electronically transmit a text-searchable copy of each final order rendered on or after July 1, 2015, to DOAH. The statute also requires agencies to maintain a subject matter index of final orders rendered before July 1, 2015, and to identify the location of the subject matter index on the agency’s website. Agencies are permitted to transmit to DOAH certified copies of final orders rendered before July 1, 2015, which are required to be in the subject matter index. DOAH’s website allows an individual to search for final orders by text, agency, case number, document, number, date, type, and subject.

With technological advancements, the ability to conduct legal research online is vital, because websites often have the most current information concerning administrative action. Hopefully, this column will be beneficial as you research administrative law issues.



ALJ Q&A

by Richard J. Shoop

In the years since I first became actively involved in the Administrative Law Section, I have had the opportunity to meet and get to know some of the best administrative practitioners in Florida. One of them is the Honorable Robert S. Cohen, the Division of Administrative Hearings' ("DOAH") director and chief administrative law judge ("ALJ"). Judge Cohen not only gave his blessing to this column when I first approached him with the idea, but also graciously agreed to be interviewed for it. Judge Cohen was born in Orlando, Florida. He graduated from Brandeis University in 1979 with a B.A. degree in American Studies, and earned his J.D. degree in 1981 from the Florida State University College of Law, where he wrote for the *Law Review*. Judge Cohen spent more than 20 years in private practice, concentrating in administrative and governmental law, as well as healthcare law, prior to being appointed by the Governor and Cabinet in October 2003 to his current position. He is currently the Secretary of the ABA National Conference of the Administrative Law Judiciary, has served as President of the National Association of Administrative Law Judiciary, is the Treasurer of the National Association of Workers' Compensation Judiciary, and serves on the boards of numerous

community and legal organizations. He is married to attorney Karen Asher-Cohen, and has two children and one grandson [editor's note: and a new granddaughter]. In our interview, we discussed a wide range of topics and I think you'll find his answers to my questions to be both amusing and enlightening.

RS: How did you become involved in the practice of administrative law?

RC: Well, I was a young lawyer. I was with a firm doing medical malpractice defense, and let's say that I wasn't really enjoying the practice that much. I met the Speaker of the House at that time, Ralph Haben. He was leaving the Legislature and going with a firm in Tallahassee. He had already landed this big healthcare client, and asked me if I was interested in working on a case. I said, "Yeah. What kind of work?" He said, "Does it matter?" I said, "No." As it turned out, they needed someone for CON (certificate of need) work. I really enjoyed administrative law in law school and Pat Dore as a professor. So my first administrative hearing was a CON case. Pat was like the greatest resource -- like [Professor Charles] Chuck Ehrhardt is for evidence. They were happy to talk to you. She loved to talk about issues like standing and

such. So I started doing CON work, and a lot of other administrative work, and I really liked it. I did civil litigation as well, like representing sheriffs defending civil rights cases brought under section 1983. Through the years I just kind of developed an administrative practice, handling all facets of administrative law: professional licensure work; housing cases for the Florida Housing Finance Agency, then the Florida Housing Finance Corporation; and just broadening from there. Bid protests, a lot of interesting bid protests. I really got to know a lot of the ALJs through that. I always liked the forum. I liked the fact that the judges had to write "real" orders with detailed findings, instead of your work in trials where you had a jury or a judge, and most of the time it was just a jury verdict form or a judge just ruling on the spot. I thought it was very intellectually challenging, and I was very impressed.

RS: What made you decide to become an ALJ?

RC: Well, I wasn't planning on it. Really, I hadn't thought about being an ALJ or applying to be an ALJ. I had clients, and I was enjoying my work. I was out there a lot, I knew a lot of the judges, and was becoming personally

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ALJ Q&A*from page 3*

friendly with several of them. Sharon Smith [the former director and chief ALJ of DOAH] was retiring, and I got a call from some folks, agency folks that I knew, general counsels and others, telling me that I should apply for it. I hadn't given it any thought. I hadn't applied for a job in many years. So, I said, "Well, I'll put in an application." Before you know it, you're in the process. And the further I got in the process, the more I began to think, "You know, I'd really like to do this." [Judge Robert] Bob Benton on the First DCA was strongly encouraging me to do this. I had known him for years, and tried a lot of cases in front of him when he was a hearing officer.

RS: What do you enjoy the most about being an ALJ?

RC: I am a true believer in DOAH and the administrative process. So many more people will have exposure to the adjudicatory system through an administrative hearing than a civil case. It runs the gamut -- the type of cases that you get to hear. And that's one thing that I said when I came in. I'm not going to be just an administrator. I'm going to be a working judge. I want all these different cases and the variety of cases. It never gets old for me. You think you've heard it all, every type of case, and then you get one where it's like, "Whoa. I didn't even know the agency did this." It's constantly challenging with new cases and different types of cases. And if you handle cases around the state you meet a whole new bar of attorneys. The administrative bar is a very professional and ethical bar for the most part. You don't see as much unprofessional and unethical behavior in the administrative bar as I used to see in trial work. I also like the fact that individuals, if they were able to put together a case, can come and represent themselves and have a shot at winning. That doesn't happen in state or federal court. Even county court is very formalized, and the rules of procedure are not relaxed very often. You have to play by the rules or you can't get much done.

Also, in my role as chief judge, I really enjoy the administrative part of it, too. Making sure everything runs well and having the assistance of a great deputy and great senior judges, and the staff. And also having the workers' comp part of it presents an additional challenge because it's its own world. I like always having to be shifting gears, tackling all the different challenges, while handling a caseload at the same time. I need to be busy. And working with the Legislature adds another dimension. You have to get your budget through, have enough dollars coming through so your service doesn't slack off any.

RS: What is the most common mistake you see attorneys who practice in front of you make?

RC: I think there are like four...no, really three things that are common. One, getting the position of counsel when you file a motion for continuance or any substantive motion. A lot of times you can't do it because opposing counsel is not being cooperative, not returning phone calls, not returning emails, but when the statement is just made that you were unable to contact opposing counsel, it's not enough. Personally, I would like to hear more. That's why we'll have a phone conference so I can get to hear how you tried and whatever else. Another thing is that folks, a lot of times it's agency folks, sometimes it's newer lawyers, but sometimes it's even more experienced lawyers, there's among some a belief that if a document, or a pile of documents, is in the agency files it automatically gets entered into evidence as a public record. Chances are a person, if they are competent, can get those in with a custodian of records, but they're usually filled with hearsay. Maybe newspaper articles, you name it. You need to do a little more, build more of a foundation. And the other one is that there are a lot of people who have an expectation that, if all the parties agree, continuances are always going to be granted. Most of us have come around, with a little prodding from me, that we need some good cause, especially when you've tied up days on the judge's calendar and then request one right before the hearing.

We have performance measures from the Legislature, and those include getting cases scheduled for hearing within 90 days of being filed with DOAH, and getting a high percentage of them out the door within 120 days of being filed with DOAH. But, as I tell the Legislature, there are cases that don't fit those guidelines. The bottom line is that it is about due process. The parties have to be diligent about their case and get ready [for hearing].

RS: Describe what your duties are as the Director and Chief Judge of DOAH.

RC: Well, obviously, the overall responsibility for all the folks down the chain, from the Deputy Chief ALJ to the Deputy Chief Judge of the Office of Judges of Compensation Claims, and so on. I am a strong believer in delegation, having good people you can trust to do their jobs, and not micromanage on a day-to-day basis. I have good communication with all of them and we do constantly stay involved to make sure we are all on the same page, certainly when there is something big coming, like we are about to launch electronic filing, so that we know what's happening. The other part of it is that I have to deal with the Legislature, present the budget, defend the budget, and testify on substantive matters that are related to administrative law or anything. I get questions all the time from different committees or members about an area of law that's not under us, like "Is this something you might want to do?" or "Would you do it?" My canned answer is "Whatever you send us, we will do." You never want to become obsolete. And then I also deal with the Cabinet because I serve at the pleasure of the Governor and Cabinet. I do quarterly reports, an annual review, and answer questions that come up from Cabinet members or their aides. And I will say this because I think it speaks well of whoever the Governor is and sitting Cabinet members are that in the 13 years that I've been in the position, I've never had a call from a Cabinet member or a legislator trying to influence a decision. Not that I would give them the answer that

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they want to hear. I do get calls from time to time asking when a decision is going to come out. Constituents are calling or whatever else, and I'll check, especially if it's a mega case. One where the decision is not going to come out 20 days after the PROs [proposed recommended orders] are due. But nothing beyond that. I've always thought that's good, that there is a respect for what we do.

RS: How do you use technology in your work?

RC: Well, of course we all prepare our own orders [electronically]. Our assistants are there to fix them up. When I cut and paste some quote from a statute or something, and screw up the margins, Loretta [Judge Cohen's assistant] is so much better at fixing them than I am. On the workers' comp side, they are getting more into social media. Using Twitter for getting the word out. The Deputy [Chief Judge] there, David Langham, has a blog. We get a lot of office information out through that. We are thinking about doing the same thing on the ALJ side, but someone's got to volunteer to do that. I'm not going to write [a blog] in addition to writing orders all the time and keeping up with everything. I also do a lot of work for the ABA [American Bar Association] and National Administrative Law Judges Association, so I use Excel spreadsheets to keep up with that.

RS: Have you seen more attorneys using electronic exhibits over notebooks or are they still sticking to hard copies?

RC: I'll say this. Part of it is on our side. We have one of our hearing rooms [in Tallahassee] that is equipped with a projector, and everyone at the table can plug in their laptops and project exhibits electronically, but so many of our cases are not in Tallahassee. Out on the road, that capability is just not there. Many of the courtrooms we are in are not wired for that.

RS: I keep holding out hope for that day.

RC: I know, and we'll get there. It's like anything else. Building infrastructure takes money, and it's hard for the agencies and the courts to get money they need to change things. So much of the focus seems to be on security, whether it is physical security or cyber security. That's where the money is going. We may have to bring in hard copies of documents, and boxes of notebooks, but hopefully we won't get shot once we're inside, and we'll make it home safe. [Chuckles.]

RS: What is the current state of DOAH and what are the most significant issues facing DOAH today?

RC: One of the big issues is security and cyber security. We're fortunate. We have 17 district offices around the state for the workers' comp program. All of them have one room that can be used for video hearings, and a lot of them have two rooms. Those are all secure buildings. There's an armed certified security guard there, and there are metal detectors. You set them off, you get wanded. So that's helpful. But still, a lot of our hearings are in government buildings that are not secure. Just because you have someone sign in and get a visitor's pass, doesn't mean there is someone checking to see what's in their pockets. So that's always an issue for us, especially when you are on the road. You want to be safe. We do child support establishment cases, and, after you do those cases for a while, you realize that, when you are doing those cases, some of the parties are not in a very good mood when they are told they have to start paying and will have their wages garnished, and also have to pay back support. I think in almost every location [where these cases are heard] now we are in a secure building. We want to be safe, we want the parties to be safe, and we want the witnesses to be safe. And also, we handle professional licensure cases. These are people whose livelihood is at stake. If they don't feel like things are going their way, you don't want them to go back out to their car and get a handgun and just be able to walk into the building. Keeping our funding, at least where it is, is always an issue. Obviously, we are in a state that has a very friendly business climate, which

means keep taxes low, cut taxes where you can. That's great, but if you are going to cut too much of the money that goes to the government it's hard to keep providing the services at the level that's expected. Also, ALJ salaries are great, but the administrative staff's salaries are not. Keeping good staff is tough. We are a very small agency. A lot of the larger agencies have more high level positions where you can go and get a significant raise. Our staff in other parts of the state get paid the same as Tallahassee. Get a good secretary working for the judges, and, before you know it, a private firm has snatched them up, pumping up their salaries by 35-40%. We can't compete with that.

RS: What qualities do you look for in an ALJ?

RC: Experienced people who are interested in applying to be an ALJ have often asked me, "What's the ideal ALJ?" So here's the ideal ALJ: strong academic credentials; hands-on trial experience, preferably in administrative law; excellent writing skills; and a good, moderate judicial temperament. There are other things I could throw in, but those are the four most important things. Now, you can't usually find those all in one person. The writing part of it is very important. You have to take that record and be able to synthesize it into a coherent recommended or final order that, in my opinion, not just gets it right, but gets it right in a way that you can read and understand it. In a way, it's kind of like CON. It's a weighing of the criteria. Very few have all those things. We get so many highly qualified applicants. It's like you could take 20% of the applicants for any ALJ position and just toss them down the stairs, and whichever one lands closest down the stairs, you'll take. It's because they're all good, and you know that they'd all do a good job. Which is why a lot of times in an interview we focus as much on how they respond to questions about treatment of people and extracurricular activities and bar involvement. We put a lot of stock in that when we are interviewing. And that's the other side of it. When I came in, I inherited a lot

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of judges that were within, let's say, 5 to 7 years of retirement, so I knew there were going to be a lot of changes coming, starting the first year when people were terming out, in DROP or going into DROP. I knew it was how I was going to make my mark. And I want people who will not only be good judges but they are involved in something outside of work, something meaningful, whether it's Bar activities, religious organizations, or charitable organizations. Whatever it is, it just goes to show that you are not locked up in a room, away from people. When you're adjudicating people's rights every day, and you haven't gone outside for another meeting or another organization, you don't know what's going on out there. I've been involved with legal aid for

30-plus years. I used to handle cases and when I couldn't handle cases, I just stayed on the board and helped organize activities and whatever. I think you just get so far away from it, being a judge, and I think it shows that some people over time they get jaded. They've heard it all before. Well, you may have heard it all before, but for this person on this day, this is the most important case they are ever going to have in their life. Maybe they had a criminal conviction in the past that disqualifies them from holding a position of trust, and they are a teacher and want to work in a day-care center or with children. They've done what they can to be rehabilitated. If you're so jaded that, you know, you believe once a drug pusher, always a drug pusher, you can't do that. You got to look at that person today, and where they are, what the threat is. I think over time, whether you call it burnout, people get jaded,

so it's good to get new blood in there. We try to get a good mix of people with different backgrounds, diverse backgrounds. That's how you build a good team. Different thinking people. You don't want everyone to be like a robot, thinking the same way and acting the same way. They follow the law, but get there in their own way.

RS: What's the most important piece of advice you could give a young lawyer that you had wished someone had given you when you were first starting out?

RC: I think that, if you are going to litigate, whether it's at DOAH or whether it's anywhere else, one, out-prepare the other side. I think some lawyers who have been doing it for a while, yeah, they prepare, but they kind of have the attitude of "I've done this. I know what to do." With new lawyers coming in, I'll look at a case

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CALL FOR AUTHORS: ADMINISTRATIVE LAW ARTICLES

One of the strengths of the Administrative Law Section is access to scholarly articles on legal issues faced by administrative law practitioners. The Section is in need of articles for submission to *The Florida Bar Journal* and the Section's newsletter. If you are interested in submitting an article for the Bar Journal, please email Stephen Emmanuel (semmanuel@ausley.com), and if you are interested in submitting an article for the Section's newsletter, please email Jowanna N. Oates (oates.jowanna@leg.state.fl.us). Please help us continue our tradition of advancing the practice of administrative law by authoring an article for either the Bar Journal or the Section's newsletter.

ALJ Q&A*from page 6*

file sometimes and wonder, “Where’s this case gonna go? The agency has a tough road here.” Then the lawyer comes in, and they have prepared their case, and have out-prepared their opponents. Especially in a license-type case where you are looking at sanctionability, the licensee can say, “Look at us. We have testimonials from thousands of individuals. There’s no way we can be sanctioned for anything.” The agency attorney is like “All that’s great, but here’s what happened, and here’s why something needs to be done here.” You need to be at least as prepared, if not more prepared than your opponent. Another thing is that, a lot of times I think lawyers with busy practices, whether they are in private practice or with an agency, don’t spend enough time looking at the case early on and figuring out if there is a way to get the case resolved without going to hearing, whether it’s sitting down and negotiating with other parties, or going to mediation. I know it’s because of the case load. There are so many cases. They’ll pick up a case three weeks before the hearing and all of the sudden realize their case isn’t really that good. Or, it’s just about a fine. Why are we going to a two or three day hearing when the agency might get a little less fine, but they don’t have to go to hearing over it, especially if the goal of righting the wrong and making sure it doesn’t happen again can be achieved with a settlement. So, develop the case early, get your discovery out early, and then see if it’s a case that is really worth taking time and resources to go to hearing on.

RS: What do you like to do for fun?

RC: Well, athletic and outdoor stuff. So, I work out. When the weather’s good I either run, or hike, or bike. Do a lot of team sports. When the weather’s not good, I work out in the gym. I also like to read a lot. And I like to travel. I do a lot of traveling. I like to go to all different kinds of places. This past summer was the hundredth anniversary of the national parks, so we went to Yellowstone and Grand Teton.

RS: How do you manage to balance your work and your personal life?

RC: Well, I don’t sleep a whole lot. [Laughs]. I like to try to keep on top of things work-wise. I’m generally accessible seven days a week. I don’t text or read my texts or emails when I’m in the movies, or playing with my grandson, or doing something with the kids or my wife. But I don’t let everything pile up over the weekend. If people are emailing or whatever, I’ll sit down and read the emails and respond to keep things going. I readily give out my cell phone [number] to people. Even on vacation, I don’t make it a big part of the day, but I keep up with everything. I hate leaving out-of-office messages on my computer.

RS: You have been a big supporter of the Administrative Law Section over the years, and have allowed some of the ALJs at DOAH to play an active role in the Section as well. Why is the Section so important to you?

RC: I think, especially if you are a judge, you have something to offer, and you have to give back to the profession in some way. Whether it be the Florida Bar, and if you are an ALJ, you should be helping with the Administrative Law Section, or the Health Law Section, or the Environmental and Land Use Law Section. A lot of ours are involved, and a lot of ours are not involved. They get involved in other things. Some are involved with the Tallahassee Women Lawyers, mentoring young lawyers, the Tallahassee Bar, the Barristers and the ABA [American Bar Association]. You’ve got to give back, and the place to start is with the ALS because, come on, you’re administrative law judges in Florida. Everyone is encouraged to get out and attend the Pat Dore Conference or Practicing before DOAH [CLEs]. Either be part of one of the panels, or just go. Everybody is required to do something besides just showing up for work even though I can’t make it a condition of their employment. There’s so many ways to be involved and not be invisible. Plus, when the lawyers come before you, they know you and you know them. They’re more comfortable with you, and

you’re more comfortable with them. There’s something to be said for getting to know the lawyers that appear before you. You don’t give them special treatment, but, generally, they behave better when they know they are going to see you outside [of court] at other Bar activities, and not go crazy over some evidentiary ruling you made against them.

RS: When it’s all said and done, how would you like to be remembered as an ALJ?

RC: Well, I think as someone who supports the independence of our ALJs and Workers’ Comp judges in terms of their independence to review the evidence and make the rulings that they make, and fight for it in the Legislature. I want to be remembered as a judge who got involved, rolling up his sleeves and hearing cases. I didn’t just say that I wanted these little cases in seaside communities. I was there with them. I felt their pain. I worked together with them. The only other thing I’d say is that I’d like to be remembered as someone who appointed ALJs with varying and diverse backgrounds. Not all government lawyers, not all private sector lawyers. Not all with the exact same type of experience. I looked for well-rounded people.

Richard J. Shoop is the Agency Clerk for the Agency for Health Care Administration. He attended the University of Miami for both undergraduate studies and law school, obtaining a Bachelor of Arts in History with General Honors in 1996 and a Juris Doctor in 1999. He began his legal career at the Quincy office of Legal Services of North Florida, Inc. In 2001, Mr. Shoop went to work for the State of Florida, first with the Agency for Health Care Administration and then with the Department of Health as a prosecuting attorney for the Boards of Medicine, Osteopathic Medicine and Psychology. He accepted the position of Agency Clerk for the Agency for Health Care Administration in 2004. Mr. Shoop has been a member of the Administrative Law Section’s executive council since 2009, and is currently serving as the immediate past chair of the section.

Appellate Case Notes

by Tara Price, Gigi Rollini and Larry Sellers

Agency Jurisdiction to Vacate Prior Final Order

Stasinov v. Dep't of Bus. & Prof'l Reg., 41 Fla. L. Weekly D2317 (Fla. 4th DCA Oct. 13, 2016).

Christos Stasinov appealed a final order of the Department of Business and Professional Regulation, Construction Industry Licensing Board ("Board") that awarded a \$50,000 restitution payment to the Guzzettas on their claim against the Florida Homeowners' Construction Recovery Fund for Mr. Stasinov's abandonment of his residential construction contract with them. The final order was issued on reconsideration of the Board's prior final order dismissing the Guzzettas' claim as untimely. By statute, such an order results in an automatic suspension of the contractor's license.

On appeal, Mr. Stasinov argued that the Board did not have jurisdiction to modify its prior final order. However, the court explained that "where the proceeding is in essence a judicial one, an agency whose final orders are subject to review under the Florida Administrative Procedure Act has the inherent or implied power to rehear or reopen a cause to reconsider the action taken therein." The court cautioned that this power must be utilized before an appeal has been filed or before the order has become final by the failure to file a notice of appeal. Because the Guzzettas filed their request to vacate the final order on the same day they filed their timely notice of appeal, the court relinquished jurisdiction to the Board for 60 days to reconsider the order. As a result, the Board had jurisdiction to reconsider and vacate its prior final order. The court noted that this procedure was also supported by section 489.142, Florida Statutes, which authorizes the Board to "take any action it deems appropriate" with respect to actions for recovery from the recovery fund. The court also observed the Board has inherent authority to reopen a

proceeding to remedy due process violations, and that it was a potential due process issue that caused the Board to reconsider its prior final order.

The court rejected the argument that the Guzzettas were barred from recovery because they did not file their claim within a year of obtaining their circuit court judgment against the contractor. While the Guzzettas did file their claim more than one year after obtaining a circuit court judgment against Mr. Stasinov, section 489.141, Florida Statutes, provides that a claim must be made after the conclusion of any action based on the Act. The Guzzettas filed their restitution claim within one year of the conclusion of the bankruptcy proceeding of the construction company, to which Mr. Stasinov was the general contractor, which the court concluded was an "action . . . based on the Act." Accordingly, the court affirmed the Board's order.

Bid Protest—Flexibility of ITN Process

AT&T Corp. v. Dep't of Mgmt. Servs., 201 So. 3d 852 (Fla. 1st DCA 2016).

The Department of Management Services solicited proposals from vendors for the award of a contract for a telecommunications infrastructure data network. AT&T and CR MSA responded to the Invitation to Negotiate (ITN) and were advanced to negotiations. After the Department posted a Notice of Intent to Award the contract to CR MSA, AT&T filed a bid protest with the Department. After a final hearing, the ALJ entered a recommended order to dismiss AT&T's protest. AT&T timely filed exceptions, and the Department entered a final order adopting the recommended order in its entirety.

AT&T identified three points of error in the ITN process on appeal: (1) the Department failed to determine whether CR MSA was a qualified and responsive vendor; (2) the

Department should have found that CR MSA was non-responsive; and (3) the Department materially changed the ITN during negotiations in a way that gave CR MSA a competitive advantage and failed to publish those changes to the Vendor Bid System.

The First District Court of Appeal noted that AT&T bore the burden of proof to show, by a preponderance of the evidence, that the award was clearly erroneous, contrary to competition, arbitrary, or capricious. Under this standard, and in light of the statutory definition of "responsive bid," the court held the evidence supported the ALJ's findings that the Department properly determined that CR MSA was a responsive vendor, thereby rejecting AT&T's first two issues.

As to the third issue, the court observed that the ITN alerted the parties that the Department reserved the right to negotiate and to request revised replies. In submitting replies to the ITN, the vendors were on notice that negotiations would be a part of the process. While the court agreed generally that the Department could not make material changes to the ITN during negotiations, the court concluded that the ALJ properly found no material changes were made. The court noted that the Department's revisions that evolved within the negotiation phase and before the Request for Best and Final Offers did not restrict competition because both vendors had the opportunity to alter their replies accordingly and AT&T simply chose not to do so.

The court affirmed the Department's decision to award the contract to CR MSA.

Bid Protest—No Price Revisions After Opening of Sealed Bids

Bright House Networks v. AT&T Corp., 205 So. 3d 837 (Fla. 5th DCA 2016).

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APPELLATE CASE NOTES*from page 8*

The Brevard County School Board advertised a Request for Proposals (RFP) for internet services. The new contract would replace the School Board's existing contract with AT&T. The RFP required each sealed bid to be ranked by a selection committee and the top proposers would then advance to oral presentations. Bright House and AT&T were selected as finalists to advance to the oral presentation.

At the oral presentation, AT&T announced a revised price that was lower than Bright House's initial price. Bright House made a change in its price in response and it remained the highest-ranking bidder in all categories except one. The School Board awarded the contract to Bright House and AT&T filed a bid protest. The ALJ found that AT&T's proposal was responsive to the RFP. However, the ALJ noted that section 120.57, Florida Statutes, does not permit bidders to change their bids after the sealed proposals are submitted and opened. The ALJ recommended that the School Board reject all proposals and rebid the project. The School Board entered a final order that "accepted the finding that AT&T was a responsive and responsible bidder" and "rejected the finding that its RFP process violated Florida Law."

The court reversed the School Board's final order and remanded for entry of a final order adopting the ALJ's recommendation. The court found that the School Board erred in rejecting the ALJ's interpretation of section 120.57(3)(f). The court also found that the ALJ erred in finding that AT&T's bid was responsive to the RFP.

Constitutional Challenge on NICA Statutes

Putnam Cmty. Med. Ctr. v. Fla. Birth-Related Neurological Injury Compensation Ass'n, 204 So. 3d 598 (Fla. 1st DCA 2016).

An infant that weighed 2,440 grams suffered neurological issues during

the birthing process. The mother filed an administrative petition seeking a determination whether her infant's injuries were compensable. The ALJ allowed Putnam Community Medical Center (PCMC) to intervene because it alleged that if the mother were denied compensation, its statutory immunity from suit would disappear. The Florida Birth-Related Neurological Injury Association (Association) moved for summary final order, arguing that the infant's injuries were not compensable under the Neurological Injury Compensation Act (NICA) because section 766.302(2), Florida Statutes, required infants to weigh at least 2,500 grams for single gestation or 2,000 grams for multiple gestation. PCMC opposed, arguing that the mother had a small stature and the infant was a normal weight for someone his mother's size. The ALJ granted the Association's motion for summary final order and concluded that the infant was not qualified for compensation because he weighed less than 2,500 grams.

On appeal, PCMC argued that the statute's different minimum weight thresholds for single and multiple gestation infants violated Florida and federal equal protection provisions because the statute unlawfully discriminated among members of the class of full-term infants who have suffered neurological injuries during birth. The first issue the court addressed was PCMC's standing to intervene. The court held that PCMC had standing to intervene to protect its liability for injuries that it argued should be covered by NICA.

The court limited PCMC's constitutional challenge to a federal equal protection claim because corporations are not entitled to equal protection rights under the Florida Constitution. The court held that PCMC did not demonstrate a federal equal protection violation because it did not show that single and multiple gestations involved similar situations. Equal protection requires only that similarly situated people are treated similarly, and the Legislature recognized through section 766.302(2) that multiple gestation infants are differently situated than single gestation infants because multiple

gestation infants share womb space and nutrition.

Additionally, even if PCMC had shown that single and multiple gestations were similarly situated, section 766.302(2) was constitutional because the distinction in weight between single and multiple gestations was rationally related to preserving NICA's actuarial soundness. The court recognized that NICA's actuarial soundness was a legitimate state interest that could withstand equal protection challenges. Thus, the court affirmed the ALJ's determination that the infant was not entitled to NICA coverage.

Dismissal of Complaint—Duty to Exhaust Administrative Remedies

Sylvain v. Fla. Agric. & Mech. Univ. Bd. of Trs., 204 So. 3d 162 (Fla. 1st DCA 2016).

Ms. Sylvain was dismissed from Florida Agricultural and Mechanical University (FAMU) for five years after the university determined that she was involved in a hazing incident. Ms. Sylvain sought both emergency and non-emergency hearings to challenge her dismissal. The emergency panel recommended upholding Ms. Sylvain's dismissal, and the Vice President for Student Affairs adopted the emergency panel's recommendation. Later, the non-emergency panel recommended that FAMU reduce Ms. Sylvain's dismissal to a two-semester suspension, and the Vice President for Student Affairs adopted the recommendation. Both orders from the Vice President for Student Affairs informed Ms. Sylvain that she had the right to seek judicial review by filing a petition for writ of certiorari in the circuit court. Ms. Sylvain, however, did not seek certiorari review in the circuit court of either order. Instead, she filed a civil suit against FAMU. FAMU moved for summary judgment, arguing that Ms. Sylvain failed to exhaust her administrative remedies by declining to seek certiorari review. The trial court granted the summary judgment motion.

On appeal, Ms. Sylvain argued that

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she exhausted her administrative remedies after she sought emergency and non-emergency review of the original dismissal. The court disagreed, holding that, generally, “exhaustion of administrative remedies includes pursuing an appeal from an administrative ruling where a method of appeal is available.” The court also rejected Ms. Sylvain’s arguments that seeking certiorari review in the circuit court was futile and would have given her an inadequate remedy. Accordingly, the court affirmed the trial court’s dismissal of her claim on summary judgment.

FFHA Claims—Exhaustion Requirement

Housing Opportunities Project v. SPV Realty, LC, 42 Fla. L. Weekly D44 (Fla. 3d DCA Dec. 21, 2016).

Housing Opportunities Project for Excellence, Inc. (HOPE) and four of its employees settled a federal Fair Housing Act case against SPV Realty, LC (SPV). Under the settlement agreement, SPV did not admit liability but agreed to take several actions, including training its employees and marketing its services to minorities. One year later, HOPE filed suit against SPV, claiming that SPV had breached the settlement agreement. The complaint also alleged that SPV violated the Florida Fair Housing Act (FFHA). The trial court dismissed the plaintiffs’ two FFHA counts for failure to engage in the mandatory conciliation process under section 760.34, Florida Statutes, prior to filing suit against SPV.

HOPE appealed the trial court’s order to the Third District Court of Appeal. The court analyzed section 760.34 and concluded that it required potential plaintiffs to file a complaint with the Florida Commission on Human Relations (Commission) prior to pursuing a civil action for violation of the FFHA. The court concluded that a plain reading of section 760.34 required aggrieved persons to file a complaint with the Commission and

gave the Commission 180 days to resolve the complaint.

HOPE also argued that the Legislature intended the FFHA to parallel the federal Fair Housing Act, which allows aggrieved persons to choose between filing suit or utilizing the conciliation process to be followed by suit in federal court if conciliation efforts were unsuccessful. The Commission filed a supporting amicus brief arguing that the FFHA does not mandate the exhaustion of administrative remedies. The court rejected this argument, noting that no statutory language existed affirmatively indicating that the Legislature intended the FFHA to incorporate the non-mandatory administrative remedies provisions of the federal Fair Housing Act. In fact, the court noted that the Commission had tried for numerous years to get the Legislature to add language to this effect to the FFHA and had been unsuccessful. Thus, the court held that a trial court lacks subject matter jurisdiction of an FFHA claim unless the aggrieved person has exhausted their administrative remedies through the statutory conciliation process in section 760.34.

Judge Salter, in dissent, wrote that the court should have reversed the trial court’s dismissal of the two FFHA claims and certified conflict with the Fourth District Court of Appeal’s decision in *Belletete v. Halford*, 886 So. 2d 308 (Fla. 4th DCA 2004). He cited federal and Florida case law for the proposition that the FFHA and federal Fair Housing Act “are substantively identical” and that the Legislature “essentially codified the Federal Act” when it enacted the FFHA. Judge Salter also observed that the Commission administers both the Florida Civil Rights Act and the FFHA, such that the court should not have dismissed the Commission’s interpretation of the FFHA statutes but instead given it great deference.

Non-Final Orders—Incurable Injury Required

Agency for Health Care Admin. v. S. Broward Hosp. Dist., 206 So. 3d 826 (Fla. 1st DCA 2016).

The Agency for Health Care Administration (“AHCA”) sought review of a non-final order granting the respondents’ motions to unseal files relevant to two Medicaid provider overpayment complaints.

The court explained that it “possess[ed] the authority to review the non-final action of an ALJ when review of the final agency action would not provide an adequate remedy.” The court concluded that AHCA failed to allege how the order on review caused it material injury that could not be remedied on a final appeal. Therefore, the petition for review of non-final agency action was dismissed.

In a written concurrence, Judge Wetherell also explained that even if AHCA had alleged or established irreparable harm, the petition should be denied on the merits, because the underlying case was not an abuse case as required to trigger the section 409.913(12), Florida Statutes, exemption from public records. DOAH’s case files are public records.

Recovering Attorney’s Fees Following Unsuccessful Ethics Complaints

Hadeed v. Comm’n on Ethics, 208 So. 3d 782 (Fla. 1st DCA 2016).

The Commission on Ethics received a complaint against Albert Hadeed, an attorney for the Flagler County Board of County Commissioners, and a second complaint against Nathan McLaughlin, a Flagler County Commissioner. The complaints were filed by two different citizens but included common allegations. The Commission dismissed both complaints, concluding that they failed to establish ethics violations and thus were legally insufficient. Both Mr. Hadeed and Commissioner McLaughlin requested attorney’s fees and costs under section 112.317, Florida Statutes, alleging that the complaints against them were filed with malicious intent to injure their reputations and included knowingly false allegations that were material to possible ethics violations. The Commission denied both requests for attorney’s fees and costs because neither request showed the

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allegations in the complaint were material to an ethics violation. Mr. Hadeed and Commissioner McLaughlin appealed the Commission's denial of their request.

The court noted that the statute "requires that the false allegations be 'material' to an ethics violation to be actionable for costs and fees." The court concluded that despite the inflammatory language within the complaints, only three allegations were actually material to possible ethics violations. The court held that Mr. Hadeed and Commissioner McLaughlin could not recover attorney's fees and costs for the "disparaging language" within the complaints, even though the language was inflammatory and either maliciously intentional or knowingly false, because the statute was "narrowly-drawn and allows recovery in only very limited situations." The court affirmed the Commission's orders denying Mr. Hadeed's and Commissioner McLaughlin's requests for attorney's fees and costs.

Recovering Attorney's Fees in NICA Claims

Lampert v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 206 So. 3d 845 (Fla. 1st DCA 2016).

The Lamperts' son was admitted into the Florida Birth-Related Neurological Injury Compensation Association (NICA) program. Subsequently, the Lamperts were part of a class action lawsuit against NICA that resulted in a process being established for class members to file claims to receive payment for providing medically necessary and reasonable custodial care benefits. A class member who disagrees with NICA's determination may file a claim with the Division of Administrative Hearings (DOAH) pursuant to sections 766.301-766.316, Florida Statutes.

The Lamperts submitted a claim to NICA for residential and custodial care benefits. NICA agreed to pay the Lamperts for future custodial

benefits for 12 hours per day, though they had sought pay for 16 hours per day. The Lamperts then filed a petition with DOAH to determine their entitlement to benefits. NICA argued that the Lamperts were not entitled to benefits and sought a credit for what it claimed were overpayments already made. The ALJ issued a final order awarding the benefits that NICA initially agreed to provide; NICA's request for recoupment or offset was not addressed. The ALJ denied the Lamperts' motion for attorney's fees and costs, which they appealed.

On appeal, the court determined that the Lamperts were entitled to attorney's fees, in spite of not being prevailing parties, because section 766.31 predicated entitlement to attorney's fees on whether a determination and award were made by the ALJ. Since the ALJ "made the final determination and award under the statute, as required by the settlement agreement," the Lamperts were entitled to their expenses. Accordingly, the court reversed and remanded to the ALJ with instructions to grant the Lamperts' motion for attorney's fees and costs.

Right to a Hearing for Denial of Exemption from Standardized Testing Due to Disability

Drew v. Dep't of Educ., 202 So. 3d 951 (Fla. 1st DCA 2016).

Paula Drew requested a permanent exemption from standardized testing for her daughter from the Department of Education (DOE). DOE denied the request, citing section 1008.22(10), Florida Statutes, without explanation. Section 1008.22(10) provides exemptions for children with medical complexities and specifically states that it applies in addition to the exemption option under section 1008.212, Florida Statutes. Section 1008.212 permits the parent of a disabled student to request an expedited hearing on the denial of an exemption.

Ms. Drew requested an expedited hearing under section 1008.212, which was denied. DOE contended that Ms. Drew was not entitled to an

expedited hearing because the denial was under section 1008.22, and as such, the decision was unreviewable. Ms. Drew, through an attorney, argued that her exemption request was based on sections 1008.22(10) and 1008.212 and that DOE did not give her notice and an opportunity to be heard on its denial of her request, pursuant to rule 6A-6.03311, Florida Administrative Code. DOE rejected Ms. Drew's third request and she sought mandamus relief in the appellate court.

DOE argued on mandamus review that it was unable to grant Ms. Drew an expedited hearing under section 1008.212 because, under section 1008.22(10), Ms. Drew was entitled to only an administrative hearing under section 120.569, Florida Statutes, as a party whose substantial interests were affected by an agency's decision. The court noted that DOE never informed Ms. Drew about her ability to seek an administrative hearing under section 120.569. The court did not decide whether an expedited hearing was required under section 1008.22(10), due to the availability of administrative review under sections 120.569 and 120.57, Florida Statutes. The court granted Ms. Drew's petition for writ of mandamus and mandated that DOE provide a hearing on its denial of her request for a statewide standardized testing exemption.

Standing—Third Party Standing to Challenge Environmental Resource Permits

Village of Key Biscayne v. Dep't of Env'tl. Prot., 206 So. 3d 788 (Fla. 3d DCA 2016).

The National Marine Manufacturers Association (NMMA) and the City of Miami sought an environmental resource permit (ERP) from the Department of Environmental Protection (DEP) for the installation of approximately 830 water slips, or temporary floating docks, at the Miami Marine Stadium to accommodate an annual boat show. The Village of Key Biscayne (Village) challenged DEP's intent to award NMMA the ERP. DEP's general

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counsel determined that the Village did not have third-party standing and did not refer the challenge to DOAH for a hearing. The general counsel determined that the Village did not meet the two-part standard for standing under *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981).

On appeal, the Village argued that it had third-party standing and that DEP violated its due process rights when the general counsel determined third-party standing instead of an ALJ. The court adopted DEP's standing analysis in whole and affirmed DEP's Final Order. The court noted that administrative agencies frequently dismiss petitions for administrative hearings for failure to allege sufficient facts to demonstrate

standing. The court observed that section 120.569(2)(d), Florida Statutes, provides that agencies may refer a petition for administrative hearing to DOAH only if the petition "is in substantial compliance" with section 120.569(2)(c). Section 120.569(2)(c) states that "the agency shall carefully review the petition" and that the "petition shall be dismissed if it is not in substantial compliance with these requirements." The court recognized that section 120.569(2)(c) and (d) appeared to set forth "an inherent conflict of interest in a system in which the agency which has determined to issue a water quality permit is also the adjudicator of whether a petitioner should be allowed to present his grievance to a neutral official," and suggested that the Legislature might want to amend the statute "to circumscribe the scope of power of the unelected, but no doubt well-meaning, individuals who populate our ever expanding

administrative state."

Finally, the court noted that the Village failed to preserve its argument that DEP lacked authority to determine the Village's standing instead of an ALJ because the Village did not raise the issue before DEP or request DEP's general counsel recuse himself from the decision. Instead, the Village sent DEP a letter following issuance of the final order stating that it would abandon its intended appeal if DEP's general counsel agreed to reconsider his decision on the Village's third-party standing.

Tara Price is an attorney with Holland & Knight LLP, practicing in the firm's Tallahassee office.

Gigi Rollini is a shareholder with Messer Caparello, P.A., in Tallahassee.

Larry Sellers is a partner with Holland & Knight LLP, practicing in the firm's Tallahassee office.

DOAH CASE NOTES

Substantial Interest Proceedings

Doug Williams v. City of Coral Springs Police Officers' Pension Fund, DOAH Case No. 16-3298 and *Sherry Williams v. City of Coral Springs Police Officers' Pension Fund*, DOAH Case No. 16-3302 (Recommended Order Nov. 18, 2016).

FACTS: The City of Coral Springs' City Commission adopted the Coral Springs Police Officers' Pension Plan ("the Plan"), which is administered by a Board of Trustees ("the Board"). Under the Plan, a police officer becomes 100-percent vested after ten years of continuous service and contribution. There is no provision in the Plan authorizing the Board to suspend an officer's vested interest after he or she enters the Deferred Retirement Option Plan ("DROP").

On December 1, 2004, Douglas

Williams, who had been employed as a Coral Springs police officer since September of 1981, entered DROP. Officer Williams terminated his employment in September 2009 and began receiving monthly pension payments. On February 1, 2012, Sherry Williams, who had been employed as a Coral Springs police officer since August of 1995, entered DROP. Officer Williams terminated her employment on September 30, 2014, and began receiving monthly pension payments effective October 1, 2014.

On September 4 and 5, 2014, respectively, Douglas and Sherry Williams were arrested and charged with multiple counts of grand theft related to their positions with the Coral Springs Fraternal Order of Police Lodge No. 87.

Section 112.3173, Florida Statutes, provides for the forfeiture of pension benefits if covered members

are convicted of certain "specified offenses" enumerated under section 112.3171(2)(e).

In January 2016, the Board adopted its "Policy Regarding Payment of Pension Benefits Pending Forfeiture Under Florida Statute §112.3173" ("the Policy"), providing that when there is evidence that a retired officer has been charged with what may be a specified offense, the Board shall suspend any monthly pension payments exceeding the retired officer's contribution, pending the outcome of the charges.

Without conducting a factual inquiry, the Board determined on February 24, 2016, that the pending charges against the Williamses amounted to specified offenses under section 112.3173 and suspended their pension benefits through the issuance of Orders Recommending Suspension of Benefits. The Williamses disputed

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the Board's action, and pursuant to contract under section 120.65, Florida Statutes, the Board referred the case to the Division of Administrative Hearings to conduct a formal administrative hearing.

OUTCOME: The Petitioners raised several arguments that were rejected by the ALJ. For instance, the ALJ rejected an argument that adoption of the Policy was improperly motivated by consideration of the Williamses' specific situation, by concluding that judicial interest in legislative action is limited to the question of power and does not extend to the motives of the policymakers. Nevertheless, the ALJ ultimately ruled in the Petitioners' favor by accepting their argument that no city ordinance or Plan provision authorized the Board to adopt a policy authorizing the suspension of benefits in anticipation of forfeiture. In doing so, the ALJ rejected the Board's argument that the Policy was sufficiently authorized because it was consistent with its duty to act as a fiduciary. As stated by the ALJ, "fiduciary standards compel the Board to exercise all of the powers granted to it by statute and municipal ordinance with the highest degree of care and loyalty toward Plan retirees and to always use these powers in their best interest. However, it does not logically follow, as [the Board] seems to argue here, that if a suspension policy is in the retirees' best interest, that the Board therefore has authority to create it. The Board has the authority to act on behalf of the Fund only through the exercise of the duties granted to it." Accordingly, the ALJ recommended that the Board not suspend the Williamses' pension benefits absent a provision in the Plan providing for such action.

Disciplinary/Enforcement Actions*In re: William Aristide, DOAH Case*

No. 16-3860EC (Recommended Order Nov. 2, 2016).

FACTS: Section 112.3145(2)(b), Florida Statutes, provides that "[e]ach state or local officer and each specified state employee shall file a statement of financial interests no later than July 1 of each year." In this case, the Florida Commission on Ethics ("Commission") entered an order finding probable cause that William Aristide, a public high school principal, willfully failed or refused to file an annual statement in violation of section 112.3145(8)(c). Based on the probable cause finding, the Commission referred the matter to DOAH to conduct a hearing. Prior to the hearing, the parties filed a joint prehearing stipulation. In the stipulation, Mr. Aristide acknowledged that his position as a principal required the filing of an annual statement and the parties further stipulated to the legal conclusion that Mr. Aristide "is subject to the requirements of Part III, Chapter 112, Florida Statutes, the Code of Ethics for public officers and employees, for his acts and omissions during his tenure [as principal]."

OUTCOME: The operative issues in this case were whether Mr. Aristide, in the capacity of a high school principal, is a "local officer" required annually to file a disclosure of financial interests and, if so, whether Mr. Aristide violated section 112.3145(8)(c). In addressing these issues, the ALJ concluded that the Commission failed, as a factual matter, to establish the threshold requirement that Mr. Aristide met the statutory definition of "local officer" and as such, the Commission lacked standing to prosecute Mr. Aristide under section 112.3145(8)(c).

Notably, the ALJ acknowledged that throughout the proceedings, the parties operated under the erroneous assumption that Mr. Aristide was indeed a local officer. With respect to the parties' stipulation, the ALJ noted that Mr. Aristide's admission that his position as a principal required him to file an annual statement "cannot create an otherwise nonexistent legal duty." *Alvarez v. Smith*, 714 So. 2d 652, 653 (Fla. 5th DCA 1998).

Moreover, the ALJ cited *Diaz de la Portilla v. Fla. Elec. Comm'n*, 857 So. 2d 913, 917 n.3 (Fla. 3d DCA 2003), for the proposition that the parties' stipulation on a question of law—namely, Mr. Aristide's legal obligation to file financial disclosure forms—is "not binding on the administrative law judge and he [is] free to disregard it."

In re: Stephan Carter, Case No. 16-3637EC (Recommended Order Jan. 3, 2017).

FACTS: Section 112.313(6), Florida Statutes, prohibits public employees from corruptly utilizing their official positions "to secure a special privilege, benefit, or exemption for himself, herself, or others." Stephen Carter served as General Counsel for the Orange County Clerk of Court from June 2003 through April 1, 2014. In January 2005, Mr. Carter and Lydia Gardner (the Orange County Clerk of Court) executed an employment contract providing that Mr. Carter would receive a substantial severance payment if the Clerk of Court were to terminate his employment. In February 2013, Ms. Gardner became gravely ill, and Colleen Reilly assumed the Clerk of Court's duties. Mr. Carter then prepared an employment agreement for Ms. Reilly that was patterned after his own. Because of Ms. Gardner's deteriorating health, Mr. Carter and Ms. Reilly were concerned about their continued employment. Mr. Carter concluded that their positions were tied to Ms. Gardner rather than the Clerk's Office and that Ms. Gardner's death would terminate the contracts, but would also entitle Mr. Carter and Ms. Reilly to receive their severance payments. Further, Mr. Carter also concluded that he and Ms. Reilly could continue in their positions as "at-will" employees. That conclusion led Ms. Reilly to visit Ms. Gardner, who was on convalescent leave at her home, and ask Ms. Gardner to terminate Mr. Carter's and her employment contracts. After Ms. Gardner refused, Mr. Carter determined that section 28.09, Florida Statutes, would empower Ms. Reilly, as interim Clerk of Court, to terminate his employment contract upon

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Ms. Gardner's death. Ms. Gardner died on May 8, 2013. Ms. Reilly was appointed as interim Clerk of Court on May 9, 2013, and she promptly terminated Mr. Carter's and her own employment agreements. In a break from established office procedure, Mr. Carter then visited the Clerk's payroll office and had the payroll administrator calculate his severance payout. Her calculations resulted in the Clerk of Court owing Mr. Carter over \$144,000. On May 10, 2013, the payroll administrator issued a \$58,400 check to Mr. Carter. However, Mr. Carter visited the payroll administrator again on May 20, 2013, and demanded that she make several adjustments to the aforementioned amount. At that point, the payroll administrator reported the situation to her supervisor. Ms. Reilly then intervened, and the payroll administrator was told to proceed with the payouts to Mr. Carter and Ms. Reilly. Mr. Carter then received a second severance payment totaling \$156,443.11, and he repaid the initial payout of \$58,400. After Ms. Reilly terminated Mr. Carter's employment agreement, he continued to work as the General Counsel for the Clerk of Court as an at-will employee. In February 2014, the new Clerk of Court, Eddie Fernandez, initiated an investigation of the severance payments to Mr. Carter and Ms. Reilly, and the ensuing investigation resulted in a recommendation that Mr. Carter's employment be terminated. However, Mr. Carter resigned from his position and reimbursed the Clerk's Office for the full amount of the money he received as a severance payment. On October 28, 2015, the Florida Commission on Ethics issued an Order Finding Probable Cause to conclude that Mr. Carter had violated section 112.313(6) by using his former position to obtain a severance package while still employed by the Clerk of Court.

OUTCOME: The ALJ concluded that the Commission persuasively demonstrated that Mr. Carter "participated in (if not instigated) a scheme

whereby the Clerk's Office would pay him his Severance Payment under his Employment Agreement, but he would continue to be employed as General Counsel for the Clerk's Office under the exact same compensation, terms and conditions contained in the Employment Agreement. [Mr. Carter]'s actions to collect a 'double salary' were inconsistent with the proper performance of his public office. Accordingly, [Mr. Carter]'s acceptance of his Severance Payment without leaving public service was unjustified and violated the Florida Code of Ethics." However, because Mr. Carter resigned his position, returned all of the money that he received through his unethical conduct, and otherwise served the Clerk of Court well, the ALJ recommended that public censure and reprimand would be an appropriate penalty.

Rule Challenges

Prince Contracting, LLC and Hubbard Construction Co. v. Dep't of Transp., DOAH Case No. 16-4982BID (Final Order Dec. 22, 2016).

FACTS: In the course of challenging the Department of Transportation's ("DOT") decision to award a contract to Astaldi Construction Corporation, Prince Contracting, LLC ("Prince"), argued that several procedures utilized by DOT in every road construction procurement in Florida and the computer algorithms DOT uses to identify outlier bids are unadopted rules.

OUTCOME: Because section 337.168, Florida Statutes, makes DOT's bid analysis and monitoring system (including computer processes and programs) confidential and exempt from disclosure, the ALJ ruled that DOT's computer algorithms are not subject to rulemaking. As for the procedures cited by Prince, the ALJ concluded that they were internal management memoranda and thus expressly excluded from the definition of a "rule" in section 120.52(16), Florida Statutes. The ALJ reached that conclusion even though DOT's employees have no discretion to not

utilize the procedures in question, and distinguished the instant case from others holding that a policy or procedure was not a "rule" because its application was discretionary. In explaining his conclusion, the ALJ stated that DOT "is not here acting primarily in a regulatory or disciplinary capacity, as is the circumstance in most cases involving alleged unadopted rules. [DOT] is operating a vast procurement process in which it contracts directly with hundreds of private entities. The Legislature has directed that the process be efficient, effective, and consistent." Furthermore, "[i]n light of legislative directives to uniformly administer the bidding process and to keep a great deal of estimating and evaluative information confidential, [DOT]'s internal management memoranda understandably provide a minimum of discretion as to their application."

Bid Protests

Bridges of America, Inc. v. Dep't of Corrections, Case No. 16-5237BID (Recommended Order Nov. 23, 2016).

FACTS: Florida Administrative Code Rule 33-601.602(1)(n) defines a "community release center" as "a correctional or contracted facility that houses community custody inmates participating in a community release program." The Department of Corrections (DOC) pays approximately \$21 a day for work-release beds and approximately \$52 a day for substance abuse transition beds ("transition beds"). The cost differential reflects the fact that inmates assigned to transition beds receive intensive therapeutic services. When treatment is completed, inmates are transferred to work-release beds, where the goal is obtaining and maintaining work-release employment. On August 11, 2016, DOC advertised a request for proposals for a "Community Release Center in Orange County, Florida" ("the RFP"). The RFP only sought proposals for work-release beds because DOC's data indicated that there is a greater need to provide substance abuse treatment to moderate and high-risk

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DOAH CASE NOTES*from page 14*

inmates in secure facilities, and DOC was responding accordingly to provide as much intervention as possible to those inmates housed in secure facilities. At the time of the final hearing in this matter, Bridges of America, Inc. (“Bridges”) held contracts with DOC to provide work-release beds and transition beds throughout Florida and held a contract to provide those services in Orange County in a facility that operated up to 54 work release beds and up to 84 transition beds. On August 16, 2016, Bridges notified DOC of its intent to protest the RFP’s specifications. Following a stipulation between the parties, the only issue to be determined was whether the omission of transition beds in the RFP was contrary to governing law, arbitrary and capricious, or contrary to competition.

OUTCOME: The ALJ recommended that DOC enter a final order dismissing Bridges’ petition. The ALJ found that Bridges failed to demonstrate that the RFP’s specifications were arbitrary and capricious. Rather than being directed toward one or more specifications within the RFP, Bridges’ challenge concerned the omission of transition beds. However, the ALJ determined that “[t]he specifications are consistent with [DOC]’s intended restructuring of substance-abuse treatment and work release opportunities for inmates. Whether or not the plan is ultimately successful, the thought process behind the specifications included in the RFP is to address legitimate concerns for providing the most treatment to the greatest number of inmates.”

Prince Contracting, LLC and Hubbard Construction Co. v. Dep’t of Transp., DOAH Case No. 16-4982BID (Recommended Order Dec. 22, 2016).

FACTS: On April 15, 2016, the Department of Transportation (“DOT”) issued an Invitation to Bid (“ITB”), on a contract for a road-widening project on U.S. Highway 301 in Hillsborough County. DOT specified that the project was a low-bid contract

with a budget estimate of \$51,702,729. The work included seven components: bridge structures, roadway, signage, lighting, signalization, utilities, and intelligent transportation systems. Astaldi Construction Corporation (“Astaldi”) submitted the lowest bid by offering to complete the project for \$48,960,013. Prince Contracting, LLC’s (“Prince”), bid of \$57,792,043 was the second lowest, and Hubbard Construction Company’s (“Hubbard”) bid of \$58,572,352.66 was the third lowest. Prince challenged the award to Astaldi by arguing that virtually all of the difference between its bid and Astaldi’s could be attributed to the project’s utilities component, which did not include all costs necessary for that component. Specifically, Astaldi’s bid of \$7,811,720 for the utilities component was approximately \$8.5 million below Prince’s and \$5.8 million below Hubbard’s. Astaldi’s chief estimator conceded that Astaldi’s bid did not include all of the costs necessary to construct the utilities portion of the project. As a result, Prince argued that Astaldi’s bid should be considered nonresponsive because a provision within the ITB required bidders to include “the cost of all labor, equipment, materials, tools, and incidentals” in their bids.

OUTCOME: The ALJ recommended that DOT enter a final order dismissing Prince’s protest and award the contract to Astaldi. The ALJ rejected Prince’s argument that Astaldi’s bid was nonresponsive by stating that “Prince has focused so intently on the second paragraph of Standard Specifications Subarticle 9-2.1, that it has lost sight of the purpose of that section.” “When read together with all of subarticle 9-2.1 and the rest of the Standard Specifications, the second paragraph is plainly seen to be cautionary, not prescriptive. It is not instructing the vendor to include all costs on pain of being found non-responsive when the Department’s line-by-line review reveals some undisclosed cost. Rather, the second paragraph reiterates the warning that the bidder had best include all of its costs for each item because the Department will not pay more than the bid price.” The ALJ also rejected Prince’s argument that

Astaldi undermined competition by materially underbidding the project. In doing so, the ALJ noted that “Astaldi’s only ‘deviation’ was bidding a lower price than the other bidders. By doing so, Astaldi gained no benefit not enjoyed by other bidders. Astaldi will have to complete the same scope of work as any other bidder would have had to complete.” As for the argument that Astaldi’s bid should be rejected if it cannot cover the costs associated with each unit, the ALJ concluded this argument “assumes that [DOT] has the authority to investigate a bidder’s business relationships with its subcontractors, vendors, or suppliers, or inquire into its business, pricing, profit strategies, inventory, and actual expenses.” The ALJ also stated that “[i]t is unreasonable to expect the Department to investigate a bidder’s pricing for every unit item and compel that bidder to explain its pricing strategy, inventory, relationships with subcontractors, and business structure, especially when such efforts would have to be made on hundreds of bids every year.”

Non-Final Orders

University of Miami, d/b/a University of Miami Hospital and Clinics v. Ag. for Health Care Admin. and Baptist Hospital of Miami, Inc., DOAH Case No. 16-1698 CON (Non-Final Order Dec. 12, 2016).

FACTS: On December 8, 2016, Baptist Hospital of Miami, Inc. filed a motion entitled “Unopposed Motion to Expand Allowable Page Limit of Proposed Recommended Orders and Permit Joint Filing of Separate Table of Acronyms and List of Applicable Criteria.” The motion was necessary because Rule 28-106.215 of the Florida Administrative Code mandates that “[u]nless authorized by the presiding officer, proposed orders shall be limited to 40 pages.”

OUTCOME: The ALJ issued an Order on December 12, 2016, granting the motion. However, in light of the old adage that “less is more,” the ALJ included a statement within the Order cautioning that “verbosity is an atrocity.”

Administrative Law Section



ADMINISTRATIVE LAW SECTION MEMBERSHIP APPLICATION (ATTORNEY) (Item # 8011001)

This is a special invitation for you to become a member of the Administrative Law Section of The Florida Bar. Membership in this Section will provide you with interesting and informative ideas. It will help keep you informed on new developments in the field of administrative law. As a Section member you will meet with lawyers sharing similar interests and problems and work with them in forwarding the public and professional needs of the Bar.

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ADMINISTRATIVE LAW SECTION
THE FLORIDA BAR
651 E. JEFFERSON STREET
TALLAHASSEE, FL 32399-2300

NAME _____ ATTORNEY NO. _____

MAILING ADDRESS _____

CITY _____ STATE _____ ZIP _____

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Note: The Florida Bar dues structure does not provide for prorated dues. Your Section dues cover the period from July 1 to June 30.

Agency Snapshot: Department of Health

by Paul P. Drake

The Florida Department of Health (DOH) was established by the Legislature in 1996 through the creation of chapter 456, F.S. DOH is an executive branch agency, established in section 20.43, F.S. The Department is led by a State Surgeon General, who serves as the State Health Officer and is directly appointed by the Governor, and confirmed by the Senate. The Surgeon General's role is to be the state's leading advocate for wellness and disease prevention. DOH has three deputy secretaries that oversee all of its business and programmatic operations.

DOH administers the health practitioner regulation program and oversees the state's public health programs through county health departments and DOH divisions. In addition, DOH is responsive to priorities identified by the Governor and the Legislature in determining services, associated funding, and delivery mechanisms.

DOH's total budget for fiscal year 2016-2017 is roughly \$2.9 billion dollars.

State Surgeon General:

Celeste Philip, MD, MPH
Florida Department of Health
4052 Bald Cypress Way, Bin A-00
Tallahassee, Florida 32399
Phone: 850-245-4444

Dr. Philip first joined DOH in 2009. Prior to being appointed as the State Surgeon General in 2016, Dr. Philip served as the Medical Director for DOH in Polk County, Florida; Director for DOH in Polk County, Florida; the Assistant Director for Public Health; and the Deputy Secretary for Health/Deputy State Health Officer for Children's Medical Services.

Agency Clerk:

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Prior to becoming the General Counsel for DOH, Ms. Geary was an associate at Broad and Cassel and provided regulatory guidance to healthcare organizations and health-care professionals. Before this, Ms. Geary was an associate attorney at Rumberger, Kirk, and Caldwell, and a judicial intern to the Honorable Frank A. Shepherd with the Third District Court of Appeal. Ms. Geary received her J.D. in 2011 from the University of Miami School of Law.

Number of lawyers on staff: 93

Kinds of Cases:

The largest volume of cases handled by DOH's staff attorneys are disciplinary proceedings resulting from complaints against practitioners, or emergency orders entered against practitioners who pose a threat to the public's health, safety, or welfare. These cases are litigated at the Division of Administrative Hearings, with the appropriate board entering a final order.

Other kinds of administrative cases include denials of applications for licensure, rule challenges, bid protests, benefits programs cases, and citations for unsanitary conditions that may pose a threat to public health.

Practice Tips:

A lawyer representing a health care practitioner who may be the subject of a disciplinary investigation must be familiar with section 456.073, F.S., and the applicable statutes and rules governing each specialty. Section 456.073, F.S., describes the disciplinary process from informal complaint through investigation and disposition, and the process when an emergency order has been placed on a licensee.

A lawyer should also be familiar with chapter 120, F.S., the Administrative Procedure Act. This chapter of the Florida Statutes guides most of the cases handled by the office of general counsel attorneys, including adjudicatory proceedings.

For information related to requesting public records, visit: <http://www.floridahealth.gov/about-the-department-of-health/about-us/sunshine-info/public-records-requests/index.html>

Visit the Administrative Law Section's Website:

<http://www.fladminlaw.org>



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Law School Liaison

Spring 2017 Update from the Florida State University College of Law

by David Markell, Steven M. Goldstein Professor

This column highlights recent accomplishments of our College of Law students and faculty in matters related to administrative law. It also features several of the programs the College of Law has hosted or is hosting this spring semester. We hope Section members will join us for one of more of these programs.

Spring 2017 Events

Spring 2017 Environmental Forum (January 18)

On January 18, 2017, the College of Law and the Environmental and Land Use Law Section of The Florida Bar hosted the spring 2017 *Environmental Forum*. Panelists included Andrew Bartlett, Deputy Secretary, Florida Department of Environmental Protection; Janet Bowman, Director of Legislative Policy and Strategies, The Nature Conservancy, Florida Chapter; David Childs, Partner, Hopping Green & Sams; and Rebecca O'Hara, Senior Legislative Advocate, Florida League of Cities. Jessica Farrell introduced the *Forum* and David Markell, Steven M. Goldstein Professor, moderated. This *Forum* was approved by The Florida Bar for 2 CLE credits.

Spring 2017 Environmental Distinguished Lecture (February 1)

Professor Nicole Stelle Garnett, John P. Murphy Foundation Professor of Law, University of Notre Dame Law School, was the Spring 2017 Distinguished Lecturer. This lecture was approved by The Florida Bar for 2 CLE credits.

Municipal Utilities and Cooperatives: Transitioning to a Lower-Carbon Future Conference (March 24)

Municipally-owned utilities and

electric cooperatives provide electricity to millions of U.S. customers. This conference will explore the challenges and opportunities faced by these entities as they transition to lower-carbon energy sources in response to changing market forces. A full day of panel discussions will feature energy law experts and municipal and co-op representatives from around the United States. Florida State University will be co-hosting this conference with University of North Carolina School of Law on Friday, March 24, 2017, at 9:00 a.m. in Roberts Hall, room 310.

Environmental, Energy, and Land Use Law Student Colloquium (April 5)

The FSU College of Law Environmental, Energy and Land Use Law program will hold its annual Spring Colloquium for student papers on Wednesday, April 5, 2017, at 3:30 p.m. in room A221 of the Advocacy Center. This is an opportunity for students to be recognized for their research and writing achievements, for them to give a short presentation of their work, and to get feedback on their hard work.

Information on upcoming events is available at <http://law.fsu.edu/academics/jd-program/environmental-energy-land-use-law/environmental-program-events>. We hope Section members will join us for one or more of these events.

Recent Student Achievements

- Four FSU Law students, Britton Alexander, Alexandra Holliday, Sarai Aldana, and Grey Dodge, have earned special recognition as Florida Gubernatorial Fellows. The Florida Gubernatorial Fellows Program offers students

a unique opportunity to learn about Florida State government. Britton Alexander has been working with the Department of Environmental Protection's Division of Air Resource Management, and will move to another DEP division this spring. After working with the DEP's Division of State Parks, Alexandra Holliday will be working with the Water Management Division this spring. Sarai Aldana is working with the Division of Emergency Management. Grey Dodge is working with the Department of Business and Professional Regulation.

- Mallory Neumann attended the Harvard Food Law & Policy Clinic's Food Law Student Leadership Summit in Iowa this September, and is currently serving an internship with the Florida Department of Agriculture & Consumer Services Office of General Counsel.

Recent Faculty Achievements

- Shi-Ling Hsu presented his draft article, *Co-operation in Law Faculties*, at the 2017 Midwestern Law and Economics Association meeting in Atlanta in September, and another of his draft articles, *The Case for a Carbon Tax 2.0*, at the Vermont Law School Colloquium for Environmental Scholarship, also in September. He was also invited to a special workshop at Winton Capital Management, a London-based investment advisor, to participate in the establishment of a market for climate change-related events. He has published *Capital Transitioning*, in the journal *TRANSNATIONAL*

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LAW SCHOOL LIAISON*from page 19*

ENVIRONMENTAL LAW, and *Inefficient Inequality*, in the INDIANA JOURNAL OF LAW AND SOCIAL EQUALITY.

- David Markell published an article on sea-level rise with a particular focus on Florida, Emerging Legal and Institutional Responses to Sea-Level Rise in Florida and Beyond, 42 COLUMBIA JOURNAL OF ENVIRONMENTAL LAW 1 (2016). Professor Markell participated in January in an invitation-only workshop on environmental compliance and enforcement in Washington, D.C., co-sponsored by Harvard Business School, the University of Virginia, and the University of Maryland, and entitled Research on Effective Government: A Workshop on Evaluating Innovative Approaches to Foster Environmental Compliance. He

also participated in an invitation-only workshop in November at George Washington University Law School on possible organizational structures for environmental governance.

- Erin Ryan published an essay, “*Multilevel Environmental Governance in the United States*,” in ENVIRONMENTAL SCIENCE, distilling the lessons of American experimentation with environmental federalism and multilevel governance for other nations. Her article, *Federalism, Regulatory Architecture, and the Clean Water Rule: Seeking Consensus on the Waters of the United States*, 46 ENVTL. L. 277 (2016) was noted on Professor Lawrence Solum’s Legal Theory Blog. She was interviewed in a segment on *Capitol Update* about the Florida-Georgia-Alabama interstate water dispute presently before the U.S. Supreme Court, and was quoted by *The Hill* in an article about proposals to defund

climate-related earth science research by NASA.

- Hannah Wiseman published two books -- HYDRAULIC FRACTURING: A GUIDE TO THE ENVIRONMENTAL AND REAL PROPERTY ISSUES (with Keith B. Hall) (American Bar Association) (2017), and ENERGY LAW CONCEPTS & INSIGHTS (with Alexandra B. Klass) (Foundation Press) (forthcoming 2017). She also published *The Environmental Risks of Shale Gas Development and Emerging Regulatory Responses: A U.S. Perspective*, in HANDBOOK OF SHALE GAS LAW AND POLICY (Tina Hunter, editor) (Intersentia) (2016) and *Disaggregating Preemption in Energy Law*, 40 HARV. ENVTL. L. REV. 294 (2016). Professor Wiseman was quoted in *The Hill* on October 30, 2016; *Politifact Florida* on October 21, 2016; *Tacoma News Tribune* on October 10, 2016; *Reuters Legal* on September 30, 2016; *Energywire* on July 8, 2016; and NPR’s *Marketplace* on July 5, 2016.

CLOSING THE JUSTICE GAP*from page 1*

disadvantaged low-income Floridians, but also for moderate-income Floridians; and to determine how to promote coordinated legal services delivery, specifically considering unbundled legal services, interactive forms, and “other innovations and alternatives.”⁵ In its 2015 Interim Report, the Commission recommended creating a statewide gateway portal to serve as an online connector to existing services, self-help advice, hotlines, legal aid organizations, lawyer referral services, and other forms of representation.⁶ A portal pilot program is currently underway in Clay County, Florida, with results expected in June 2017.

While the Division of Administrative Hearings (DOAH) is outside the civil judicial system, the role DOAH plays is vital to individuals with similar legal issues. DOAH serves as the administrative court for families

seeking to adopt children in the state dependency system, individuals with criminal records seeking gainful employment, employees contending they were discharged for discriminatory reasons, regulated individuals and entities challenging what they consider to be unfair rules, as well as Florida’s licensed individuals and companies contesting disciplinary actions.

In fiscal year 2012-2013, in over 30 percent of the cases filed at DOAH (65 percent when including administrative child support), at least one party appeared pro se. In FY 2013-2014, that figure was nearly 20 percent (88 percent when including administrative child support). Individuals represented themselves in 66 percent of the total cases filed with DOAH in 2014-2015, and 68 percent in 2015-2016.

Administrative Law Section members are well aware of the difficulties accompanying litigation against pro se parties. The cases often result in scheduling delays, extended

discovery periods, avoidable motions to compel, and rescheduled final hearings. The Administrative Law Judges (ALJs) struggle to maintain the balance as impartial adjudicator, ensuring a fair proceeding while avoiding advocacy for the lost pro se litigant. ALJs loathe entering adverse orders against a pro se petitioner when it appears that, had the petitioner been assisted in presenting his or her case, he or she likely would have prevailed, or at least had a fighting chance to prevail. Access to the system means little if petitioners have no chance of succeeding on their own.

Enter the QR

The Administrative Procedure Act was designed to foster easy access to administrative determinations in contested proceedings. Not only are parties authorized to proceed without any representation, but they also have the alternative of assistance by a “qualified representative,”⁷ or QR. The Uniform Rules of Procedure

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CLOSING THE JUSTICE GAP

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provide the criteria and process for approving QRs, as well as the standards of conduct therefor.⁸ ALJs have discretion to determine whether a prospective QR is qualified to appear in an administrative proceeding.⁹ However, the ALJ is directed to consider the applicant's knowledge of jurisdiction, the rules of civil procedure relating to discovery, the rules of evidence (including the concept of hearsay in an administrative proceeding), as well as the factual and legal issues involved in the proceeding.¹⁰ Further, the ALJ must consider the applicant's knowledge of and compliance with specified standards of conduct to which a QR must adhere.¹¹ The standards of conduct include, among other prohibitions, that a QR not handle a matter which he or she knows or should know that he or she is not competent to handle.¹²

The QR alternative is employed relatively infrequently at DOAH. In the six years beginning with 2010, DOAH approved an average of 84 appearances by QRs per year.¹³ The number of QR appearances ranged from a low of 52 in 2014, to a high of 103 in 2015. The numbers are a very small percentage of the average 5,000 cases filed with or referred to DOAH in those same years.

Lawyer and Student QRs

Surprisingly, a large percentage of the QR appearances are being made by law clerks at state agencies. Of the 97 QR appearances at DOAH in 2015, almost half were by law clerks with the Department of Financial Services, most of whom were law students not practicing under the auspices of the Florida Supreme Court Certified Legal Internship program.¹⁴ In 2016, one-third of the appearances were by state agency law clerks. The vast majority of the cases in which the students appeared were workers' compensation coverage cases, although one student made an appearance in a licensing action against a bail bondsman. In 2015 and 2016, the Department of Business and Professional Regulation

authorized appearances by student law clerks in beverage license and a smattering of other license disciplinary cases.

The next largest group of appearances is out-of-state counsel, usually for large corporate respondents in a variety of cases, including automobile dealership franchise terminations and employment discrimination complaints (think BMW Motors, Kawasaki, JetBlue, Disney, and J.C. Penney). In 2015, a number of out-of-state counsel also appeared in a series of consolidated cases in which the State of Florida charged its prescription coverage provider with overpayments following an audit. Overall, out-of-state counsel for corporate parties accounted for 36 percent of QR appearances in 2015, and 35 percent in 2016.

These representations shed no light on the effectiveness of the QR as a tool to increase access to administrative proceedings by low or moderate-income persons. State agencies are not exactly within the demographic of Florida residents for whom access to justice is out of reach. Large corporations are certainly not marginalized in accessibility to the courts. Moreover, in both of these cases, the party is actually represented by a licensed lawyer, whether in Florida or another jurisdiction.

Who are the remaining litigants obtaining QR representation? And, who is representing them? The small remaining percentage of parties are being represented by family members, friends, community activists, and a small number of persons who have developed, or believe they have developed, expertise in particular types of cases.

Family and Friends

Family members and friends represent petitioners in cases alleging illegal discrimination (employment, housing, and public accommodation), lack of workers' compensation coverage, and automatic disqualification from holding certain employment due to past criminal convictions.

It is difficult to say whether "family and friends" representation has been effective for the litigant. How do we quantify "effectiveness"? Do we count

how often they prevail on their petitions? If so, against what benchmark do we measure? How do we know whether the individual would have fared better if left to his or her own devices? What we want to know is whether the petitioner would have participated in the process at all, without the family member or friend acting as advocate. If not, then the family member and/or friend created some access to the process.

Community activists are another subset of "family and friends" representation. They have appeared in environmental and growth management cases, as well as cases referred from the Commission on Human Relations. Again, it is difficult to gauge effectiveness of the representation, since success on the merits may be attributed to the facts as much as to the advocacy. Ineffectiveness is, again, anecdotal. For example, a 2014 employment discrimination case, which should have taken no more than two days, dragged on for four days due to the QR's inartful witness questioning. Her questions were mostly argument, and elicited no more factual information than the ALJ could have gleaned from reading the documents in evidence.

Business Associates

In a handful of cases, small businesses choose their accountants, bookkeepers, business managers, or other specialized employees or contractors to represent them. Such appearances occur most frequently in workers' compensation coverage, sales and use tax collection, and Medicaid program integrity cases. Again, it is difficult to say whether this representation is "effective." If we look only at whether the party prevailed, we cannot account for whether the facts were in their favor, rather than advocacy. Evidence of ineffectiveness is strictly anecdotal. For example, in a 2015 workers' compensation case, Respondent's tax accountant stipulated to all the material facts at issue, holding out for a contested point that was immaterial to the case. Needless to say, the ALJ granted the agency's motion to relinquish jurisdiction for lack of material facts in dispute.

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CLOSING THE JUSTICE GAP*from page 21***The Entitled**

A small number of non-lawyers hold themselves out as quasi-professional QRs and appear to believe they are entitled to QR status. One example is an individual who represented himself in the early '90s in a series of rule challenges against the Department of Health and Rehabilitative Services. Petitioner had partial success in one of the cases,¹⁵ and subsequently represented another petitioner in a 2004 rule challenge against Miami-Dade Community College.¹⁶ The individual resurfaced in a 2015 rule challenge against Florida International University,¹⁷ in which the petitioner was already represented by licensed counsel. In an apparent effort to serve as “co-counsel” of record, the individual sought, and received, QR status. In his petition to qualify as a QR, the individual openly expressed his resentment at “having to requalify again and again” and cited to his “heavy duty accomplishments” from prior appearances, both pro se and as a QR.

In another case, an individual appeared at the deposition of respondent's corporate representative and handed opposing counsel a notice of appearance which had not been filed in the case. When the non-lawyer did seek an order to appear as a QR, she explained in the request that she was qualified to appear because “she has been deemed qualified” in prior cases, and was only seeking to be qualified “in an abundance of caution.”¹⁸

In the charter school arena, an unlicensed Florida law graduate has established a consulting firm in charter school governance. He has appeared in 2015 and 2016 cases wherein the Broward County School Board sought termination of charter school agreements, and in a 2016 rule challenge to State Board of Education proposed charter school rules. In the 2015 charter revocation case, the petition was withdrawn after the final hearing.¹⁹ The advocate did not prevail for this client in the 2016 charter revocation case,²⁰ but was effective in getting the offending 2016

proposed rules withdrawn by the State Board of Education.²¹

Another “frequent flyer” initially limited his appearances to exceptional student education cases, but has branched out into other case types in recent years. In 2015, he appeared as a QR in a teacher termination proceeding, both an employment and a housing discrimination complaint, an exemption from disqualification case, and a nurse's professional licensing disciplinary proceeding, in addition to the 34 exceptional student education cases in which he appeared that year. In 2016, he appeared in nine cases outside of the exceptional student education arena--six workers' compensation coverage cases, two employment discrimination cases, and one vocational rehabilitation case.

The outcomes have been mixed. The 2015 teacher termination case, five of the 2016 workers' compensation cases, and the vocational rehabilitation case all settled before hearing. The 2015 employment discrimination complaint was withdrawn. The remaining cases proceeded to hearing, but none of the clients prevailed.²² As with other cases, it is difficult to judge the individual QR's effectiveness solely on the case outcomes. Perhaps settlement was in the best interest of the teacher client and the employers facing workers' compensation coverage disputes. Perhaps the employment discrimination claim was meritless, but would have been pursued by the petitioner pro se, resulting in a waste of time and resources for all sides. As to the non-prevailing parties after hearing, who can say whether it was the advocacy, rather than the facts, that were to blame? From the access to justice perspective, were not all the clients winners because someone familiar with the administrative process was willing to take up their cause?

UPL

The foregoing examples of the “professional QR” raise a different issue for many practitioners--are some non-lawyers taking advantage of the QR option? The issue has arisen whether the QR alternative fosters the unlicensed practice of law (UPL).

The Florida UPL program was established by the Supreme Court to protect the public against harm caused by unlicensed individuals practicing law, and the Supreme Court delegated to The Florida Bar the duty to investigate and prosecute allegations of UPL. The Florida Bar Standing Committee on UPL (Committee) may issue proposed formal advisory opinions in response to petitions made pursuant to rule 10-9.1 of the Rules Regulating The Florida Bar, known as a Goldberg request.²³ If the Committee finds that the facts presented in the Goldberg request constitute UPL, the proposed opinion is submitted to the Supreme Court, which may approve or disapprove the Committee's proposed advisory opinion. If the Committee finds that the facts presented in the Goldberg request do not constitute UPL, the Committee may publish its opinion in *The Florida Bar News* or submit the proposed opinion to the Supreme Court for review. Based upon a review of previously-issued formal advisory opinions, the Committee has never been presented with a Goldberg request related to representation in DOAH proceedings.

Within the auspices of the UPL program, The Florida Bar has oversight of specific exceptions to the UPL, including rules authorizing limited appearances in Florida courts by out-of-state attorneys. Notably, Rule 2.510 of the Florida Rules of Judicial Administration prohibits out-of-state attorneys from engaging in “general practice” before Florida courts. “General practice” is defined as more than three appearances in separate cases within a 365-day period.²⁴ Short of petitioning the Standing Committee on UPL for an advisory opinion regarding serial QR appearances, perhaps practitioners should explore an amendment to the Uniform Rules to prohibit “general practice” by QRs.²⁵

Disqualification

As written, the criteria to become a QR are daunting. Knowledge of jurisdiction, the Florida Rules of Civil Procedure related to discovery, and the rules of evidence, including the

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CLOSING THE JUSTICE GAP*from page 22*

concept of hearsay in an administrative proceeding, are large hurdles for non-lawyers. Given that the ALJ has wide discretion in determining whether a representative is qualified, under what circumstances is the discretion to disqualify a representative being exercised?

In a few cases, ALJs have declined to qualify prospective QRs for behavior that would arguably amount to a breach of the rules of professional conduct for members of The Florida Bar. In a 2013 case, the author declined to approve a QR's application based, in part, on a 2011 case in which the QR withdrew from representing the client via email on a Sunday night prior to the client's scheduled deposition the following morning.²⁶ The QR neither sought nor awaited approval from the ALJ to withdraw. The author's unwillingness to accept the individual as a QR in the 2013 case was also based upon the QR's behavior during the deposition of the respondent's corporate representative (prior to requesting to appear as a QR) in which she contemporaneously posted on Facebook her belief that the deponent was lying.²⁷

QRs have also been disqualified for failure to abide by the standards of conduct required by rule 28-106.107. In a 2014 case, the ALJ declined to accept a QR based upon the QR's misrepresentation in motions filed in another pending case.²⁸ The ALJ has subsequently refused to accept the same individual as a QR this year based, in part, on the misrepresentation in the 2014 case, and, in part, on the QR's subsequent attempt to offer testimony of an out-of-state witness by telephone at the outset of the final hearing.²⁹ Also this year, another ALJ has declined to accept the same individual as a QR, stating that, after considering his affidavit, the ALJ is "not satisfied that the [QR] has the necessary qualifications to responsibly represent Respondents' interests in a manner which will not impair the fairness of the proceeding or the correctness of the action to be taken."³⁰

Some opponents argue that QRs compete with licensed Florida lawyers for clients. Many of those same voices are raised in opposition to the work of the Commission and other groups trying to address the justice gap in Florida. The controversy leads me to wonder, was there a Florida licensed attorney who was ready, willing, and able to take on the various cases handled by the QR? Did his appearance actually deprive any licensed lawyer from a paid client? Without the QR, the petitioners likely would have gone forward pro se. Were the clients better served by the QR than they would have been pro se? Maybe. Was the playing field more level? Perhaps. Was the process more accessible? Absolutely.

Conclusion

The QR option is infrequently utilized, and is imperfect. There are some abuses, and there is probably a need to tweak some of the rules and clarify the standards of conduct applicable to QRs. However, from this side of the bench, it appears the QR option allows access to the administrative process by some litigants who would otherwise stumble through the process on their own, with the attendant delays and frustration for all parties, or, worse yet, forego their one opportunity to change the status quo.

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Endnotes:

¹ Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study, at 3 (American Bar Foundation, 2014) http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf.

² The Justice Index 2016, National Center for Access to Justice, <http://www.justiceindex.org/2016-findings/findings/>.

³ Accessing Justice in the Contemporary USA, at 11.

⁴ *Id.* at 3.

⁵ Fla. Admin. Order No. AOSC16-17 (Fla. Oct. 10, 2016) (on file with Clerk, Fla. Sup. Ct.).

⁶ Comm'n. on Access to Civ. Just., *Interim Report*, at 23 (Oct. 1, 2015) (on file with Clerk, Fla. Sup. Ct.).

⁷ See § 120.57(1)(b) Fla. Stat. (2016) ("All parties shall have the opportunity to . . . be represented by counsel or other qualified representative.")

⁸ See Fla. Admin. Code R. 28-106.106 and 28-106.107.

⁹ See Fla. Admin. Code R. 28-106.106(2)(b) ("The presiding officer shall consider whether the representative is qualified to appear in the administrative proceeding and capable of representing the rights and interests of the party."); and (4) ("The presiding officer shall make a determination of the qualifications of the representative in light of the nature of the proceedings and applicable law.")

¹⁰ See Fla. Admin. Code R. 28-106.106(4)(a) through (d).

¹¹ See Fla. Admin. Code R. 28-106.106(4)(e).

¹² Fla. Admin. Code R. 28-106.107(3)(c).

¹³ The figures reported herein exclude appearances by QRs in due process hearings arising under the Individuals with Disabilities Education Act (IDEA) or section 504 of the Rehabilitation Act of 1973, both of which are structured to accommodate "parent advocates" and other non-lawyer representatives.

¹⁴ Pursuant to rule 28-106.106, students certified pursuant to Rule 11 of the Rules Governing The Florida Bar (the Law School Practice Program), are "counsel" for purposes of representing a party in an administrative proceeding.

¹⁵ In one case, Petitioner proved the agency was relying upon non-rule policy, but the ALJ found he did not have standing to challenge the unadopted rule. See *Sherin v. Dep't of HRS*, Case No. 92-4665RX (Fla. DOAH May 5, 1993); *aff'd Dep't of HRS v. Sherin*, 638 So. 2d 136 (Fla. 1st DCA 1994).

¹⁶ The petitioner was not successful. See *Ohlfest v. Miami Dade Cmty. College*, Case



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No. 04-2531RU (Fla. DOAH Oct. 6, 2004).

¹⁷ See Carter v. FIU, Case No. 15-2019RU (Fla. DOAH June 29, 2015).

¹⁸ Tarver v. Center Point HRC, LLC, Case No. 13-0513 (Pet.'s Response to Resp.'s Mot. for Prot. Ord., June 13, 2013).

¹⁹ See Broward Cnty. Sch. Bd. v. N.E.W. Generation Prep. High Sch. Of Perf. Arts, Inc., Case No. 15-3052 (Not. to Withdraw Pet. for Admin. Hrg., Aug. 31, 2015).

²⁰ See Broward Cnty. Sch. Bd. v. Silva of S. Fla., Inc., Case No. 16-2576 (Fla. DOAH Jan. 9, 2017).

²¹ See Fla. Assoc. of Ind. Charter Schs. v. Fla. Dep't of Educ., Case No. 16-5765RP (Fla. DOAH Dec. 14, 2016).

²² At the time of submission, one 2016 employment discrimination case was awaiting a recommended order, and the remaining 2016 workers' compensation coverage case was set for hearing.

²³ See Goldberg v. Merrill Lynch Credit Corp., 35 So. 3d 905, 907 (Fla. 2010) ("To state a cause of action for damages under any legal theory that arises from the unauthorized practice of law, we hold that the pleading must state that this Court has ruled that the specified conduct at issue constitutes the unauthorized practice of law.")

²⁴ Fla. R. Jud. Admin. 3.510(a)(2017).

²⁵ The author is neither promoting such

an amendment, nor taking any position on whether colleagues at DOAH or members of the Administrative Law Section Executive Council should support such an amendment.

²⁶ See Bridges v. Delta Air Lines, Case No. 11-1727 (Fla. DOAH Nov. 29, 2011).

²⁷ See Tarver v. Center Point HRC, Inc., Case No. 13-0513 (Or. On Pending Mots., June 17, 2013).

²⁸ See Dep't of Fin. Servs. v. Beaurline, Case No. 14-4356 (Or. Den. Mot. to Accept [QR] as Qual. Rep., Oct. 27, 2014).

²⁹ See Ford v. A-1 Block Corp., Case No. 14-4132 (Fla. DOAH Dec. 22, 2014).

³⁰ Dep't. of Fin. Servs. v. Precision Roofing of SW Fla., Case No. 17-0001 (Or. Den. the Request of [QR] to Act as Resp.'s QR, Jan. 18, 2017).



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