Administrative Law Section Newsletter

Vol. XXXIII, No. 2 Amy W. Schrader and Elizabeth W. McArthur, Co-Editors December 2011

Recent Amendments to Section 120.569, Florida Statutes - ALJ Says Documentary Evidence is Sufficient Alone to Support a Prima Facie Case

by Amy Wells Brennan and Adrienne Ellen Vining

During its 2011 session, the Legislature amended section 120.569, Florida Statutes, to add subsection (2)(p), which directs the order of case presentation involving third-party challenges to an agency's issuance of a license, permit, or conceptual approval. The effect and meaning of this new statutory regime, particularly what constitutes the establishment of a prima facie case, became a major issue in *Washington County v. Bay County and Northwest Florida Water Management District*, DOAH Case Nos. 10-2983, 10-2984, 10-3313, and 10-10100 (as consolidated).[1] The Administrative Law Judge's (ALJ) recent order in this case interpreting subsection 120.569(2)(p) gives rise to a number of interesting legal issues for consideration.

Amendments to Section 120.569, Florida Statutes, Take Effect

It has long been customary practice in permit challenges arising under chapters 373 and 403, Florida

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Chair's Column

by Allen R. Grossman

On October 20, 2011, the Section's Executive Council held its regular meeting in Tallahassee. The meeting was held for the first time at the First District Court of Appeal and was followed by a reception for Past Chairs of the Section. The meeting was well attended and we were pleased to welcome Professor Linda Jellum, who teaches administrative law at the FSU College of Law, and Stephen Emmanuel, former member of The Florida Bar Foundation Board of Directors and current member of the Florida Supreme Court Commission on Professionalism. Stephen has an administrative law practice with Ausley and McMullen in Tallahassee and has decided to get more involved with the Section. During the meeting, the Council voted to renew our legislative monitoring arrangement with now-retired Administrative Law Judge, Linda Rigot. We are expecting significant activity in this year's legislative session and Linda's efforts will continue to keep the Section abreast of relevant legislation impacting Florida administrative law and practice. It was also determined that the Section should continue to provide a Steering Committee for the Bar's Florida Administrative Practice manual. Our Steering Committee is the only remaining Section Steering

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Committee overseeing a Florida Bar published practice manual. An updated edition has just been published. The Section is very pleased to continue having a significant role in the preparation and publication of Florida's leading handbook on administrative law practice and procedure. During the meeting, Assistant Attorney General Clark Jennings, who is a long-time member of the Section's Executive Council and is currently on loan to the Governor's Office to assist with the biennial review of the Uniform Rules of Procedure, acknowledged the efforts of the Section to develop suggested revisions, explained in commentary, to the Uniform Rules. He assured the Section that all of the submitted comments and suggestions would be carefully considered during the current process.

Between the two functions, Judge T. Kent Wetherell, II graciously hosted an informative and interesting tour of the court's new building. As one would expect in such a facility, there are all kinds of new technology utilized, but contrary to what you may have read, nothing so over the top as to appear inappropriate. If you get the chance to visit, take the time to look around.

The afternoon finished off with a reception acknowledging the former Chairs of the Administrative Law Section. We were honored to have several former Chairs, including the Section's second Chair, Ron Laface, and subsequent Section Chairs Bill Williams, Mary Smallwood, Cathy Lannon, Seann Frazier, Steve Pfeiffer, Elizabeth McArthur, Linda Rigot, Li Nelson, and Debby Kearney. It was a great opportunity to reminisce about the last 35 years since the Section was created and to discuss memorable events, old and new.

One of the Section's most important functions is to provide outstanding CLE programs to our members and other practitioners interested in administrative law practice in Florida. The day after the Section meeting, we hosted this year's Practice Before the Division of Administrative Hearings program. We offer a hearty thank you to Chief Administrative Law Judge Robert Cohen and all of the ALJs and staff at DOAH for their assistance in hosting the event and for their participation throughout the program. We had standing room only attendance at the day-long learning opportunity that presented an array of administrative practice topics. The CD and course materials are already available on-line from The Florida Bar. The Section's next live CLE presentation will be the annual certification review program in the spring. Keep an eye out for more information and make plans to attend.

The Executive Council is in the process of approving a new Section budget for next year. Although the economy has put a significant crimp in the usually dependable income to the Section from a share of The Florida Bar's investment program, which unfortunately has resulted in a deficit this year, the Section is in sound financial condition and we are looking forward to at least a minimal improvement in income for next year. The other aspect of negative pressure created by the economy is a slight reduction in the number of dues-paying members of the Section. The financial impact of this is relatively minor, but the possibility of decreased participation in Section activities would be extremely unfortunate. The Section is going to continue examining avenues for encouraging and supporting the continued participation of government attorneys and others who are feeling particularly pressured by the current economic strife.

The Section will continue to strive to provide relevant and meaningful programming and other resources for all administrative law practitioners in the State. I hope that each of you will take advantage of the opportunities to participate in Section activities, attend CLE programs and utilize the various resources the Section provides. We will soon be selecting nominees to stand for election to the Section's Executive Council and I encourage each of you to consider stepping up to accept a leadership role in the Section. If you are interested in standing for election or participating in a leadership role for any specific project or program, please contact me, the Section's Chair–Elect, Administrative Law Judge Scott Boyd, or our Section Administrator, Jackie Werndli.

Enjoy this edition of the Section Newsletter and please consider getting more involved in Section activities and programs. Happy holidays and happy New Year to all.

This newsletter is prepared and published by the Administrative Law Section of The Florida Bar.

What One Can (and Can't) Do with An Unfavorable Recommended Order

by Garnett Chisenhall

While serving as the Chief Appellate Counsel for the Department of Business and Professional Regulation, I often have colleagues charging into my office asking what we can do about an unfavorable recommended order. Most of those colleagues arrive in my office with some vague, preconceived idea that an administrative body can reject findings of fact and conclusions of law with unfettered abandon. Unfortunately, I usually have to sit those colleagues down and explain how things actually work. While it would be inaccurate to state that administrative law judges have the final say in formal administrative proceedings, there is no arguing that section 120.57(1)(*l*) of the Florida Statutes substantially limits a state agency's ability to "flip" findings of fact and conclusions of law set forth in a recommended order. This article will explain what one can (and can't) do when he or she believes that an administrative law judge "got it wrong." Even though this article is being written with government attorneys in mind, a great deal of the discussion below is relevant to private attorneys who practice before the Division of Administrative Hearings.

HOW DOES ONE DEAL WITH UNFAVORABLE FINDINGS OF FACT?

So, what can one do upon receiving a recommended order containing unfavorable findings of fact? The answer is very little. Section 120.57(1)(*l*) provides that an agency cannot reject findings of fact in a recommended order unless those findings are unsupported by "competent, substantial evidence." Obviously, one would then ask, "What is competent, substantial evidence?" In order to answer that question, legal practitioners usually turn to *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957), in which the Florida Supreme Court explained that "[s]ubstantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." In explaining what it means for evidence to be "competent," the Court stated "[w]e are of the view . . . that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *Id.; see also City of Hialeah Gardens v. Miami-Dade Charter Foundation,* 857 So. 2d 202, 204 (Fla. 3d DCA 2003)(explaining that "competent evidence is evidence sufficiently relevant and material to the ultimate determination 'that a reasonable mind would accept it as adequate to support the conclusion reached.' Substantial evidence is evidence that provides a factual basis from which a fact at issue may reasonably be inferred.")(citing *DeGroot v. Sheffield*). In my own practice, I rely on a shorthand definition in which "competent, substantial evidence" is simply anything that a reasonable person could reasonably rely upon to support a finding of fact.

The definition of "competent, substantial evidence" results in administrative law judges having an extreme amount of deference when it comes to findings of fact. I have probably handled a few hundred administrative law appeals, and have frequently seen opposing attorneys argue that an administrative law judge's findings of fact were not supported by competent, substantial evidence. However, I have NEVER been involved in a case in which that argument turned out to be a winner. That is because administrative law judges are very intelligent, and it is very unlikely one would base a finding of fact on no evidence or evidence a reasonable person could not reasonably rely on to make a particular finding.

The colleagues I referred to above often assure me that the unfavorable findings of fact can be rejected because the amount of evidence supporting our position far outweighs the evidence relied on by the administrative law judge. However, those colleagues leave my office very disappointed. Even if our position was supported by a mountain of evidence the size of Mount Everest, an administrative law judge is free to rely on contrary evidence the size of a molehill. The First District Court of Appeal said it best in *Heifetz v. Department of Business Regulation, Division of Alcoholic Beverages & Tobacco*, 475 So. 2d 1277, 1282 (Fla. 1st DCA 1985) by explaining:

> [i]t is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence. If, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue one way or the other. **The agency may not reject the hearing officer's finding unless there is no competent, substantial evidence from which the finding could reasonably be inferred. The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion.**

(Emphasis added).

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The passage quoted directly above states that administrative law judges get to evaluate the credibility of witnesses, and that further demonstrates why there is very little one can do about unfavorable findings of fact. For example, consider a case that boiled down to a "battle of the experts" in which an administrative law judge is going to rule based on the expert testimony he or she finds to be more credible. Even if your expert has a doctorate from an Ivy League university and has published a treatise considered to be the ultimate authority in his or her field, an administrative law judge could theoretically base his or her findings of fact on testimony from the opposing "expert" who received his or her bachelor's degree last week. While my colleagues would be tempted to argue that our agency could reject the findings of fact because the opposing expert's testimony was not competent, substantial evidence, that may not prove to be a winning argument on appeal. As explained by the First District Court of Appeal in *Orthopaedic Medical Group of Tampa Bay / Stuart A. Goldsmith, P.A. v. Agency for Health Care Admininstration,* 957 So. 2d 18, 19 (Fla. 1st DCA 2007), "[t]he determination of a witness's qualifications to express an expert opinion is within the discretion of the ALJ and will not be reversed absent a showing of clear error."

To this point, the discussion paints a pretty bleak picture for my colleagues, but there is some hope if one is confronted with unfavorable findings of fact. In addition to assessing whether the findings of fact were supported by competent, substantial evidence, one should also consider whether there are compelling policy-based reasons that justify rejection of the findings of fact. For instance, the First District Court of Appeal recognized in *Baptist Hosp., Inc. v. Dep't of Health & Rehab. Serv.*, 500 So. 2d 620, 623 (Fla. 1st DCA 1987), that "[m]atters that are susceptible of ordinary methods of proof, such as determining the credibility of witnesses or the weight to accord evidence, are factual matters to be determined by the hearing officer." In the very next sentence, the Court stated that "[o]n the other hand, matters infused with overriding policy considerations are left to the agency discretion." *Id.* This principle has been referred to as "the deference rule," and it "recognizes that policy considerations left to the discretion of an agency may take precedence over findings of fact by an administrative law judge." *Gross v. Dep't of Health*, 819 So. 2d 997, 1002 (Fla. 5th DCA 2002). I believe that the best example of the deference rule is *Utilities of Fla. v. Public Serv. Comm'n*, 420 So. 2d 331, 333 (Fla. 1st DCA 1982). In that case, the First District Court of Appeal affirmed the Public Service Commission's rejection of an administrative law judge's finding of fact by explaining that "[t]he factual issue with which the PSC was concerned, i.e., the fair and proper rate of return on equity capital for a utility of the type and size of appellant, was not one susceptible to ordinary methods of proof; instead, it was essentially a matter of opinion which necessarily had to be infused by policy considerations for which the PSC has special responsibility."

HOW DOES ONE DEAL WITH UNFAVORABLE CONCLUSIONS OF LAW?

In contrast to the situation described above, one could receive a recommended order with favorable findings of fact but unfavorable conclusions of law. But, agencies have a little more leeway when it comes to rejecting conclusions of law. Section 120.57(1)(*l*) of the Florida Statutes provides that an agency "may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction."

Just as section 120.57(1)(*l*) left us to ponder the meaning of "competent, substantial evidence" when it came to rejecting findings of fact, the statute leaves us to ponder the meaning of "substantive jurisdiction" when it comes to rejecting conclusions of law.

In my discussions with colleagues over the years, two well-defined schools of thought have emerged. One school of thought asserts that any statute administered by an agency is within that agency's substantive jurisdiction. For example, the Construction Industry Licensing Board administers chapter 489 of the Florida Statutes, and advocates of this school of thought would argue that the Board is free to reject a conclusion of law based on an interpretation of ANY statute within chapter 489. Those practitioners would also argue that the Board's interpretation would have to be affirmed on appeal unless it was clearly erroneous, unreasonable, or outside the range of possible interpretations. *See generally Wallace Corp. v. City of Miami Beach*, 793 So. 2d 1134, 1140 (Fla. 1st DCA 2001) (holding that "[a]n agency construction of a statute which it is given the power to administer will not be overturned on appeal unless it is clearly erroneous."); *Pershing Indus., Inc. v. Dep't of Banking & Fin.,* 591 So. 2d 991, 993 (Fla. 1st DCA 1991)(noting that "[i]f an agency's interpretation is one of several permissible interpretations, it must be upheld despite the existence of reasonable alternatives."); *Dep't of Prof'l Regulation, Bd. of Med. Examiners v. Durrani*, 455 So. 2d 515, 517 (Fla. 1st DCA 1984)(explaining that "the agency's interpretation of a statute need not be the sole possible interpretation or even the most desirable one, it need only be within the range of *possible* interpretations.")(superseded on other grounds by statute)(italics in original).

The other school of thought takes the position that an agency cannot reject a conclusion of law unless the agency in question is applying some special expertise. For example, if chapter 489 contained a statute providing for attorney's fees, this school of thought would hold that interpreting such a statute would be outside the Construction Industry Licensing Board's substantive jurisdiction because the Board has no special expertise with attorney's fees. Therefore, section 120.57(1)(*l*) would preclude the Board from rejecting an administrative law judge's interpretation of this hypothetical fees statute. *See Doyle v. Dep't of Bus. Regulation & Public Employees Relations Comm'n*, 794 So. 2d 686, 690 (Fla. 1st DCA 2001)(noting "a court need not defer to an agency's construction or application of a statute if special agency expertise is not required . . .;" noting "PERC's field of expertise is public sector labor regulation . . ." and holding "[i]nterpretation of the fee statute at issue in this case does not require expertise in the field of labor organizations."). *See generally Bd. of Podiatric Med. v. Fla. Med. Ass'n,* 779 So. 2d 658, 660 (Fla. 1st DCA 2001) (noting "the broad discretion and deference which is accorded an agency in the interpretation of a statute which it administers" and holding the administrative law judge should not have rejected the Board's definition of "human leg.").

If an agency rejects a conclusion of law in which an administrative law judge interpreted a statute or rule, a government attorney is obviously going to be in a much stronger position on appeal if he or she can argue that the agency in question utilized special expertise in rejecting the administrative law judge's interpretation. If that argument cannot be made, then I would strongly recommend that our hypothetical government attorney be prepared to explain why the administrative law judge's interpretation is wrong, regardless of whether the agency's interpretation is owed any deference.

In addition to interpretations of relevant authorities, a conclusion of law may also set forth an administrative law judge's ultimate determination on whether a respondent committed the violations at issue in an administrative complaint. Unfortunately for government attorneys, agencies do not have unfettered discretion to reject such determinations. *See Gross v. Dep't of Health*, 819 So. 2d 997, 1003 (Fla. 5th DCA 2002)(noting "Florida Courts have consistently held that the issue of whether an individual violated a statute or deviated from a standard of conduct is generally an issue of fact to be determined by the administrative law judge based on the evidence and testimony."); *Goin v. Comm'n on Ethics*, 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995)(holding "the question of whether the facts, as found in the recommended order, constitute a violation of a rule or statute, is a question of ultimate fact which the agency may not reject without adequate explanation.").

However, for an attorney who prosecuted a licensee absolved by an administrative law judge, there is some hope if you are seeking to have the administrative law judge's determination rejected. Assuming that all of the administrative law judge's findings of fact are supported by competent, substantial evidence, I recommend evaluating whether there are any policy-based reasons why those findings of fact SHOULD amount to a violation of the statute or rule at issue. In other words, evaluate whether any grounds exist for invoking the deference rule and argue that the agency in question has special expertise in this area that the administrative law judge lacks. *See generally Criminal Justice Standards & Training Comm'n v. Bradley,* 596 So. 2d 661, 664 (Fla. 1992)(noting that "[a]lthough hearing officers are entitled to substantial deference, they are judicial generalists who are trained in the law but not necessarily in any specific profession. The various administrative boards have far greater expertise in their designated specialties and should be permitted to develop policy concerning penalties within their professions.").

FILE YOUR EXCEPTIONS.

On the rare occasions when one can make a colorable argument that an administrative law judge's findings of fact and/or conclusions of law should be rejected, the filing of exceptions is the procedural vehicle one uses to make that argument. However, there are some things to keep in mind in this situation. First of all, be sure to file TIMELY exceptions. Generally speaking, exceptions must be filed "within 15 days of entry of the recommended order." *See* Fla. Admin. Code R. 28-106.217(1). Also, do not file exceptions with the Division of Administrative Hearings. Exceptions must be filed "with the agency responsible for rendering final agency action . . ." *See* Fla. Admin. Code R. 28-106.217(1). Within the body of your exceptions, thoroughly discuss the legal justification for rejecting

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the findings of fact and/or conclusions of law at issue. If the agency in question is a collegial body such as the Construction Industry Licensing Board, go to the board meeting and elicit a thorough discussion from the board members on the merits of your exceptions. If the board ultimately grants your exceptions, you do not want opposing counsel to have an opportunity to argue on appeal that the board simply "rubber-stamped" your exceptions. Finally, encourage board counsel to expressly incorporate your exceptions into the final order. That will ensure the legal analysis or policy rationale set forth in your exceptions becomes part of the final order.

REMEMBER THAT YOU CAN FILE A PETITION FOR REVIEW.

After reading the discussion above, you may be wondering if agencies have any recourse if a recommended order contains an erroneous evidentiary ruling or an erroneous conclusion of law outside the agency's substantive jurisdiction. The answer is "yes" because Rule 9.100(c)(3) of the Florida Rules of Appellate Procedure enables a party to file a petition to review non-final agency action. *See also* §120.68(1), Fla. Stat. (2011)(providing that "[a] preliminary, procedural, or intermediate order of the agency or of an administrative law judge of the Division of Administrative Hearings is immediately reviewable if review of the final agency decision would not provide an adequate remedy."). I think of a petition for review as the administrative law equivalent of a petition for writ of certiorari. Like certiorari petitions, petitions for review are directed toward non-final orders. Also, both petitions must explain why the harm at issue cannot be remedied on appeal from a final order. In the administrative law context, the irreparable harm results from the fact that agencies cannot correct erroneous evidentiary rulings and they cannot reject conclusions of law outside their substantive jurisdiction. *See Barfield v. Dep't of Health*, 805 So. 2d 1008, 1012 (Fla. 1st DCA 2002)(noting the Board of Dentistry lacked the substantive jurisdiction to reject an evidentiary conclusion and that the Department should have sought judicial review of the ALJ's evidentiary ruling); *G.E.L. v. Dep't of Envtl. Protection*, 875 So. 2d 1257, 1264-65 (Fla. 5th DCA 2004)(acknowledging "that uncertainty exists regarding the avenues of review available to parties and agencies aggrieved by an ALJ's erroneous legal ruling that is not within the agency's substantive jurisdiction to correct" and noting "[w]e agree that GEL should have appealed the ALJ's order of dismissal directly to this court.").

Unfortunately, petitions for review have the same drawbacks associated with petitions for certiorari. For instance, a petition for review must be FILED within 30 days of rendition of the order to be reviewed. *See* Fla. R. App. P. 9.100(c). Also, a petition for review is equivalent to an initial brief in terms of the time and effort necessary to prepare a good product. In stark contrast to a one or two-page notice of appeal, a petition for review must set forth the facts on which the petitioner relies and a complete legal argument explaining why the petitioner is entitled to the sought-after relief. *See* Fla. R. App. P. 9.100(g). So, before you boot up your word-processing program, be very sure you have a good explanation for why your case will be irreparably harmed if the appellate court does not grant immediate judicial review.

CONCLUSION

In sum, administrative law judges do not have the final word in formal administrative proceedings. But, section 120.57(1)(*l*) of the Florida Statutes substantially constrains an agency's ability to reject an administrative law judge's findings of fact and conclusions of law. Therefore, if you receive an unfavorable recommended order, do not assume your agency has unfettered discretion to reject that recommended order. If the case is important enough, evaluate whether you should file a petition for review.

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APPELLATE CASE NOTES

by Mary F. Smallwood

Adjudicatory Proceedings

Abrams v. Seminole County School Bd., 73 So. 3d 285 (Fla. 5th DCA 2011) (Opinion filed September 9, 2011)

Abrams, a special education teacher in the Seminole County school system, was disciplined by the school board for conduct unbecoming a board employee and misconduct in office. She was first suspended and subsequently terminated by the board. The action arose from an altercation between Abrams and one of her students in a classroom with several other students present. During the course of the argument, which lasted for more than twenty-five minutes, Abrams and the student engaged in screaming profanities and insults at each other. One of the students in the room recorded the argument on an MP3 player. Abrams requested a formal administrative hearing.

At the hearing there was testimony presented by both the school board and Abrams. The school board presented the testimony of the board's human resources director, a high school principal and the father of a student in Abrams' class. Abrams presented the testimony of a mental health counselor, a former assistant principal, several teachers and a number of parents of students in her classes. Abrams admitted at the hearing that her conduct was inappropriate and warranted suspension, but argued that it did not justify termination of her employment. She asserted, in part, that she had not had the student removed from the classroom because they had a long-term supportive relationship and that she acted in a "motherly" capacity toward the student.

The administrative law judge issued a recommended order concluding that the school board had proved that Abrams' conduct was inappropriate and a violation of the standard of conduct expected of teachers. However, he concluded that the behavior did not constitute "just cause" for termination of Abrams' employment, relying on the definition of that term in section 1012.33(1)(a), Fla. Stat. The statutory provision included "misconduct" as just cause but did not define that term. Misconduct was defined by a rule to be actions that were so serious that they impaired the individual's effectiveness in the school system. The judge recommended that Abrams' suspension without pay be upheld, that she be reinstated as a teacher and that she be placed on probation for two years.

The school board rejected a number of the findings of fact and conclusions of law in the recommended order and entered a final order terminating her employment. Specifically, the school board rejected the judge's findings that the argument had undertones of a long friendly relationship between the student and Abrams and that the human resource director's testimony lacked credibility since he was unfamiliar with relevant facts. In addition, the school board added certain findings of fact supportive of its position. The board also substituted certain conclusions of law for those in the recommended order, including a conclusion that conduct unbecoming a teacher was a sufficient basis for termination of employment separate from a finding of misconduct. The administrative law judge had concluded that Abrams' effectiveness in the school system had not been impaired even though the conduct in this one instance had been egregious. He noted that her behavior in this situation was not indicative of her normal demeanor and did not indicate that she would repeat such behavior in the future. The school board substituted its own conclusion of law that it had proven that Abrams' behavior had impaired her effectiveness in the school system.

On appeal, the court reversed. On appeal, Abrams argued that the school board's substitute conclusion of law was, in effect, a finding of fact, citing various cases where the effectiveness of a teacher had been determined to be a factual issue. The school board relied on contrary cases holding that impairment can be established as a matter of law. It argued that the extreme nature of her conduct was sufficient to establish impaired effectiveness.

The court held that the school board had improperly rejected findings of fact in the recommended order related to the nature of the argument between Abrams and the student in light of the long-term friendly relationship between them. The court agreed that impaired effectiveness could, in some circumstances, be decided as a matter of law; however, it concluded that in most situations the decision was very fact driven.

Gardner v. School Board of Glades County, Florida, 73 So. 3d 314 (Fla. 2d DCA 2011) (Opinion filed October 21, 2011)

Gardner, a teacher for the Glades County school system, was disciplined by the school board after an incident by being placed on fourth year probationary contract status and removing her professional services contract. The only notice Gardner received before the action was an email from the school principal stating that she intended to recommend a change in Gardner's contract status. The email did not include any notice of rights to challenge the action. After the board's action, Gardner sought a formal administrative hearing and reconsideration of the board's action. The board denied the request on the basis of *Krischer v. School Board of Dade County*, 555 So. 2d 436 (Fla. 3d DCA 1995).

On appeal, the court reversed. It held that Gardner was entitled to notice of the availability of a hearing to challenge the board's action. It noted that the email from the principal did not contain such a notice and that the principal did not have the authority to take a final action on

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Gardner's contract status. The court distinguished *Krischer* as it involved a situation where a teacher had been given multiple notices of potential deficiencies in classroom performance and opportunities to improve such performance.

Licensing

Presmy v. Smith, 69 So. 3d 383 (Fla. 1st DCA 2011) (Opinion filed September 16, 2011)

In 2006, Presmy, an elementary school teacher, was involved in an incident where he used his fingertips to push a student out of the classroom doorway to end a disruption. He was charged with criminal misdemeanor battery and pled guilty. In a subsequent licensing disciplinary action, the administrative law judge recommended that Presmy not be suspended for the action, concluding that it did not violate the Code of Ethics or Principle of Professional Conduct. The school board adopted the recommended order in 2008.

During the 2008 legislative session, the Legislature adopted section 1012.795(1)(n), Fla. Stat., which mandated that any teacher convicted of misdemeanor battery on a minor have his teaching certificate permanently revoked. On the basis of that statute, the Education Practices Commission moved to revoke Presmy's certificate. A second administrative hearing was held and the judge recommended revocation. The Commission adopted that recommended order.

On appeal, the court reversed. It held that the Legislature did not clearly indicate its intent to apply the statute retroactively to actions occurring before its adoption. In addition, the court held that retroactive application of the statute would be unconstitutional as it would deprive him of a vested property interest in his teaching certificate.

Georges v. Department of Health, 36 Fla. L. Weekly 2388, 2011 WL 5169407 (Fla. 2d DCA 2011) (Opinion filed November 2, 2011)

Georges, a certified nursing assistant, was disciplined by the Board of Nursing for stealing $10.00 from a patient. The administrative law judge found Georges guilty of unprofessional conduct and recommended a fine of $250 and probation. At the hearing, the Board did not present any evidence of aggravating circumstances to justify an increase in the maximum penalty set forth in the rules governing certified nursing assistants. After consideration of the recommended order, the Board rejected the recommended penalty and revoked Georges' license. It also imposed costs, including attorney's fees, of $15,703.17.

On appeal, the court reversed. It held that the Board did not have any evidence of aggravating circumstances before it that would justify an increase in the penalties set forth in the rules. Further, the court rejected that portion of the assessment of costs that constituted attorney's fees ($13,525.38), noting that the Board had not provided an affidavit from an attorney regarding the amount of the fees or the time spent on the case.

Schimenti v. School Board of Hernando County, 73 So. 3d 831 (Fla. 5th DCA 2011) (Opinion filed October 28, 2011)

Schimenti appealed her dismissal as a teacher in the Hernando County school system arguing that she was not afforded due process in that the notice of the board's action was insufficient. On appeal, the court affirmed.

Schimenti was provided notice of a predetermination hearing regarding her repeated absences from work, which she failed to attend. She also failed to return phone calls regarding her absence from the hearing. An administrative complaint was then hand-delivered to her home mail box and provided to two separate email addresses for her. When Schimenti failed to respond to the administrative complaint, her employment was terminated. On appeal, the court held that the notice provided to Schimenti met due process requirements.

Rulemaking

Elmwood Terrace Ltd. Partnership v. Florida Housing Finance Corp., 73 So. 3d 362 (Fla. 1st DCA 2011) (Opinion filed November 7, 2011)

Elmwood Terrace, an applicant for tax credits in the Florida Housing Finance Corporation's Universal Cycle, challenged a modification to the Corporation's rule on credit underwriter review. The rule essentially required the credit underwriter to consider the impact to Guarantee Fund Developments when reviewing an application for a new project to determine the effect approval of the new project would have on existing developments. The administrative law judge determined that the language was not a rule because it did not implement, interpret or prescribe law or policy. He also held, in the alternative, that if the language constituted a rule it was a valid exercise of delegated legislative authority.

On appeal, the court affirmed only as to the latter grounds. It held that the language was, in fact, a rule as the applicant had been denied funds on the basis of the adopted rule language.

Bid Protests

Pro Tech Monitoring, Inc. v. Department of Corrections, 72 So. 3d 277 (Fla. 1st DCA 2011) (Opinion filed October 17, 2011)

Pro Tech Monitoring filed a bid protest with the Department of Corrections. It was hand-delivered by an employee of the law firm representing the protesting bidder at 4:46 p.m. on the date the filing was due. Because the Department restricted access to the building, the employee of the law firm delivered the pleading to the security guard at the front desk and asked that it be provided to the agency clerk. He obtained a date-stamped copy of the protest reflecting the time of delivery. However, the agency clerk's office did not stamp the petition as received until 10:15 a.m. the following morning. The Department subsequently dismissed the petition as untimely despite accepting the truth of the allegations in the affidavit of the employee about its delivery. It took the position that the law firm had failed to take necessary measures to assure that the petition was received by the agency clerk.

On appeal, the court reversed and remanded. Rule 28-106.104(1), Fla. Admin. Code, provides that a petition is filed when it is received by the agency clerk during normal business hours. The court concluded that the agency's interpretation of that rule was unreasonable to the extent that it seemed to require the party to deliver a petition to an individual in an area of restricted access. It held that the security guard's desk must be deemed to be the agency clerk's office for purpose of receipt of the petition. In addition, the court held that the doctrine of equitable tolling applied to the circumstances of the case. It rejected the Department's argument that late filing of a protest under section 120.57(3), Fla. Stat., deprived it of jurisdiction. The court held that the provisions of section 120.569, Fla. Stat., that specifically provide for the application of equitable tolling to late filings of petitions, applies to bid protests under section 120.57(3).

Public Records

Johnson v. Jarvis, 74 So. 3d 168, 2011 WL 5560679 (Fla. 1st DCA 2011) (Opinion filed November 16, 2011)

Johnson was arrested following an incident at a Wal-Mart store in Lake City, Florida. His attorney met with the assistant state attorney to review documents including video surveillance tapes and witness statements. However, when he arrived at the state attorney's office to look at the documents, he was informed that the charges had been dropped. Johnson's attorney made a verbal request to review the documents under the Public Records Act and was told that it was the State Attorney's policy that all public records were to be sent to Live Oak where the State Attorney's office was located so that he could personally review them for exemptions under the Act.

Johnson filed suit in circuit court seeking access to the documents, and the State Attorney's office filed a motion to dismiss. The court granted the motion to dismiss, holding that access had not been denied and that the time and location of providing access was not unreasonable.

On appeal, the appellate court reversed. It remanded the case to the circuit court for an evidentiary hearing on whether the State Attorney's policy of requiring all public records to be produced in Live Oak caused unreasonable delay.

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Agency Snapshot:

Department of Economic Opportunity

The Department of Economic Opportunity (DEO) is Florida's newest agency. DEO was launched October 1, 2011, to place a greater focus on economic development and jobs. The agency combines parts of the Department of Community Affairs (DCA), the Agency for Workforce Innovation (AWI), and the Office of Tourism, Trade and Economic Development (OTTED). DEO is subdivided into four divisions:

The Division of Strategic Business Development is responsible for development of a state business strategic plan. This Division serves as the single point of contact for state agencies for approving economic incentives, and it is responsible for analyzing and evaluating business prospects that may be identified by the Governor, Enterprise Florida, Inc., or internally. The Division also administers a number of tax refund, tax credit, and grant programs.

The Division of Workforce Services administers the state's Unemployment Compensation and Workforce Services programs. The Unemployment Appeals Commission is an independent commission housed within DEO for administrative support purposes. These programs were transferred from the former AWI. The Workforce Services program responsibilities are carried out through a performance agreement with Workforce Florida, Inc. The state's workforce development system is carried out through cooperative agreements between DEO and each of the state's 24 Regional Workforce Boards, with policy direction from Workforce Florida, Inc.

The Division of Community Development is comprised of programs transferred from the Community Planning Division and the Division of Housing and Community Development of the former DCA, as well as small business, rural and urban development incentive programs transferred from OTTED. While DEO is less involved in growth management litigation than was DCA, the Division of Community Development continues to assist Florida's communities with planning for the impacts of growth and development. Statutes relating to the DRI program and Areas of Critical State Concern were transferred in *toto*. This Division administers the Uniform Special District Accountability Act, the Small Cities Community Development Block Program, the Community Services Block Grant Program, and the Low-Income Energy Assistance and Weatherization Assistance Programs.

The Division of Finance & Administration is the agency's administrative arm, overseeing budget, financial management, financial monitoring, human resources, and general services.

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Debby Kearney has a wide array of experience in state government over the past 30 years, having served as General Counsel for the Department of Community Affairs, the Department of Education, the Florida House of Representatives, the State Courts System, the Department of State, the Constitution Revision Commission, and as the Deputy General Counsel for the Governor. She is a graduate of Florida State University College of Law (1981). Debby chaired the Administrative Law Section (05-06) and continues to serve on the Section's Executive Council (1996-Present), was the 2001 recipient of The Florida Bar Claude Pepper Outstanding Government Lawyer award, and is AV-rated.

Number of lawyers on staff: 10, plus 1 OPS

Kinds of Cases:
In addition to traditional agency litigation in such areas as bid protests, human resources, employee garnishments, and torts, the following cases are handled by the Department:

- Comprehensive plan compliance when an important state interest is concerned
- Challenges to DRI development orders
- Challenges to development orders in Areas of Critical State Concern
- Challenges to disallowances as result of misexpenditures of grant funds
- Appeals of Unemployment Compensation tax determinations
- Collections cases brought by the Department to recoup unemployment compensation benefit overpayments
- UC Claimant garnishments
- Foreclosure cases

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Statutes, for the applicant to have the "ultimate burden of persuasion" to demonstrate entitlement to a permit, as delineated in *Florida Department of Transportation v. J.W.C. Company, Inc.,* 396 So. 2d 778, 787 (Fla. 1st DCA 1981). However, this standard changed on June 24, 2011, when Governor Scott approved CS/CS/CS/HB 993 and HB 7239, now codified in chapter 2011-225, Laws of Florida, which created subsection 120.569(2)(p), Florida Statutes (the "New Law"). The New Law states:

> For any proceeding arising under chapter 373, chapter 378, or chapter 403, if a nonapplicant petitions as a third party to challenge an agency's issuance of a license, permit, or conceptual approval, the order of presentation in the proceeding is for the permit applicant to present a prima facie case demonstrating entitlement to the license, permit, or conceptual approval, followed by the agency. This demonstration may be made by entering into evidence the application and relevant material submitted to the agency in support of the application, and the agency's staff report or notice of intent to approve the permit, license, or conceptual approval. Subsequent to the presentation of the applicant's prima facie case and any direct evidence submitted by the agency, the petitioner initiating the action challenging the issuance of the license, permit, or conceptual approval has the burden of ultimate persuasion and has the burden of going forward to prove the case in opposition to the license, permit, or conceptual approval through the presentation of competent and substantial evidence. The permit applicant and agency may on rebuttal present any evidence relevant to demonstrating that the application meets the conditions for issuance. Notwithstanding subsection (1), this paragraph applies to proceedings under s. 120.574.

The New Law provides that in any proceeding that arises under chapters 373, 378, and 403, Florida Statutes, wherein a third party challenges an agency's issuance of a license, permit, or conceptual approval, the permit applicant must first present a prima facie case demonstrating entitlement to the license, permit, or conceptual approval. After the applicant has presented its prima facie case, the third party challenger now has the burden of ultimate persuasion and the burden of going forward to prove by competent and substantial evidence that the applicant is not entitled to the license, permit, or conceptual approval. The New Law may streamline the permitting process by shifting the ultimate burden of persuasion to third-party challengers.

Procedural Background in *Washington County v. Bay County and Northwest Florida Water Management District*

On March 26, 2010, the Northwest Florida Water Management District (District) issued a Notice of Proposed Agency Action to issue an individual water use permit (WUP) to Bay County. The proposed WUP allows Bay County to withdraw 10 million gallons per day of groundwater from a wellfield located in northern Bay County along the boundary of Washington County. Washington County, The Northern Trust Company (NTC), and a number of other entities filed petitions for formal administrative hearing challenging the proposed issuance of the WUP. The proceedings have been ongoing for well over a year, during which two revised proposed agency actions and staff reports have been issued and a partial evidentiary hearing has been held.

Does the New Law Apply in this Proceeding?

On July 27, 2011, Bay County filed a motion in limine requesting a determination of the applicability of the New Law to the challenges to its WUP and to determine the burden of proof. By order dated August 11, 2011, the ALJ held that the New Law was in fact applicable and that it controls the order of presentation. The ALJ further ordered that Bay County, as the permit applicant, would first present a prima facie case demonstrating entitlement to approval of the WUP, followed by presentation of the District's case demonstrating that the WUP application met the conditions for issuance. Notably, the ALJ held that pursuant to the New Law, Bay County could present a prima facie case solely by entering into evidence its WUP application, relevant material submitted to the District in support of its WUP application, and the District's staff report or notice of intent to approve. Thereafter, the District could present direct evidence in support of the application's approval. The ALJ held that after this "first phase" concludes, the proceeding enters a second phase in which the third-party challengers "ha[ve] the burden of ultimate persuasion and . . . the burden of going forward to prove the case in opposition . . . through the presentation of competent and substantial evidence." Once the second phase ends, the ALJ contemplated the potential for a third phase, in that the New Law allows the permit applicant and agency to present on rebuttal any evidence relevant to demonstrating that the application meets the conditions for issuance. Washington County and NTC argued that as third-party challengers to the WUP, if the New Law applies and if during the proceeding Bay County or the District presented rebuttal evidence, then each should be given surrebuttal to rebut the evidence admitted during the third phase. The ALJ subsequently issued an Order on September 12, 2011, allowing limited surrebuttal.

A partial evidentiary proceeding took place in early September 2011. When Bay County and the District rested their cases, the Respondents lodged a hearsay objection and at that point, the ALJ requested that the parties brief the issue on the interpretation of the New Law. All memoranda were filed on September 23, 2011, and those memoranda are summarized below.

NTC Memorandum of Law

NTC argued that the intent of this new statutory section is clear from the statute itself in that it establishes the order of presentation and shifts the burden of ultimate persuasion to the third-party challengers. NTC stated that the "cardinal rule" of statutory construction is that a statute should

be construed so as to give effect to the intent of the Legislature. In order to discern legislative intent one must consider the statute as a whole, including the evil to be corrected, the language, title, and history of its enactment, and the state of law already in existence on the statute. NTC argued that the intent of the provision is clearly laid out in the preamble to the legislation, which provides that a non-applicant who challenges an agency's approval of a permit has the burden of ultimate persuasion and the burden of going forward with evidence. NTC contended that the Respondents want the ALJ to interpret the new section more broadly than the clear language and the preamble allow, negating the applicable rules of evidence.

According to NTC, in passing new legislation, the Legislature is presumed to be acquainted with prior case law addressing the subject matter of the new legislation. Section 120.57(1)(c), Florida Statutes, provides that "hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." NTC argued that if one of the purposes of the new section was to negate hearsay objections, then the Legislature failed to express that intention with sufficient clarity, as it has done in many other cases. The rules of statutory construction forbid such a language insertion where there is no clear indication that the omission was inadvertent, and the plain and ordinary meaning of the language must be used. NTC argued that the Respondents' assertion of a right to bypass the rules of evidence would impermissibly insert language in the statute.

NTC stated that the Respondents suggest that by using the term "prima facie" the Legislature intended automatic admission of the permit application, but that interpretation ignores the provision in the statute requiring demonstration of a prima facie case through "entering into evidence the application and relevant material . . ." NTC argued that a more accurate reading of the provision reflects the changes explained in the preamble, which is a shift of the burden of ultimate persuasion and the burden of going forward with evidence. The result of this shift, according to NTC, is that the applicant is entitled to a rebuttable presumption, but only after it has entered into evidence the application and other relevant material. Further, NTC argued that the prima facie case is entitled to an inference of correctness, but the direct evidence used to support the prima facie case cannot be based on hearsay testimony. In conclusion, NTC asserted that the new section cannot be read to bypass the rules of evidence, absent a clear expression of intent to do so by the Legislature; and as there is no expression of that intent, the rules of evidence continue to apply to the proceeding.

Washington County's Memorandum of Law

Washington County argued that legislative intent can be determined by examining the new section with the rest of the statute and in light of the overall legislative scheme. Washington County also pointed out the general presumption that later statutes are passed with the Legislature's knowledge of prior existing laws. Washington County contended that the Administrative Procedure Act (APA) provides protection for due process rights, including the right of confrontation, which is also the right to be protected against agency reliance on hearsay evidence, except as it may be "used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient to support a finding unless it would be admissible over objection in civil actions."[2] Washington County maintained that the new section is silent regarding evidentiary standards that may apply to the introduction of evidence to establish the prima facie case. According to Washington County, when the new section is read in combination with the APA and section 120.57(1)(c), specifically, the new section should not be interpreted to modify the APA's protection against the reliance on hearsay evidence. Washington County argued that such an interpretation would result in a repeal by implication of the due process confrontation rights recognized in section 120.57(1)(c).

Washington County also contended that the new section specifically indicates that the applicant's prima facie case may be demonstrated by "entering into evidence" the application, which clearly recognizes that the evidence must be "entered" into the record. If the Legislature had intended to do more than simply create a presumption of a prima facie case for the applicant, then it would have directed the ALJ to admit such material, or simply directed the agency to forward the application and notice of intent to issue the permit to DOAH and directed the third party challenger to present evidence first with a presumptive prima facie case already in place. In conclusion, Washington County argued that the new section does not modify the existing evidentiary standards for the admission of and agency reliance upon various forms of evidence.

Bay County and Northwest Florida Water Management District's Memorandum of Law

Bay County and the District argued that the New Law allows an applicant to only enter the application documents in order to establish its prima facie case demonstrating entitlement to approval of its WUP application. Although Petitioners had taken the position that direct testimonial evidence or other adequate proof would be required to overcome the hearsay objection before the prima facie case could be established, Bay County and the District argued that this position would require submittal of additional direct evidence and would defy the logic of the New Law. Bay County and the District argued that it was "obvious" under the New Law that the application, the relevant material submitted to the Agency in support of the application, and the Agency's staff report and notice of intent were admissible and alone sufficient to prove a prima facie case; therefore, Petitioners' hearsay objection was invalid.

Bay County and the District further argued that there was no doubt that the Legislature's intent in enacting the New Law was to modify the long-standing requirement established in *J.W.C.* that the applicant carry the ultimate burden of proof. The New Law shifted the ultimate burden

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of persuasion onto those challenging permits under chapters 373, 378 or 403, Florida Statutes. They asserted that if the applicant had to prove up every portion of the application and staff report by direct testimony to overcome a hearsay objection, the New Law would have no effect. Bay County and the District also argued that the New Law clearly accomplishes the requirement that the permit applicant establish a prima facie case,[3] and did not require that the documents be otherwise bolstered by additional competent and substantial evidence such as expert testimony, thereby eliminating a time-consuming, expensive, and duplicative process. They argued that if the hearsay standard applied, the New Law would be completely meaningless. In order to avoid nullification of the New Law, the prima facie case submittal should be "immune" from a hearsay objection.

Finally, Bay County and the District argued that when the Legislature changes a statutory scheme or established practice, a construction of the new regime that renders a portion of that new law meaningless should be avoided. The Legislature understood the changes to section 120.57 would result in an increased burden to third-party challengers and lessen the burden on the applicant. It also was entirely within the Legislature's purview to determine what proof constitutes prima facie evidence.[4]

NTC's Reply to Bay County and the District's Joint Memorandum

On September 23, 2011, NTC also filed a reply to Bay County and the District's Joint Memorandum regarding the effect of the New Law. NTC contended that Bay County and the District have misapprehended the issue before the ALJ for resolution. According to NTC, the Respondents stated that the issue is whether the submission of the documents, after having been authenticated, is enough to create a prima facie case, or whether a hearsay objection may be validly raised to the admission of such documentary proof. NTC conceded that the permit application, staff report and notice of proposed agency action are admissible to establish the elements required for the applicant's prima facie case of entitlement to a permit. NTC argued that admission for that purpose does not resolve its hearsay objection. NTC stated that not all evidence containing hearsay is inadmissible; rather the admissibility turns on the purpose for which the evidence is offered. According to NTC, these documents were offered, not for the truth of the statements made therein, but instead to establish that the documents exist in order to meet the applicant's initial burden of establishing its prima facie case, and to that extent these documents are admissible with no objection from NTC. However, NTC argued that admission for this purpose does not cure the hearsay objection as to the contents of the documents. If the applicant wishes to offer these documents for the truth of the statements contained therein, it must present testimony of the declarant of the statements. Otherwise, NTC maintained, these statements should be treated as hearsay insufficient to support a finding of fact in this proceeding.

The ALJ's Order Interpreting the New Law

On September 23, 2011, the ALJ issued a very short order regarding the interpretation of the New Law. The ALJ adopted Bay County and the District's interpretation of the New Law – that documentary evidence alone was sufficient to establish a prima facie case and the hearsay standard did not apply. Finally, the ALJ held "that Bay County and the District have presented a prima facie case demonstrating entitlement to the permit…."

Remaining Questions on the Effect of Section 120.569(2)(p), Florida Statutes

Many lingering questions remain after entry of the ALJ's order overruling hearsay objections and determining that Bay County and the District had presented a prima facie case demonstrating entitlement to the WUP. What is the effect of section 120.569(2)(p) on section 120.57(1)(c), Florida Statutes? It would appear that the ALJ has ruled that section 120.569(2)(p) nullifies section 120.57(1)(c) in third party challenges that arise under chapters 373, 378, and 403, Florida Statutes. The effect of the ALJ's decision is that hearsay evidence will likely be the sole support for many, if not most, of the findings of fact in this proceeding. If the Legislature intended to allow this new process to circumvent section 120.57(1)(c), then why did it not more clearly state this intent? Why was this scenario not discussed in the bill analysis? Does this new process, as interpreted by the ALJ in this proceeding, potentially violate the due process rights of third party challengers as they may have lost the right to cross-examine an applicant's experts? Finally, could both provisions be harmonized by utilizing the business records exception to the hearsay rule found in section 90.803(6), Florida Statutes? These are likely just a few of the many questions raised by the ALJ's order interpreting the New Law. It remains to be seen what effect this interpretation will have in this and other proceedings pursuant to chapters 373, 378, and 403, Florida Statutes.

Endnotes:

[1] The pleadings and orders discussed herein are available at www.doah.state.fl.us/ALJ/ by searching the docket for Case No. 10-2983.
[2] § 120.57(1)(c), Fla. Stat. (2011).
[3] A prima facie case is established where: 1) the applicant submits competent, substantial evidence that all relevant permitting criteria have been met; and 2) the evidence is of such weight to constitute an initial showing of entitlement. *See State v. Kahler,* 232 So. 2d 166 (Fla. 1970) and *Miami-Dade County v. Reyes,* 772 So. 2d 24 (Fla. 3d DCA 2000).
[4] Their joint memorandum quoted *Cooper v. City of Ft. Lauderdale*, 203 So. 2d 16 (Fla. 4th DCA 1967), which states "The Legislation, whether by statute or ordinance, may provide that one fact or set of facts may be presumptive or prima facie evidence of another, thereby shifting the burden of proof."

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