ADMINISTRATIVE LAW SECTION NEWSLETTER

Vol. XXXV, No. 2 **Jowanna N. Oates and Elizabeth W. McArthur, Co-Editors** **December 2013**

THE SECRET CHAIR: a tribute to Jackie Werndli

Introduction by Linda Rigot and Elizabeth McArthur
Compiled by Elizabeth McArthur

The year 1993 was memorable for many reasons. Charlie Ward won the Heisman Trophy, the Dallas Cowboys won Super Bowl XXVII, "Jurassic Park" hit the movie theatres, and Schindler's List won the Academy Award for Best Picture. We were reading The Bridges of Madison County and Men Are from Mars, Women Are from Venus. We were watching Seinfeld and Murphy Brown. And a gallon of gasoline cost $1.16.

But most memorable to administrative law practitioners active in the Administrative Law Section was the fact that The Florida Bar assigned Jackie Werndli to be the Section's program administrator.

That is a full twenty years ago, folks. Twenty years.

Thanks to Jackie, the history and evolution of the Administrative Law Section over the years can be gleaned almost entirely by touring prior issues of the Section's newsletter, available on our webpage. [Side-note from your co-editors: you all really should consider writing something for the newsletter – your contribution will be preserved for posterity, perhaps referred to in future tributes. That was a digression, we know, but Jackie will forgive, perhaps even applaud, that relentless spirit.]

While there are some gaps in coverage of the Section's early years,

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From the Chair

by Amy W. Schrader

Section events are in full-swing this year as we bid a fond farewell to our beloved program administrator, Jackie Werndli, and welcome a new young lawyers committee. Participation in the young lawyers committee is open to attorneys in practice less than ten years who have an interest in becoming more active in the Section. This is an excellent opportunity for newer attorneys to work alongside Section leadership and increase their knowledge of administrative law. At our September meeting, Daniel Russell, Debbie Tyson, Christina Arzillo, and Vilma Martinez were selected as the inaugural co-chairs of the young lawyers committee. Welcome—I look forward to working with all of you on this new committee to expand our Section's activities and increase involvement of our newer members! If you would like to join the young lawyers committee, it's not too late. Email Richard Shoop (Richard.Shoop@ahca.myflorida.com) to get involved.

I am also happy to announce that the Section held a very successful (and entertaining) Practice Before

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DOAH CLE seminar on October 4th. Many thanks to all of our gracious speakers and participants, including Administrative Law Judges Li Nelson and Scott Boyd for their assistance in hosting this always informative event! If you didn't have the opportunity to attend this CLE seminar live, you will not want to miss out on the audio recorded version and ALJ Nelson's stellar performance as an unruly witness during the mock trial segment. Also, be sure to sign up for the upcoming Advanced Government and Administrative Practice CLE seminar, set to be held on April 3, 2014. For those of you who are board certified or seeking to become board certified in state and federal government and administrative practice, this will be an excellent opportunity to get those required CLE credits. Additionally, the Section is looking for speakers on topics suitable for presentation in a one-hour webinar format. Please contact our CLE chair, Bruce Lamb (blamb@gunster.com), if you have an idea for a webinar topic or are interested in being a speaker.

Section members have also been keeping busy working on proposals to increase access to agency final orders. Our orders access committee, led by Richard Shoop, has consulted with a number of agencies along with DOAH's clerk, and is currently working on a recommendation for all agencies to file future final orders with DOAH. Although a number of agencies already utilize DOAH's services to index their final orders, we believe it is important to work toward uniformity in indexing to increase public access to this information. DOAH's indexing service is free to all agencies and simple to implement. Look for updates on this proposal in the near future.

Another way the Section is working to increase access and improve the administrative hearing process is through our work with the Legal Services of North Florida. The pro se ad hoc committee has partnered with LSNF and DOAH to ensure that all initial orders will contain information referring pro se litigants to contact LSNF if they are in need of assistance. LSNF can answer questions from pro se litigants regarding the hearing process and assist them in preparing to effectively participate in the hearing.

As you can see, there are so many ways you can get involved in our Section in the upcoming year! I am looking forward to an exciting and productive 2014!

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upon researching all of the posted newsletters, the following facts were revealed: in the 16 years preceding the Jackie Years, there were at least seven different persons, and maybe more, in the position that Jackie has held for 20 years. The newsletters posted between 1977 and 1993 document that there were at least seven different persons over a shorter total time span than we have had the luxury of a single person. Sometimes the person formerly in Jackie's position would last a year or less, sometimes a little more, in a few cases as long as two or three years. But 20 years? At no time in the past has our Section had anything approaching what we have been able to experience: superior quality borne of longevity, stability, dedication, and talent: the Jackie Years. We are going to sorely miss the Jackie Years.

And so, a tribute to the secret chair of our Section, as every person who ever acted as Section chair knows all too well. Collectively, we all say to you, Jackie Werndli, thank you. No, that doesn't approach what we want to say. THANK YOU!!!!! Better, but for 20 years?

THANK YOU!!!!!!!!!!!!!!!!!!!!!

Times infinity.

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Open Letter to the Section

It has been both a pleasure and a privilege to serve as your program administrator over the last twenty years. Your support during those years has made my job an enjoyable and rewarding experience. I sincerely thank you all for that working relationship. It's difficult to say goodbye, so fair winds and calm seas – I wish you well in the future.

Jackie Werndli

APPELLATE CASE NOTES

by Mary F. Smallwood

Adjudicatory Proceedings

Davis Family Day Care v. Dep't of Children and Family Servs., 117 So. 3d 464 (Fla. 2d DCA 2013) (Opinion filed July 17, 2013)

Davis Family Day Care Home ("Davis") was issued a license as a family day care home in 2007. Davis applied annually for renewal of that license. In 2011, Davis applied for renewal of its license and also applied for a license as a large family child care home.

The Department of Children and Families ("DCF") proposed to deny both the renewal application and the application for licensure as a large family child care home. Davis sought an administrative hearing on both denials. After an administrative hearing, the administrative law judge ("ALJ") issued a recommended order recommending issuance of the renewal on a probationary basis and issuance of the large family child care home application on a provisional basis. The ALJ held that the burden of proof for the license denial was clear and convincing evidence. DCF rejected that conclusion, and provided a substituted conclusion of law that the burden of proof was by competent substantial evidence. DCF adopted the ALJ's recommendation to renew the family day care home on a probationary basis, but denied the application for a large family child care home license.

On appeal, the court reversed and remanded. It held that DCF had misused the appellate "competent substantial evidence" standard of review as the burden of proof.

With respect to the appropriate burden on DCF, the court held that DCF must establish by clear and convincing evidence that the license should be denied, and not by a preponderance of the evidence. The court opined that the denial of the license for a large family child care home was essentially a disciplinary action since it was predicated on violations allegedly committed under the day care home license. The statute relied on by DCF authorized imposition of "disciplinary sanctions," including denial or revocation of a license, for violations of the licensing laws. The court noted that DCF itself had acknowledged the disciplinary nature of its action, referring to its initial decision letter as an "administrative complaint."

While recognizing that the court in *Department of Banking and Finance v. Osborne Stern & Co.,* 670 So. 2d 932 (Fla. 2006), had applied the preponderance of the evidence burden of proof (instead of clear and convincing evidence) to license application proceedings, the court noted that section 120.57(1), Fla. Stat., had been amended since the *Osborne* decision. Section 120.57(1)(j), Fla. Stat., now provides that the preponderance of the evidence standard applies except in penal or disciplinary actions. In this case, the statute made clear that DCF was taking disciplinary action.

Herrmann v. District Board of Trustees of Santa Fe College, Florida, 120 So. 3d 626 (Fla. 1st DCA 2013) (Substituted Opinion filed September 3, 2013)

Herrmann submitted a letter to the Board of Trustees of Santa Fe College ("Board") contesting her dismissal as a professor at the college. The Board denied Herrmann's request for an administrative hearing on the grounds that she had cited an inapplicable statutory provision. The order of denial did not provide an opportunity for filing an amended petition. Despite that failure, Herrmann filed an amended petition with the Board. She argued that her initial letter was in substantial compliance with the statutory filing requirements and clearly requested a hearing.

The Board denied the amended petition. It asserted that the petition was untimely, although the initial letter requesting a hearing had been filed within the required time frame. The Board also rejected Herrmann's argument that the initial letter was in substantial compliance with the filing requirements.

On appeal, the court reversed and remanded. The court recognized that Herrmann's initial letter had specifically requested a hearing. More importantly, however, the court held that the Board had failed to comply with the provisions of the Administrative Procedure Act requiring that a petitioner be allowed at least one opportunity to amend its petition unless the defect cannot be cured.

In response to a motion for clarification about the directions on remand, the court issued a substituted opinion clarifying that its remand was "with directions to afford Herrmann a hearing on her Amended Petition in accordance with section 120.57(1)(a), Florida Statutes (2012)."

Shands Jacksonville Medical Center, Inc. v. Dep't of Health, 123 So. 3d 86 (Fla. 1st DCA 2013) (Opinion filed September 12, 2013).

A number of existing trauma centers filed challenges to the Department of Health's ("DOH") decision to grant provisional licenses to nearby hospitals to provide trauma care. DOH dismissed the petitions on the grounds that the existing trauma centers lacked standing as their alleged substantial interests were not within the zone of interest protected by applicable statutes requiring DOH to consider the impact of new trauma centers on existing facilities.

The appellants argued that the approval of the new trauma centers would adversely affect their ability to provide trauma care due to decreased income and competition for medical professionals needed to operate the existing centers. Conversely, DOH argued that the interest alleged by the existing trauma centers was purely economic and that the provisional approval was not a final agency action.

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On appeal, the court reversed. The court noted that the statutory scheme specifically required DOH to consider the impact on existing centers in determining need for new facilities. The court concluded that the interests alleged by the existing centers were within the zone of interest intended to be protected under the legislative regulatory scheme. The court rejected DOH's argument that the statutes were intended to protect the interest of the patients and not the economic interests of existing trauma centers.

The court also rejected DOH's argument that provisional approval of the licenses for new trauma centers did not constitute final agency action. The court found that the effect of provisional approval was to allow new centers to operate for a significant period of time. Therefore, the court treated it as final action.

Public Records

City of Avon Park v. State of Florida, 117 So. 3d 470 (Fla. 2d DCA 2013) (Opinion filed July 17, 2013)

The City of Avon Park ("City") terminated Michael Rowan's employment as Chief of Police. In the subsequent administrative hearing, at issue was Rowan's investigation of certain city council members and alleged deletion of certain information from his work computer.

An investigator with the State Attorney's Office was called in to investigate those issues; he prepared a report of his findings. The City subpoenaed the investigator to appear as a witness at the administrative hearing on Rowan's termination, and to bring his report, which the City wanted to rely on. The State sought a circuit court order quashing the subpoena issued to the investigator. It also sought to prevent disclosure of portions of the report which constituted mental impressions of the investigator. The circuit court granted in part and denied in part the State's petition. It concluded the investigator's mental impressions were exempt from the Public Records Act and entered a protective order limiting the investigator's testimony and protecting the mental-impression portions of the report.

The City appealed, arguing the report should be admissible in full and Rowan's testimony should not be limited; Rowan cross-appealed, arguing that he should not be required to testify at all. The Second District Court of Appeal reversed the trial court's decision excluding from evidence the portion of the report containing the investigator's mental impressions. The court pointed to section 119.071(1)(d)1., Florida Statutes, which protects mental impressions from disclosure only until the conclusion of the litigation or adversarial administrative proceedings. In this case, the court concluded that the investigation had ended and no charges had been filed. Therefore, the investigator's mental impressions were no longer protected.

Licensing

Gonzalez v. Dep't of Health, 120 So. 3d 234 (Fla. 1st DCA 2013) (Opinion filed August 30, 2013)

The Department of Health ("DOH") filed an administrative complaint against Gonzalez, a licensed chiropractor, for alleged statutory and rule violations. The alleged violations involved recordkeeping practices and failure to provide records to a patient upon request.

Gonzalez elected to have an informal hearing and did not dispute the findings of fact in the administrative complaint. At the informal hearing, Gonzalez addressed the alleged violations in mitigation of any penalty assessment. The Board of Chiropractic Medicine ("Board") then raised additional issues outside the four corners of the complaint, including business location, staffing, and diagnostic practices.

The Board adopted the findings in the administrative complaint, imposed a fine, required Gonzalez to pass a written examination, and required monitoring of his performance.

On appeal, Gonzalez argued that the Board should have terminated the informal proceeding when it became apparent material facts were in dispute. He further argued that the Board had violated his right to due process by considering matters not charged in the administrative complaint.

The court rejected Gonzalez' argument regarding his right to a formal hearing, holding that he had waived that right by not requesting a formal hearing during the informal proceeding before the Board. However, the court agreed with Gonzalez that his right to due process had been violated, because the Board had strayed into matters not charged in the administrative complaint, related to Gonzalez' competency to practice chiropractic medicine. The court rejected DOH's argument that the error was harmless, concluding from the final order and comments made by the Board members in the hearing to consider entry of

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

a final order that the penalty imposed appeared to be directly related to Gonzalez' competency rather than to the violations alleged in the complaint. The court reversed and remanded for a new hearing by the Board, at which the Board was directed to confine itself to matters charged in the administrative complaint.

Fernandez v. Dep't of Health, 120 So. 3d 117 (Fla. 4th DCA 2013) (Opinion filed August 14, 2013)

The Department of Health, Board of Nursing ("Board") filed charges against Fernandez for administering medication to a person who was not his patient. The facts demonstrated that Fernandez had visited a friend in the hospital and administered a drug prescribed for one of his home health care patients. After an administrative hearing, the Board found that five aggravating circumstances justified an upward departure in the penalty provided for the Board's guidelines to license revocation.

On appeal, the court reversed. While it found support for four of the aggravating circumstances cited by the Board, it held that one of the circumstances was not supported by competent substantial evidence. Specifically, the Board had determined that Fernandez' actions had caused damage to the patient. The court found the only support for this determination was testimony in the hearing transcript that the court characterized as "speculation." Since the court concluded that it was unclear whether the Board would have revoked Fernandez' license absent the determination of damage to the patient, it reversed in part and remanded for the Board to reconsider the penalty without the unsupported aggravating circumstance.

McAlpin v. Criminal Justice Standards and Training Comm'n, 120 So. 3d 1260 (Fla. 1st DCA 2013)(Opinion filed September 13, 2013).

McAlpin appealed an order of the Criminal Justice Standards and Training Commission ("Commission") suspending his law enforcement certification for eighteen months. The Commission filed an administrative complaint alleging misconduct during the course of a criminal investigation. A formal administrative hearing was held and a recommended order was issued.

At the Commission hearing to consider the recommended order, the attorney who prosecuted the case against McAlpin was present and offered advice to the Commission. The Commission's staff had prepared a memorandum to the Commission recommending an increase in the recommended penalty to revocation of McAlpin's license. It was not clear who prepared the staff memorandum. However, it was clear the prosecuting attorney had prepared exceptions to the recommended order for the agency.

On appeal, the court reversed and remanded for a new Commission hearing. While the Commission did not ultimately adopt the agency's recommendation of an increased penalty, the court held that the staff attorney's enhanced access to the Commission undermined the Commission's function as an unbiased reviewer of the recommended order.

The court did note that it was not inherently inappropriate to consolidate investigative, prosecutorial and adjudicatory authority in a single agency. Each case must be considered on its unique factual background.

Burton v. Dep't of Health, 116 So. 3d 1285 (Fla. 1st DCA 2013) (Opinion filed July 24, 2013).

The Department of Health ("DOH") issued an emergency order suspending Burton's license to practice nursing.

On appeal, the court quashed the emergency order. It held that DOH had failed to examine other disciplinary options available to it short of suspension. While recognizing DOH might be able to support license suspension as an appropriate penalty, it held that Burton was entitled to a hearing to contest the charges.

In the dissenting opinion, Judge Osterhaus cited numerous findings in the DOH order that supported suspension.

Appeals

Taylor-Tillotson v. Agency for Health Care Administration, 120 So. 3d 101 (Fla. 4th DCA 2013) (Opinion filed August 7, 2013)

Taylor-Tillotson sought medical supplies and prescriptions, and the Agency for Health Care Administration ("AHCA") denied that request. On appeal, AHCA filed a motion to dismiss. In its motion, AHCA stated that it believed Appellant should be entitled to a new hearing since an AHCA staff member had ex parte communications with the original hearing officer.

While acknowledging the Appellant's objection to dismissal of the appeal, the court treated AHCA's motion to dismiss as a confession of error and noted that it concurred with AHCA's recommendation to reverse and remand for a new hearing.

Mary F. Smallwood *is a past chair of the Administrative Law Section and a past chair of the Environmental and Land Use Law Section of the Florida Bar. Mary has practiced in the areas of environmental, land use, and administrative law for the past 36 years.*

Before the turn of the century, a full 14 years ago, Mary F. Smallwood agreed to take over the regular Appellate Case Notes feature of our newsletter. We all have gotten so used to relying on the steady stream of well-written, concise, informative summaries of the most important appellate court opinions, provided like clockwork by Mary, we must have assumed Mary would want to keep doing this forever. Unfortunately, that is not the case. We have come to the end of an era, as you have just read Mary's final Appellate Case Notes.

From volume XXI, no. 2 (December 1999) through volume XXXV, no. 2 (December 2013), Mary's Appellate Case Notes feature in every newsletter has been such a valuable resource to the Section! Mary, current and former readers of the newsletter have been better prepared in their practices because of cases that you brought to our attention. On everyone's behalf, please accept our deepest thanks for your dedication and excellent service these past 14 years.

DOAH CASE NOTES

Substantial Interest Hearings

Ft. Myers Real Estate Holdings, LLC v. Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering, DOAH Case No. 11-1495 (Recommended Order Aug. 6, 2013).

FACTS: The Division of Pari-Mutuel Wagering ("Division") reviews applications for pari-mutuel wagering permits, including those for quarter horse racing. In January 2009, Fort Myers Real Estate Holdings, LLC ("Ft. Myers") filed an application to build and operate a quarter horse racing facility in Lee County, Florida. Even though the application was complete sometime after February 18, 2009, Ft. Myers requested that further action on its application be delayed because of pending legislation and proposed gaming compacts with the Seminole Tribe.

On May 8, 2009, the Legislature enacted chapter 2009-170, Laws of Florida (commonly referred to as SB 788). One provision amended section 550.334, Florida Statutes, so that no new quarter horse facilities could be approved for a site within 100 miles of an existing pari-mutuel wagering facility. Another provision authorized slot machine gaming for pari-mutuel permit holders in Miami-Dade County. However, chapter 2009-170 was not to take effect until ratification of a gaming compact between the Governor and the Seminole Tribe.

At the time of Ft. Myers' application, section 550.334(1) required an applicant for a quarter horse racing permit to demonstrate that the proposed location of the racing facility was available for such use. Between November 2008 and May 2009, the Division approved quarter horse racing permits for four other applicants that demonstrated their proposed locations were available for such use by providing written assurances from land use attorneys that zoning and other land use approvals could be obtained after issuance of the permits.

On August 12, 2009, Ft. Myers filed an amended application, changing the location for its proposed facility to Miami-Dade County. The amended application was filed just as the Division was changing its interpretation of what a quarter horse applicant had to present in order to demonstrate the proposed site will be available for use. Among other things, the Division was now requiring applicants to demonstrate they controlled the property on which they were proposing to conduct races. This change occurred after existing pari-mutuel wagering permit holders in south Florida lobbied the Division to impose stricter criteria on quarter horse applicants.

Upon considering Ft. Myers' response to a Division letter seeking more information regarding the amended application, the Division issued a denial on January 12, 2010, stating Ft. Myers failed to demonstrate the proposed site was available for use. The denial letter also notified Ft. Myers of its right to request an administrative hearing.

Ft. Myers petitioned for a formal administrative hearing. The Division issued a Final Order dismissing the petition on March 23, 2010, concluding Ft. Myers lacked standing because it did not sufficiently control the land on which it proposed to race. Ft. Myers appealed the Final Order.

During the pendency of the appeal, on July 1, 2010, the gaming compact between the Governor and the Seminole Tribe went into effect, which in turn caused the amendment to section 550.334, prohibiting quarter horse race tracks within 100 miles of an existing pari-mutuel wagering facility, to take effect. Because no location in Florida satisfies that mileage requirement, Ft. Myers' application could only be granted if the prior version of section 550.334 were applied to its application.

The First District Court of Appeal reversed and remanded the Final Order with directions that the case be referred to DOAH. Ft. Myers Real Estate Holdings, LLC v. Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering, 53 So. 3d 1158 (Fla. 1st DCA 2011). In the process of doing so, the court granted Ft. Myers' request for attorney's fees because the agency action precipitating the appeal—dismissal of Ft. Myers' petition to challenge the denial of its own permit application, due to lack of standing—was "contrary to the fundamental principles of administrative law." Id. at 1162, n. 4.

Following the remand, the Division referred the case to DOAH for a determination as to which version of section 550.334 applied to Ft. Myers' application. In general, an amendment to a licensure statute applies to a pending licensure application unless certain exceptions apply. The DOAH proceeding was bifurcated, and a hearing was conducted on whether an exception to the general rule was warranted due because of the Division's repeated denials of the application or unreasonable delays. If those exceptions were inapplicable, then DOAH was to determine during the second portion of the bifurcated proceeding whether the Division acted in bad faith, a separate exception to the general rule that the amended statute would apply to Ft. Myers' application.

Following the first portion of the bifurcated proceeding, the ALJ issued a Recommended Order on August 22, 2011, concluding the Division had not repeatedly denied Ft. Myers' application, or engaged in unreasonable delay. The Division issued a "Final Order" adopting those conclusions *in toto*. Ft. Myers appealed to the Third District Court of Appeal, but the court dismissed the appeal as a premature appeal of a non-final order, because the issue of bad faith had yet to be resolved. This remaining issue was heard at DOAH on June 17, 2013.

OUTCOME: To resolve the issue of whether the Division acted in bad faith, the ALJ compared the instant case to others in which governmental entities were found to have acted in bad faith. The ALJ concluded that the Division's actions were distinguishable: "In each of the cases cited above, the governmental entity was clearly (almost blatantly) delaying the application process so it could create and apply a new legal requirement. The present case is distinguishable because: 1) there is no clear intent to delay the application process; and 2) the Division was not in control of the new legal standard that was to be imposed." The ALJ also concluded that even if the Division had been in control of when the new law was to take effect, "Ft. Myers' own actions in seeking delays in the processing of its application militate against the suggestion that the Division delayed the process in order to allow for a Legislative enactment to become law." Accordingly, the ALJ concluded that the Division did not act in bad faith and recommended the Division issue a final order declaring that the 2010 version of section 550.334 applies to Ft. Myers' application.

Florists Mutual Ins. Co. v. Dep't of Fin. Serv., Div. of Workers' Compensation, DOAH Case No. 13-2940 (Final Order Sept. 30, 2013).

FACTS: The Department of Financial Services ("DFS") resolves disputes over the costs of medical care provided to workers' compensation claimants. On April 8, 2013, Florists Mutual Ins. Co. ("Florists") received notice of DFS's determination that Florists owed $100,894.54 to the Kendall Regional Medical Center. The notice advised that a request for an administrative hearing had to be received by DFS within 21 days (i.e., by Monday, April 29, 2013). Even though DFS's office was only four miles away, Florists' attorneys elected to mail a petition from their Tallahassee office on or about Thursday, April 25, 2013. The postal service inexplicably transported the petition to Louisville, Kentucky where it was processed, returned to Tallahassee, and delivered to DFS on Wednesday, May 1, 2013. DFS issued a Notice of Intent to Dismiss, and Florists requested a formal hearing on whether equitable tolling should excuse the untimeliness.

PROCEDURE: One of the most interesting aspects of this case is that the parties invoked section 120.574, agreeing in writing to use the summary hearing process that would expedite proceedings and convey final order authority on DOAH.

OUTCOME: While concluding "[t]here is no bright line or mechanical rule to determine when equitable tolling is warranted," the ALJ rejected Florists' argument that the postal service's error was an extraordinary circumstance that would excuse the untimely filing. In doing so, the ALJ stated that a diligent petitioner would have used the post office's tracking services to determine that the petition was delayed "in time to dispatch a courier from its Tallahassee office across the four miles to meet the pending deadline." The ALJ noted that "[w]hile this conclusion may seem contrary to the important goal of ameliorating harsh results where there is no prejudice to the other party, there is an equally important competing value: the filing deadlines of procedural rules must be routinely enforced if they are not to become blurred and unreliable." The ALJ qualified his ruling by stating that "[t]his is not to conclude that mailing delay could never warrant equitable tolling, but only that it does not do so here[.]"

Avalon's Assisted Living III, LLC v. Agency for Health Care Admin., DOAH Case No. 09-6342 (Recommended Order Oct. 9, 2013).

FACTS: The Agency for Health Care Administration ("AHCA") denied Avalon Assisted Living III's ("Avalon III") application for licensure of an assisted living facility in Orlando. Avalon III challenged the denial, and the case was referred to DOAH for a formal hearing. During AHCA's attempts to obtain discovery, two people closely associated with Avalon III (Mr. Robert Walker and Mrs. Chiqquittia Carter-Walker) invoked their Fifth Amendment privilege against self-incrimination in response to questions regarding the grounds stated by AHCA in its initial decision to deny the license. These areas of inquiry included alleged unlicensed activity, the ownership and control of Avalon III, and Avalon III's lease on the facility sought to be licensed. Based on Avalon III's failure to provide any relevant information during three discovery depositions, AHCA filed a Motion to Dismiss on September 16, 2013. In an Order issued on September 27, 2013, the ALJ stated that dismissal of Avalon III's petition and denial of its licensure application would be an appropriate sanction. However, in an abundance of caution, the ALJ gave Avalon III one more chance to have the Walkers answer deposition questions without invoking the Fifth Amendment. Avalon III responded to the Order by filing a notice that the Walkers would answer deposition questions regarding ownership and the lease without invoking the Fifth Amendment. Conspicuously absent from the notice was any assurance the Walkers would answer questions about the alleged unlicensed activity.

OUTCOME: The ALJ issued an Order recommending that AHCA deny Avalon III's application. In contrast to licensure disciplinary cases in which the agency has the burden of proof, Avalon III had the burden of proving entitlement to licensure, and the Walkers were the only people with knowledge of the relevant issues. Accordingly, their refusal to answer deposition questions left Avalon III "in an untenable position," preventing Avalon III from proving its entitlement to licensure.

Boone, Boone, Boone, Koda & Frook, P.A., Colonial House Office Bldg. v. Dep't of Bus. & Prof'l Regulation, Div. of Hotels & Restaurants. DOAH Case No. 13-2421 (Recommended Order Oct. 10, 2013).

FACTS: The Petitioner has professional offices in an office building containing an elevator that is regulated and periodically inspected by the

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Bureau of Elevator Safety within the Department of Business and Professional Regulation's Division of Hotels and Restaurants ("the Division"). A recent inspection called into question whether the elevator floor complies with section 11-4.5.2 of the Florida Accessibility Code for Building Construction ("the Florida Accessibility Code"). Accordingly, the Petitioner asked the Division for a variance from section 11-4.5-2. The Division denied the request because: (1) section 120.542(1), Florida Statutes, prohibits agencies from granting variances from statutes or from rules required by the federal government; and (2) the Division has no statutory authority to grant a variance from the Florida Accessibility Code. The Petitioner elected to challenge the denial through a formal administrative hearing, and the Division moved to dismiss.

OUTCOME: In 1993, Florida adopted the Florida Americans with Disabilities Accessibility Implementation Act, codified at sections 553.501 through 553.513, Florida Statutes. The express purpose of this enactment was to incorporate the 1991 accessibility requirements of the federal ADA. See §553.503, Fla. Stat. (1993) (providing that the "federal Americans with Disabilities Act Accessibility Guidelines, as adopted by reference in 28 C.F.R., part 36" were "hereby adopted and incorporated by reference as the law of this state."). Section 11-4.5.2 is identical to a corresponding provision within the federal ADA's 1991 Standards. Thus, the "rule" from which the Petitioner sought a variance is also a statute. Because an administrative agency has no authority to grant a variance from statutory requirements, the Division could not grant Petitioner's request for a variance from section 11-4.5.2. Moreover, even if a variance could be granted, such relief would have to be sought from the Florida Building Commission, the agency responsible for promulgating the Florida Accessibility Code. The ALJ issued a Recommended Order of Dismissal.

Haskett v. Rosati and Dep't of Envtl. Prot., DOAH Case No. 13-0465 (Recommended Order July 31, 2013), DEP OGC Case No. 13-0040 (Final Order Oct. 29, 2013).

FACTS: In order to construct, repair, and maintain a small dock on sovereignty submerged lands, one must apply to the Department of Environmental Protection ("DEP") for a "Noticed General Permit." DEP also processes applications on behalf of the Board of Trustees of the Internal Improvement Trust Fund ("Board of Trustees") for a "Letter of Consent" to use sovereignty submerged lands. Thomas Rosati planned to replace his dock on the St. Lucie River with a new dock. As part of the process, Rosati was required to publish notice to inform the general public that the proposed project qualifies for a Noticed General Permit and a Letter of Consent. Rosati published notice in a local newspaper, using the exact language regularly used by DEP to notify the general public of such decisions. However, the language only referred to DEP's determination that the proposed dock replacement qualifies for a Noticed General Permit, and made no mention that the proposed project also qualified for a Letter of Consent issued on behalf of the Board of Trustees.

PROCEDURE: Petitioners filed a petition for an administrative hearing within 10 days of receiving actual notice of the Department's action; however, they failed to file their petition within 21 days of the notice published by Rosati in the local newspaper. The petition challenged both the adequacy of the newspaper notice and Rosati's entitlement to the Noticed General Permit and the Letter of Consent.

OUTCOME: The ALJ concluded that the Petitioners waived their right to challenge the Noticed General Permit by failing to timely petition for a hearing. However, the ALJ found the published notice inadequate to trigger a clear point of entry to challenge the Letter of Consent, because there was no mention of the authorizing agency or the action taken. The ALJ further concluded: "If the newspaper notice had only failed to identify the Board of Trustees as the agency for whom the Department was acting in issuing the Letter of Consent, that omission would not have been fatal. However, failing to mention that Rosati had been authorized by Letter of Consent to use sovereignty submerged lands, an authorization governed by different statutes and rules, is too fundamental an omission for the newspaper notice to be legally sufficient to bar injured persons from contesting the authorization." The ALJ proceeded to consider the merits of whether Mr. Rosati's dock project met the requirements for a Letter of Consent, and he found that Rosati failed to meet his burden of proof in that regard. Accordingly, the ALJ recommended that DEP enter a Final Order issuing the Noticed General Permit, but denying the Letter of Consent.

DEP's final order adopted the ALJ's findings and conclusions regarding the Petitioners' waiver of a clear point of entry to challenge the Noticed General Permit, as well as the ALJ's findings and conclusions regarding the inadequacy of the published notice to provide a clear point of entry to challenge the Letter of Consent. DEP disagreed, however, with the ALJ's conclusions on the merits of Rosati's entitlement to a Letter of Consent. According to DEP, the ALJ imposed a standard not called for by the governing rule, by determining that the proposed dock would be a "significant impairment to navigation." DEP noted that the only rule standard regarding "navigation" was addressed by the ALJ's finding that the proposed dock would not be a "navigation hazard." Accordingly, DEP substituted its "more reasonable" interpretation of the rule and concluded that Rosati was entitled to the Letter of Consent.

Hernandez v. Manatee Cnty. Sch. Bd., DOAH Case No. 13-2885 (Recommended Order Oct. 9, 2013).

FACTS: The Manatee County School Board ("MCSB") offered Petitioner a professional services contract as a teacher for the 1996-1997 school year. Two years later, Petitioner became an assistant principal and worked in that capacity until she resigned in October 2000. However, in 2004, Petitioner returned to work as a teacher with the MCSB under an annual contract. Several years thereafter, Petitioner worked as an assistant principal before transferring back to a teaching position. For the 2009-2010 and 2010-2011 school years, Petitioner requested a leave of absence and the MCSB granted her request.

In March 2011, Petitioner notified the MCSB of her intent to return to work for the 2011-2012 school year, but the MCSB did not renew Petitioner's employment contract. Subsequently, a dispute arose between Petitioner and Respondent regarding the following: whether Petitioner had an annual contract or a professional services contract with Respondent; how that contract was terminated; and when that contract was terminated. The Petitioner contended that she was working under a professional services contract and that the MCSB did not have just cause for the termination or non-renewal of her contract; therefore, she filed a request for administrative hearing.

OUTCOME: The ALJ entered a Recommended Order dismissing Petitioner's claim, concluding that DOAH did not have subject matter jurisdiction to resolve a contract dispute between the parties. Because DOAH is a quasi-judicial forum and not a court of competent jurisdiction, the ALJ reasoned that the parties' dispute is within the exclusive jurisdiction of Article V courts.

SRQUS, LLC v. Sarasota County, Town of Longboat Key, City of Sarasota, City of Venice, Dep't of Transp. Dist. 1, & Dep't of Envtl. Protection, DOAH Case No. 13-1219 (Recommended Order Oct. 18, 2013).

FACTS: The Department of Environmental Protection ("DEP") proposed to renew a Municipal Separate Storm Sewer Systems permit (the "MS4 Permit") to Sarasota County, the City of Sarasota, the City of Venice, the Town of Longboat Key, and the Department of Transportation (the "Applicants"). On January 30, 2013, Sarasota County arranged for notice of the proposed action to be published in the Sarasota Herald-Tribune, a newspaper of general circulation in Sarasota County. The notice explained that a petition challenging the proposed action had to be filed with DEP within 14 days of publication. The notice also explained that failure to timely file would result in waiver of the right to request an administrative hearing. Because a portion of the Town of Longboat Key extends into Manatee County, the Town of Longboat Key arranged for a virtually identical notice to be published on February 4, 2013, in the Bradenton Herald, a newspaper of general circulation in Manatee County.

On February 13, 2013, Christopher Wright, a consultant for the Petitioner, spoke with a DEP employee about a different matter and learned of DEP's intent to issue the MS4 Permit. After the close of business that day, Mr. Wright sent an e-mail to the DEP employee, requesting a copy of DEP's Notice of Intent, which was transmitted to him the next morning. When Mr. Wright inquired about the time for filing a challenge to the Notice of Intent, the DEP employee reported that 14-day window had closed on February 13, 2013. Nevertheless, the Petitioner filed a petition challenging the Notice of Intent on February 15, 2013.

OUTCOME: After holding an evidentiary hearing, the ALJ recommended that the petition be dismissed. In addressing an issue characterized as one of first impression, the ALJ concluded that the notice published in Manatee County did not create a new point of entry for challenging the MS4 Permit: "It is the opinion of the undersigned that, for permits that apply in multiple counties, the publication of notice in a newspaper serving an adjoining county does not serve to extend a point of entry that has been created through the publication in a newspaper of general circulation in the county in which the activity that is the subject of the dispute is to take place." As for the argument that the DEP employee should have notified Mr. Wright of the 14-day window when they first spoke on February 13, despite the lack of a specific request, the ALJ concluded as follows: "The doctrine of equitable tolling places no affirmative obligation on the part of an agency employee to discern the intent behind a request for information, or to provide documents in the absence of a request. In this case, [the DEP employee] provided a copy of the Notice of Intent almost immediately upon receipt of the request. The fact that Mr. Wright did not request the notice until after the time for challenging the MS4 Permit had passed does not constitute a misleading act on the part of [the DEP employee], nor does it constitute an act that could be construed in any way as lulling Petitioner into inaction."

Disciplinary/Enforcement Actions

Dep't of Health v. Diamond, DOAH Case No. 12-3825PL (Recommended Order April 9, 2013); DOH Case No. 2012-11850 (Final Order Aug. 21, 2013).

FACTS: As reported in the June 2013 edition of DOAH Case Notes, Guiping Diamond graduated from the Florida College of Natural Health ("FCNH") and became a Florida-licensed massage therapist in 2009. However, FCNH's former registrar falsely told her that FCNH would accept all of the credits from her previous school and that those transfer credits fulfilled FCNH's requirements for issuance of a diploma satisfying state licensure requirements. There was no evidence that Ms. Diamond was aware of the falsified documentation, which the FCNH registrar submitted directly to the Board of Massage Therapy ("the Board").

The Department of Health ("DOH") issued an administrative complaint seeking revocation of Ms. Diamond's license based on a variety of charges, including that Ms. Diamond obtained a license through fraudulent misrepresentation, or in the alternative,

continued...

DOAH CASE NOTES
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through an error by DOH. After a formal administrative hearing, the ALJ recommended that the Board enter a final order finding her not guilty. While section 456.072(1)(h), Florida Statutes, subjects licensees to discipline for obtaining a license through an error of DOH, the ALJ concluded the licensee must have knowingly used DOH's error to his or her advantage, which the ALJ found was not the case here.

OUTCOME: The Board issued a Final Order rejecting all 13 of DOH's Exceptions to the Recommended Order and dismissed the administrative complaint. DOH appealed the Board's Final Order to the First District Court of Appeal. That appeal and four others involving similar events at FCNH are currently pending.

Rule Challenges

Radhakrishna K. Rao et al. v. AHCA, DOAH Case No. 12-2813RU (Final Order Aug. 20, 2013).

FACTS: The Agency for Health Care Administration's ("AHCA") Office of Medicaid Program Integrity audited Dr. Rao, an authorized provider of Medicaid services, for claims between July 1, 2007, and June 30, 2009, and found him to be in violation of certain Medicaid provider policies. AHCA prepared a Final Audit Letter on June 1, 2011, notifying Dr. Rao that he had been overpaid by the Medicaid program by $110,712.09 for services provided during the audit period. Dr. Rao's administrative hearing challenging AHCA's overpayment determination was pending before DOAH. On August 17, 2012, Dr. Rao filed an unadopted rule challenge, alleging that AHCA's overpayment determination was based on unadopted rules regarding the medical necessity of long-term monitored electroencephalograms (LTM EEGs).

OUTCOME: The ALJ found that AHCA's peer review expert applied certain standards to the Medicaid claims he examined in conducting the Medicaid audit, but "exercised his discretion as to whether to apply them based on the specifics of each patient's medical records." The ALJ dismissed the unadopted rule challenge, explaining that "where application of agency policy is subject to the discretion of agency personnel, the policy is not a rule. . . . The medical standards at issue in this case are not self-executing and require the exercise of discretion in their application." The ALJ noted that "the medical standards of practice must be applied on a case-by-case basis to determine whether the services provided were medically necessary, and provided both an appropriate level of care and standard of care 'customarily furnished by the physician's peers and to recognized health care standards" as required by section 409.9131(2)(d), Florida Statutes.

Bid Protests

CCA of Tennessee, LLC v. Dep't of Mgmt. Servs., DOAH Case No. 13-880BID, DMS No. 13-0079 (Final Order Aug. 16, 2013).

FACTS: DOAH issued a Recommended Order on July 12, 2013, calling for the Department of Management Services ("DMS") to withdraw the Invitation to Negotiate for the operation and management of the Bay, Graceville, and Moore Haven Correctional Facilities. The ALJ did so after finding the Department of Corrections ("DOC") made several errors in calculating the costs of operating correctional facilities substantially similar to the aforementioned facilities. (For more detail, see the DOAH Case Notes summary in the September 2013 Newsletter.)

OUTCOME: DMS's Final Order rejected the ALJ's recommendation to withdraw the ITN. Instead, DMS announced it would request recalculated costs from DOC and then amend the ITN accordingly. As stated in the Final Order, "[t]his agency has the power to amend the ITN through formally noticed amendments issued by the Procurement Officer." As justification for amending rather than withdrawing the ITN, DMS explained "[t]he ITN has been pending since October 10, 2012. The contracts that will result from the ITN provide services for private correctional facilities and will replace the current contracts that have now reached the expiration of their initial term. The resulting contracts are predicted to include a lower per diem than the current contracts, and therefore a greater cost-savings to the state. Based on the circumstances and the agency's authority in law described above, the undersigned finds it more reasonable to amend the ITN and continue with the current procurement process." No appeal was filed.

What is the Animal Law Committee?

The Animal Law Committee (ALC) monitors and informs the members of the Florida Bar and the public of significant developments in the area of animal law. We meet at least three times a year to share new information regarding this practice area.

The ALC is in the midst of a drive to increase awareness and encourage administrative lawyers with an interest in animal law to participate in ALC activities. The ALC is also pursuing section status as a critical goal. Section status will also allow us to engage in a number of activities that we are currently prohibited or restricted from pursuing, including but not limited to increasing publications and drafting and supporting legislation. It will allow us to make a far greater impact in animal law. We request that attorneys with an interest in this legal area email Gil Panzer at gil@gilpanzerlaw.com.

Agency Snapshot

Department of Financial Services

by Anthony B. Miller

Recommended by the Constitutional Revision Commission, and passed into law by voters in 1998, the Florida Legislature carried out an amendment to the state's constitution by merging the Department of Insurance, Treasury, State Fire Marshal, and the Department of Banking and Finance into the Department of Financial Services (DFS), effective January 2003. The result is an entity with approximately 2,602 employees. Section 20.121, Florida Statutes, sets forth the organizational structure and statutory authority for DFS, which can be considered three agencies in one.

Also effective January 2003, the Financial Services Commission (Commission) was created. Members of the Commission are the Governor, the Chief Financial Officer, the Attorney General, and the Commissioner of Agriculture. The purpose of the Commission is to safeguard the public by regulating the banking, securities, and insurance industries. The Commission appoints the officials who oversee the Office of Financial Regulation (OFR) and the Office of Insurance Regulation (OIR). These two offices are administratively housed in the Department of Financial Services, but report directly to the Commission. The Commission is the agency head for purposes of rulemaking by the two offices.

Jeff Atwater is the elected Chief Financial Officer (CFO) and serves as the DFS agency head, the State Treasurer, and the State Fire Marshal. The Commissioner of OIR is Kevin McCarty. The Commissioner of OFR is Drew J. Breakspear. Each Commissioner is the agency head for purposes of final agency action under chapter 120, Florida Statutes, for all areas within the regulatory authority delegated to that Commissioner's office.

DFS

DFS oversees the state's accounting and auditing functions and unclaimed property, monitors the investment of state funds and manages the deferred compensation program and risk management program for the state. Insurance consumer service is handled by the DFS, and the office is responsible for the licensing and oversight of insurance agents and agencies, as well as funeral homes and cemeteries. Insurance fraud investigation also is overseen by the DFS, as well as ensuring businesses have workers' compensation coverage in place for employees and helping injured workers with benefit payments and re-employment. DFS also provides various fire-related services throughout the state, from assisting local fire departments by conducting arson investigations to training citizens at one of the fire-training colleges in the state. DFS has 62 attorneys on staff.

DFS Agency Clerk

All notices of appeal of final orders or requests for administrative hearings should be sent to the Agency Clerk, Julie Jones at the following address:

Agency Clerk
Florida Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-0390.

DFS Public Records Requests

By email, regular mail, telephone, or fax, to the following:

The Public Records Unit
Florida Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-0307
Telephone: 850-413-3149
Fax: 850-488-3429
PublicRecordsRequest@myfloridacfo.com

DFS General Counsel

P.K. Jameson is the general counsel and deputy chief financial officer for CFO Jeff Atwater. She has experience in all three branches of government, in addition to private practice experience. She was appointed as the general counsel in January 2011,

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AGENCY SNAPSHOT
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and oversees the division of legal services, the division of risk management, and the division of rehabilitation and liquidation. Prior to coming to DFS, she was the senior policy advisor for Senate President Jeff Atwater. She previously served as the chief of staff for the House of Representatives, and has served as staff director for a number of legislative committees in both the House and Senate, including: judiciary; real property and probate; council on procedures and redistricting; and children, families, and elder affairs. Ms. Jameson has also served as the general counsel for the Agency for Persons with Disabilities, where she was also responsible for legislative affairs. Ms. Jameson was the policy chief for health and human services in the Governor's Office of Policy & Budget. She also has private practice experience in the areas of insurance defense, workers' compensation, contracts, and social security. She holds a Bachelor of Science degree with honors in Accounting/Business Administration. She received her law degree with honors, from Florida State University College of Law.

OIR

OIR is responsible for all activities concerning insurers and other risk bearing entities, including licensing, rates, policy forms, market conduct, claims, issuance of certificates of authority, solvency, viatical settlements, premium financing, and administrative supervision. OIR has 21 attorneys on staff.

OIR Agency Clerk

All notices of appeal of agency final orders or requests for administrative hearings should be sent to the OIR Agency Clerk, Belinda Miller at the following address:

Agency Clerk
Legal Services Office
Florida Office of Insurance Regulation
200 East Gaines Street, Room 612L
Tallassee, Florida 32399-4206

OIR Public Records Requests

By e-mail, regular mail, or telephone to:

Public Records Office
Office of Insurance Regulation
200 East Gaines Street
Tallahassee, Florida 32399-4206
Telephone: (850) 413-4223
PublicRecords@floir.com

OIR General Counsel

Belinda Miller is the OIR general counsel. She has more than 20 years of insurance regulatory and receivership experience. As the general counsel for OIR, she directs the legal services unit and oversees the market investigations unit. In addition, Ms. Miller provides legal counsel to the Insurance Commissioner and the Financial Services Commission regarding matters related to the regulation of insurers. She was appointed to this role in February 2011. Ms. Miller graduated in 1982 from Emory University where she earned a Bachelor of Arts degree with a major in International Studies. She earned her law degree from Florida State University and has been a member of the Florida Bar since 1986. She served as an attorney and then as director of the division of rehabilitation and liquidation, accumulating over 10 years of receivership experience. Ms. Miller also served as director for the division of insurer services and division of legal services for the Department of Insurance. She has worked for a private sector law firm as an attorney representing receivers and regulators, and has served more recently as OIR's deputy commissioner for property & casualty insurance.

OFR

OFR is responsible for the regulation of a wide range of financial enterprises and individuals, such as state-chartered banks, credit unions, mortgage loan originators, securities industry participants, consumer finance companies, money transmitters, foreign currency exchangers and payday lenders. OFR has 27 attorneys on staff.

OFR Agency Clerk

The address for the OFR Agency Clerk, Gigi Guthrie, is as follows:

Agency Clerk
Office of General Counsel

Mailing address:
Post Office Box 8050
Tallahassee, Florida 32314-8050

Physical Address:
The Fletcher Building, Suite 118
101 East Gaines St.
Tallahassee, Florida 32399-0379

OFR Public Records Requests

To request public records or ask a question concerning the Agency's records, you may contact the public records coordinator by e-mail, regular mail, or telephone:

Public Records Coordinator
The Fletcher Building, Ste. 526
200 East Gaines Street
Tallahassee, Florida 32399-0379
Telephone: (850) 410-9784
Brian.Hermeling@flofr.com

OFR General Counsel

Colin Roopnarine is the OFR general counsel. He is board certified in state and federal government and administrative practice. Mr. Roopnarine worked as an assistant general counsel at the Department of Community Affairs in the areas of administrative law, land-use law and emergency management. Additionally, he litigated rule challenges and large land-use cases before the Division of Administrative Hearings (DOAH). Mr. Roopnarine was subsequently hired by the Department of Financial Services where he litigated workers' compensation cases both at DOAH and in circuit court. He was subsequently promoted to managing attorney of the workers' compensation legal section. In 2009, Mr. Roopnarine became a hearing officer at the Public Employees Relations Commission where he presided over cases and formal administrative hearings in labor and employment law. He has extensive appellate experience in briefing and arguing appellate cases. In 2011, he was hired as the deputy general counsel of professions at the Department of Business and Professional Regulation, wherein he was also selected to lead DBPR's litigation team as its chief.

Law School Liaison

Update from the Florida State University College of Law

by David Markell, Associate Dean for Environmental Programs and Steven M. Goldstein Professor

The Florida State University College of Law is pleased to provide this update for the Administrative Law Section Newsletter. The Environmental Law Program had a very active schedule for the Fall 2013 semester.

Fall 2013 Events

Environmental Law Distinguished Lecture: The Obama Administration, Climate Change and the Clean Air Act (November 6)

Anne Carlson, the Shirley Shapiro Professor of Environmental Law and Faculty Co-Director, Emmett Center on Climate Change and the Environment, UCLA Law School, gave the Fall 2013 Distinguished Environmental Lecture on the role of the Clean Air Act in addressing climate change challenges.

Environmental Forum: Adaptation Challenges and A Review of Ongoing Initiatives (November 14)

The College of Law's Fall 2013 Environmental Forum focused on adaptation challenges. Featured panelists included: Heidi Stiller, Human Dimensions Specialist, National Oceanic and Atmospheric Administration, Julie A. Dennis, Coordinator, Community Resiliency: Planning for Adaptive Initiative, Florida Department of Economic Opportunity, Janet Bowman, Director, Legislative Policy & Strategies, Florida Chapter of The Nature Conservancy, and Will Butler, Assistant Professor of Environmental Planning, Florida State University Department of Urban and Regional Planning. Professor David Markell moderated the Forum.

Environmental Enrichment Series

The Fall Environmental Enrichment Series for our Environmental Certificate and Environmental LL.M. students included leading academics, policy makers and attorneys. Guest speakers included: Angela Morrison, Hopping Green & Sams (August 27); Meredith Jagger, Environmental Epidemiologist, Florida Department of Health and Manager of the Department's Building Resilience Against Climate Effects (BRACE) Program (September 19); Professor Amy Stein, Tulane University Law School (October 9); Noah D. Valenstein, Executive Office of the Governor of Florida (October 24); and Anne Longman, Lewis, Longman & Walker (November 13).

Environmental Externship Luncheon (September 19)

The College of Law's Clinical Externship Program and Environmental Faculty hosted a luncheon to enable students to learn about externship opportunities for the spring and summer semesters. Lawyers from several government agencies and non-profit groups participated.

Recent Externship Placements

Leslie Ann Ames (3L) and Jacquelyn Thomas (3L), Florida Department of Environmental Protection (Tallahassee).

Lauren Brothers (3L), Environmental Protection Agency, Region 2, (New York City).

Andrew Missel (3L), Earthjustice (Seattle, WA).

Sarah Spacht (3L), U.S. Attorney's Office (San Diego, CA).

Austin Hensel (3L) and Kaitlin Monaghan (3L), Florida Division of Administrative Hearings (Tallahassee).

We hope you will join us for one or more of our programs. For more information, please consult our web site at: http://www.law.fsu.edu, or please feel free to contact Professor David Markell, at dmarkell@law.fsu.edu.

Section Budget/Financial Operations

	2012-2013 Budget	2012-2013 Actual	2013-2014 Budget
REVENUE			
Dues	27,500	25,648	26,875
Affiliate Dues	400	300	400
Dues Retained by Bar	(19,570)	(19,043)	(19,133)
Administrative Fee Adjustment	0	0	0
CLE Courses	5,000	(5,196)	5,000
Section Differential	3,000	3,567	2,500
Section Service Programs	2,000	2,305	2,000
Investment Allocation	6,402	9,614	6,511
Miscellaneous	0	0	0
TOTAL REVENUE	**24,732**	**17,195**	**24,153**
EXPENSE			
CreditCard Fees	32	28	35
Staff Travel	1,364	526	1,477
Internet Charges	420	445	420
Postage	100	2	75
Printing	100	33	75
Officer Expense	500	0	500
Newsletter	6,000	5,006	6,500
Membership	500	0	500
Supplies	50	0	50
Photocopying	75	36	60
Officer Travel	1,500	620	1,000
Meeting Travel	3,000	500	1,000
CLE Speaker Expense	100	0	100
Committees	500	13	500
Council Meetings	600	136	300
Bar Annual Meeting	2,200	1,892	2,200
Section Service Programs	500	231	750
Retreat	3,000	650	3,000
Public Utilities	500	0	500
Awards	625	649	700
Writing Contest/Law School Liaison	3,000	275	3,000
Website	1,500	1,187	1,500
Legislative Consultant	5,000	5,000	5,000
Council of Sections	300	0	300
Misc.	100	0	100
Operating Reserve	3,442	0	3,265
TFB Support Services	2,853	3,407	3,007
TOTAL EXPENSE	**37,861**	**20,636**	**35,914**
BEGINNING FUND BALANCE	**213,404**	**224,659**	**217,049**
PLUS REVENUE	**24,732**	**17,195**	**24,153**
LESS EXPENSE	**(37,861)**	**(20,636)**	**(35,914)**
ENDING FUND BALANCE	**200,275**	**221,218**	**205,288**

SECTION REIMBURSEMENT POLICIES:

General: All travel and office expense payments are in accordance with Standing Board Policy 5.61. Travel expenses for other than members of Bar staff may be made if in accordance with SBP 5.61(e)(5)(a)-(i) or 5.61(e)(6) which is available from Bar headquarters upon request.

THE FLORIDA BAR CLE

The Florida Bar Continuing Legal Education Committee and the Administrative Law Section present

Administrative Law Audio Webcast Series: Ethics for Constitutional Officers

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Dates: December 4, 2013 • 12:00 noon - 1:30 p.m. EST
January 8, 2014 and February 5, 2014 • 12:00 noon - 1:15 p.m. EST

Course No. 1644R

The Florida Bar Administrative Law Section is pleased to announce its 2013-2014 Administrative Law Audio Webcast Series: Ethics for Constitutional Officers (audio and slides over the internet). You may register for the live audio webcasts individually or pay a reduced price for all three live audio webcasts. In addition, you may purchase the audio CD which includes all three webcasts.

December 4, 2013

12:00 noon – 1:30 p.m.
Open Meetings and Public Records (1645R)
Patricia R. Gleason, Florida Attorney General's Office

January 8, 2014

12:00 noon – 1:15 p.m.
Gift Laws, Financial Disclosure Issues, and Misuse of Office (1646R)
Herbert W. A. Thiele, Leon County Attorney's Office

February 5, 2014

12:00 noon – 1:15 p.m.
Conflicts of Interest and Post-Employment/ Officeholding Restrictions (1647R)
C. Christopher Anderson, Florida Commission on Ethics

CLE CREDITS

CLER PROGRAM

(For the Series)
(Max. Credit: 5.0 hours)

General: 5.0 hours
Ethics: 5.0 hours

CERTIFICATION PROGRAM

(For the Series)
(Max. Credit: 5.0 hours)

City, County & Local Government: 5.0 hours
State & Federal Gov't & Administrative Practice: 5.0 hours

Seminar credit may be applied to satisfy CLER / Certification requirements in the amounts specified above, not to exceed the maximum credit. See the CLE link at www.floridabar.org for more information.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar News or available in your CLE record on-line) you will be sent a Reporting Affidavit if you have not completed your required hours (must be returned by your CLER reporting date).

AUDIO WEBCAST

As an audio webcast attendee, you will listen to the program over the Internet. Registrants will receive audio webcast connection instructions 2 days prior to the scheduled course date via e-mail. If you do not have an e-mail address, contact the Order Entry Department at 850-561-5831, 2 days prior to the event for the instructions.

REFUND POLICY: A $25 service fee applies to all requests for refunds. Requests must be in writing and postmarked no later than two business days following the live course presentation or receipt of product. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid.

TO REGISTER	ON-LINE: www.floridabar.org/CLE	MAIL: Completed form with check	FAX: Completed form to 850/561-9413

TO REGISTER OR ORDER AUDIO CD BY MAIL, SEND THIS FORM TO: The Florida Bar, Order Entry Department, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831.

Name _____ Florida Bar # _____

Address _____ Phone: ( ) _____

City/State/Zip _____ E-mail* _____

E-mail address required to transmit electronic course materials and is only used for this order. **JMW: Course No. 1644R**

ELECTRONIC COURSE MATERIAL NOTICE: Florida Bar CLE Courses feature electronic course materials for all live presentations, live webcasts, webinars, teleseminars, audio CDs and video DVDs. This searchable electronic material can be downloaded and printed and is available via e-mail several days in advance of the live presentation or thereafter for purchased products. Effective July 1, 2010.

REGISTRATION FEE (CHECK ALL THAT APPLY):

Open Meetings and Public Records – December 4, 2013 (1645R)
- ❑ Member of Administrative Law Section: $50
- ❑ Non-section member: $75

Gift Laws, Financial Disclosure Issues, and Misuse of Office – January 8, 2014 (1646R)
- ❑ Member of Administrative Law Section: $50
- ❑ Non-section member: $75

Conflicts of Interest and Post-Employment/ Officeholding Restrictions – February 5, 2014 (1647R)
- ❑ Member of Administrative Law Section: $50
- ❑ Non-section member: $75

Reduced Rate: Entire Audio Webinar Series (1644R)
- ❑ Member of Administrative Law Section: $125
- ❑ Non-section member: $150

METHOD OF PAYMENT (CHECK ONE):

- ❑ Check enclosed made payable to The Florida Bar
- ❑ Credit Card (Fax to 850/561-9413.)
  ☐ MASTERCARD ☐ VISA ☐ DISCOVER ☐ AMEX Exp. Date: ____/____ (MO./YR.)

Signature: _____

Name on Card: _____

Billing Zip Code: _____

Card No. _____

❑ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

❑ Enclosed is my separate check in the amount of $25 to join the Administrative Law Section. Membership expires June 30, 2014.

AUDIO CD

Private recording of this program is not permitted. **Delivery time is 4 to 6 weeks after 2/5/14. TO ORDER AUDIO CD,** fill out the order form above, including a street address for delivery. **Please add sales tax.**

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If tax exempt, include documentation with the order form.

❑ **AUDIO CD** (includes electronic course material)
$125 plus tax (section member)
$150 plus tax (non-section member)

COURSE No. 1644C TOTAL $ _____

Related Florida Bar Publications can be found at http://www.lexisnexis.com/flabar/

SECRET CHAIR
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Next, we know that every individual who is or ever has been on the executive council, or ever has attended an Administrative Law Section CLE seminar or reception, or ever has been involved in any Section activities has a specific reason, or many, for paying tribute to Jackie as she heads off for blue-greener pastures. Some of those individuals were able and inclined to offer their two cents in writing. Their personal tributes are shared in the remainder of this piece.

First, from past chairs:

F. Scott Boyd (2012-13) (also current executive council member as immediate past chair)

I was chair of the Section when I first heard through the rumor mill that Jackie was going to retire. My first reaction was near panic. Selfishly, when I realized that she would not be leaving until the end of 2013, and so beyond my tenure, that panic receded a bit to become mere garden-variety dread. That shows just how much I depended on her, as we all do.

You can't attend an executive council meeting without seeing the key role that Jackie plays. Not that she dominates those meetings - far from it - she only speaks once or twice. But when she does, the room goes quiet: everyone wants to hear what Jackie thinks. She always gently puts the council back on the right track, and as far as I can recall, she's never steered us wrong.

Her expertise runs deep, too. Shortly after I was elected as treasurer I made an appointment to sit down with Jackie about the Section budget. I used to be a bookkeeper and I had several questions about the reports. She not only knew the answer to every one, she filled in lots of background on the big Bar's system and how everything fit together.

It is Jackie's human side though, not just her expertise, that makes her such a gem. She has worked with countless chairs, officers, and members of the Administrative Law Section over the years, and you cannot find anyone who will say a bad word about her. Behind all of her efficiency is a true sense of dedication—and even love—toward our Section, and to the people that make it up, and that shows through.

Of course, Jackie has never been one to dwell on the past, she is just too darn busy. She is always on to the next conference, the next budget, the next council meeting. And now, she is on to an entirely new chapter in her life, full of sailing and family time. Fair winds and following seas, Jackie. We will all miss you dearly.

Allen R. Grossman (2011-12)

Although I do not have a specific story, I can tell you that in my many years of involvement with the Administrative Law Section and most particularly during my term as chair of the Section, Jackie provided such an outstanding level of service and assistance that in spite of her relatively slight stature, she managed to stand head and shoulders above her peers at The Florida Bar. In my thirty-plus years of involvement in sections and committees of The Florida Bar, I would be hard pressed to identify another staff person better at his or her job, or more willing to provide assistance. Jackie has provided very sage guidance when necessary in regard to the operations of The Florida Bar and the most appropriate and expeditious manner in which to navigate the processes and procedures we volunteers are required to follow. We in the Administrative Law Section owe her an enormous debt of gratitude for her loyal and dedicated service to the Section. Jackie deserves a lot of the credit for most, if not all, of the successful services, events, and programs the Section has provided over the years of her service. I will most certainly miss the opportunity to work with Jackie and to benefit from Jackie's loyal and dedicated assistance. More importantly, I will miss her friendship and her knowing smile. I wish her the best of life in her well-earned retirement. She will be missed.

Cathy Sellers (2010-11)

Jackie always made me look better than I was. When I was treasurer of the ALS and did not understand anything about the specifics of our finances but was determined to be ready for any arcane question Bill Williams or Clark Jennings might lob my way, Jackie spent time with me painstakingly explaining each item and the relationships between the items. I never had to just say "we have money," thanks to Jackie. She also always kept me on schedule and attending to things as chair. I was so grateful for her keeping me out of the ditch and in the middle of the road.

Elizabeth McArthur (2008-09)

While I had always seen Jackie subtly giving the chair clues and prompts in our executive council meetings, I came to appreciate just how capable Jackie was during my year as chair. I do not know Robert or his Rules of Order, and I aspire never to learn those rules. However, I needed to know how to run a meeting – or at least how to accept those clues and prompts. What do I do now, Jackie? You need a motion. And a second. Now what? Say, all in favor . . . oh wait, hold up, we just lost our quorum, wait until we get one more person back in the room. . . . No, you don't need a motion for that – you can just do it. I can? Okay, I can, and did. . . . Someone wants to revise the minutes, how do we do that? . . . Okay, we've covered everything, do we just leave? Oh, motion to adjourn? Second again? . . . Got it.

Jackie was my advisor on procedure and protocol, not only at meetings, but behind the scenes. I would get letters asking for Section participation or financial contributions, or requests for appearances, and I would immediately turn to Jackie: what do I do, Jackie? Have we gotten this kind of request before? Do I need to call a special meeting for a vote? Jackie would always lay out the options, drawing on her years of experience with the Section and her knowledge of the Bar: Yes, we get this request every year; in the past, this is what was done; you could circulate it to the council members to gauge the interest, or you could just respond. Or sometimes: Yes, it would be a good idea for you to go and make a presentation, you should think about accepting. Thanks to Jackie's guidance, I was

able to muddle through the process of being chair, while focusing on what was interesting and important to me: the policy issues of the day affecting Florida administrative practice.

Andy Bertron (2007-08) (also current member of executive council – he's baaaaack!)

Jackie, you saved me many times, but I am most thankful for the time I chaired the Pat Dore Conference and learned with one hour to go that my ethics speaker was a no-show. Fifty-nine minutes later you had Elizabeth Tarbert standing beside the podium ready to go! Thanks Jackie!!!

Booter Imhof (2006-07)

My fondest memories of Jackie are at The Florida Bar conventions and the Section receptions. In addition to ALL the great things Jackie did for her Sections, you could ALWAYS count on her receptions having the best food and drink. The receptions were indicative of how Jackie did everything – FIRST CLASS! To say we are going to miss her expertise, professionalism, organizational prowess, and her pleasant demeanor is an understatement. Bon voyage and great travels in your retirement, you will be missed greatly. P.S. – Go Gators! [Editor's note: harrumph! For you, Jackie, Booter's P.S. made the cut – THAT should tell you a lot!]

Robert Downie (2004-05)

My best way of describing Jackie Werndli is that it was hard not to take her for granted because she was so good at what she did. When Jackie said something was done, or would be done, it was, and it was done right. Jackie not only put all the details together for every single thing the Section did, she also knew the personalities of everyone involved, and gave people what they needed in terms of support, guidance, or even prodding. She made things as simple as possible for me as chair - all the headaches I had were self-imposed! I consider myself fortunate to know Jackie, lucky to have worked with her, and I know she's the true MVP of the Section. The rest of us are easily, and often, replaced, but she will indeed be a tough act to follow.

Li Nelson (2002-03)

What You Take for Granted…..

When people do a good job, they seldom get mentioned. When they do a great job, they make us smile, but we still take them for granted. Jackie always makes me smile. Recently, I have learned how much I have taken her for granted.

I have worked on continuing legal education projects with Jackie since approximately 1996. I get to do the fun part: create an idea or theme, work up a program outline, and (help) get speakers. From then on, I leave it to Jackie. She lines up the location, the fees, the materials, the AV schedule, and where necessary, the meals. She does all the hard work and the nagging, and I get to stand up and take all the credit.

I recently worked on a project where there was no Jackie. The "thinkers" had to do everything: stuff the conference bags, organize the meal selections, confirm all of the speakers, make sure their AV and computer needs were met, check the bills and work with the venue to make sure everything was done. In short, we had to do everything Jackie takes care of for the Administrative Law Section, and it was exhausting. Yet, she makes it seem effortless!

I daresay that, no matter how diligent the Bar is in finding a person to work with the Section, they will never truly replace Jackie Werndli. We may come to love and respect her successor, but he or she will never take Jackie's place in our hearts. The next year will teach us just how much we have taken her for granted. I hope we do not wait that long to let her know just how much she makes us smile.

Bob Rhodes (1997-98)

My term as chair coincided with starting a new position with a large real estate company. I quickly realized I would have reduced time for Bar activity and questioned whether this would benefit the Section. With the support and encouragement of Bill Williams and Linda Rigot, I served as chair and thanks to Jackie's very effective and efficient "signal calling" we completed a year in which we expanded membership and broadened the membership of the executive council.

Thank you Jackie and warm wishes as you and your husband begin a new chapter.

Linda Rigot (1995-96)

Jackie has helped the Section grow in size and expand its offerings to its members. She has worked with us through Bar policies and conflicting views. She guided the executive council of the Section through the almost once-a-week meetings it had for several months as the APA was being substantially revised and re-organized by the executive council of the Section, Governor Lawton Chiles' APA Review Commission, and the 1996 Legislature. She worked with the executive council as its drafting committee wrote the Uniform Rules of Procedure on behalf of the Administration Commission. She brought the Section into the digital age by implementing the executive council's desire to have a user-friendly website. In short, she has "been there and seen that" as the Florida APA has continued to become more and more important to the citizens of the State of Florida.

She has worked hard and efficiently on behalf of the executive council of the Section. She has been cheerful and courteous in all things asked of her by the council and has patiently "trained" each year the Section's new officers and new committee chairs. She has been an outstanding representative of The Florida Bar and has demonstrated competence in every aspect of her assignment as program administrator.

After twenty years of work on behalf of The Florida Bar and the Administrative Law Section, she and her beloved Phil are about to sail off into the sunset. We sincerely wish her many years of enjoyment in her well-earned retirement. But we will miss her greatly. Bon voyage to the Section's good friend.

Next, from other executive council current members and officers:

Amy Schrader, chair

Jackie has truly done so much for our Section. Many members will

continued...

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SECRET CHAIR
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never realize that so much of what we have accomplished is attributable to Jackie's hard work and dedication. She has always been there to give newer members the history of the Section and to keep the long-time members in-line. I count myself extremely lucky to have "learned the ropes" from Jackie and wish her all the best as she sets sail on a new adventure.

Richard Shoop, secretary

As with many job titles, Jackie's title of "program administrator" belies her true value to the Section. Without her, our executive council meetings and retreats would not have run smoothly, our Section's finances would not be in order, and our CLE programs would not have been successful. She is the quintessential worker, juggling duties that should be distributed among several people while retaining a calm, assuring presence. I congratulate her on all her accomplishments in service to our Section, and wish her well as she begins this new chapter in her life.

Jowanna N. Oates, treasurer

Jackie, I have not known you as long as some others, but I thank you for the kindness and warmth that you have shown me from my first day attending council meetings. You have been a source of knowledge and a helping hand when needed. I am sure that I speak for everyone when I say I have mixed feelings about your retirement. Although we all want to see you happy, we selfishly want to keep you here with us.

Jackie, make sure you work as hard at relaxing as you have worked for the Section. As you sail into the next phase of life, I wish you "fair winds and a following sea," my friend.

Gar Chisenhall, member

From a professional standpoint, I believe Jackie's greatest attribute has been her quiet efficiency. She is a master at taking care of the proverbial "little things." Council members and the Section as a whole could take so many things for granted because Jackie always made sure everything ran smoothly. Of course, the Administrative Law Section would not be where it is today unless Jackie had taken care of the "big things" as well. Yet, she always made that look easy and did so without drawing any attention to herself.

From a personal standpoint, Jackie is one of the nicest people I have encountered in the legal profession. I can attest that Jackie was always available to patiently answer a newbie council member's questions, even though I'm sure she had heard those same questions several dozen times over the years.

Section chairs and council members come and go, but the Administrative Law Section owes a great deal of its success to the invaluable work Jackie did behind the scenes. Now that she is retiring, all of us should say "thank you" one more time for all of her outstanding work. While she will be greatly missed, I sincerely hope Jackie enjoys her much-deserved retirement!

And finally, this:

Tribute from No One or Someone or Everyone

Jackie, I know I never said this, know I should have said this, but thank you. Thank you for saving me, making me look good, jumping in to do the work I said I would do, but never did; thank you for covering for me, letting me take credit for your work. And I know I never said this, know I should have said this, but I'm sorry. I'm sorry for sitting by silently while you took the blame for not getting something done sooner or better or at all, when the fault was really mine. I knew it, you knew it – maybe everyone knew it – but you never said a word, just did the job, my job, probably much better than I could've done, no, definitely better than I could've done. You've been more than the secret chair; at times, you've been the whole council, or at least the part of the council that I was supposed to be. So thank you, really, thank you. And seriously, who is going to cover for me now?