ADMINISTRATIVE LAW SECTION NEWSLETTER

Vol. XXXIII, No. 3 Amy W. Schrader and Elizabeth W. McArthur, Co-Editors April 2012

The 2012 Amendments to the APA: The Legislature Responds to *Whiley*--and More

by Lawrence E. Sellers, Jr.

During the 2012 Regular Session, the Florida Legislature enacted several measures amending the Florida Administrative Procedure Act (APA). Among other things, these include a legislative response to the Florida Supreme Court's decision in *Whiley v. Scott*; provision for the nullification, repeal and summary removal of rules; and making the online versions of the *Florida Administrative Code* and the *Florida Administrative Register* the official versions. Here's a brief summary of some of the bills that passed. Look for a more detailed discussion of one or more of these in the next issue of this Newsletter.

Administrative Authority. CS/HB 7055 is the legislative response to the Florida Supreme Court's decision in *Whiley v. Scott* that Governor Rick Scott "impermissibly suspended agency rulemaking to the extent that Executive Orders 11-01 and 11-72 include a requirement that the Office of Fiscal Accountability and Regulatory Reform (OFARR) must first permit an agency to engage in the rulemaking which has been delegated by the Florida Legislature."[1] The bill affirms that Executive Orders 11-01 and 11-72[2] are consistent with state law,

See "2012 Amendments" page 10

Practice Tips for Private Attorneys New to Administrative Law

by Garnett Chisenhall

In the last edition of the Administrative Law Section's Newsletter, I presented an article explaining what government attorneys can (and cannot) do with unfavorable recommended orders. While a great deal of the information in that article was also relevant for private attorneys who practice before the Division of Administrative Hearings ("DOAH"), I thought it would be appropriate to submit a follow-up article more geared to the perspective of private attorneys.

In the course of representing state agencies over the last ten years, I have worked with many outstanding private attorneys who know the Administrative Procedure Act backward and forward. I have also worked with private attorneys who had little or no previous experience with administrative law. Sometimes, these attorneys became involved in an administrative

See "Practice Tips," next page

INSIDE:

PRACTICE TIPS
from page 1

law case because a client had an issue with an agency and did not want to retain an attorney with whom they had no previous dealings. Those attorneys were very knowledgeable in their customary practice areas but often failed to appreciate the unique aspects of administrative law. While an attorney new to administrative practice will probably discover that hearsay is admissible in an administrative proceeding upon making his or her first hearsay objection at DOAH, other unique aspects of administrative law are not so easily discoverable. *See* Fla. Admin. Code R. 28-106.213(3)(providing "[h]earsay evidence, whether received in evidence over objection or not, may be used to supplement or explain other evidence, but shall not be sufficient in itself to support a finding unless the evidence falls within an exception to the hearsay rule as found in Chapter 90, F.S."). As a result, attorneys who do not take the time to become familiar with the unique aspects of this field run the risk of committing significant errors that will undermine their cases and their clients' best interests. For private attorneys new to administrative law, this article will explain some basic (but extremely important) steps that can be taken to avoid those errors.

GETTING STARTED

The first task in administrative litigation is to ascertain what portion of the Administrative Procedure Act governs your case. For instance, if you are challenging an existing or unadopted agency rule, then your case will be governed by the procedures set forth in section 120.56 of the Florida Statutes. On the other hand, if you are challenging proposed agency action, such as an application denial or licensure discipline, then your case will be governed by the procedures set forth in sections 120.569 and 120.57 of the Florida Statutes.

In any cases under section 120.57, you will file a petition or a request for hearing with the agency in question, and the agency will refer the matter to DOAH if there are any disputed issues of material fact which must be resolved by an impartial fact-finder. *See* §120.569(2)(a), Fla. Stat. (2011) (providing in pertinent part that "a petition or request for a hearing under this section shall be filed with the agency. If the agency requests an administrative law judge from the division, it shall so notify the division within 15 days after receipt of the petition or request."); §120.57(1)(a), Fla. Stat. (2011)(providing in pertinent part that "an administrative law judge assigned by the division shall conduct all hearings under this subsection . . .").[1] If the case proceeds to a formal hearing before an administrative law judge, then DOAH will issue a recommended order that the agency may (or may not) adopt as its final order. *See* §120.57(1)(k), Fla. Stat. (2011)(providing that "[t]he presiding officer shall complete and submit to the agency and all parties a recommended order consisting of findings of fact, conclusions of law, and recommended disposition or penalty, if applicable, and any other information required by law to be contained in the final order.").

In contrast to cases under section 120.57(1), in which DOAH issues a recommended order, DOAH has final order authority in rule challenges conducted pursuant to section 120.56. The agency in question acts merely as a party litigant and will not be issuing the final order. Also, petitions under section 120.56 are filed directly with DOAH rather than with the agency. *See* §120.56(1)(c), Fla. Stat. (2011) (mandating that "[t]he petition shall be filed with the division which shall, immediately upon filing, forward copies to the agency whose rule is challenged . . .").

Administrative proceedings are also governed by the rules set forth in Chapter 28-106 of the Florida Administrative Code. Before filing a petition or request for hearing, be sure that your pleading satisfies the requirements set forth in Rules 28-106.201, 28-106.2015, and 28-106.301.

Practitioners new to DOAH will be comforted by the fact that other provisions within Chapter 28-106 cause DOAH proceedings to be very much like civil litigation. *See* Fla. Admin. Code R. 28-106.206 (providing that "parties may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure."); Fla. Admin. Code R. 28-106.204(1)(mandating that "[a]ll requests for relief shall be by motion."); Fla. Admin. Code R. 28-106.213 (providing that "[t]he rules of privilege apply to the same extent as in civil actions under Florida law.").

Regardless of whether you are at DOAH under section 120.56 or 120.57, all pleadings must be filed

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

by electronic means through DOAH's e-filing system. For more information on this very user-friendly system, please visit www.doah.state.fl.us.

ALWAYS FILE EXCEPTIONS TO AN UNFAVORABLE RECOMMENDED ORDER

As discussed above, DOAH has final order authority in some cases, and those final orders can be appealed directly to a district court of appeal. *See generally* §120.68, Fla. Stat. (2011) (setting forth the parameters governing judicial review of agency action). However, in the majority of cases, DOAH acts as a finder-of-fact and issues a recommended order that an agency may adopt as its final order. In those cases, exceptions are the means through which a party notifies the agency of errors allegedly committed by an administrative law judge. If the agency considers an exception to be well-taken, then it will not adopt the portion of the recommended order to which the exception was directed. However, an agency's ability to reject any portion of a recommended order is very limited. *See* §120.57(1)(*l*), Fla. Stat. (2011).

The very end of every recommended order from DOAH has a paragraph entitled "NOTICE OF RIGHT TO SUBMIT EXCEPTIONS." The paragraph states that "[a]ll parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case." *See also* §120.57(1)(k), Fla. Stat. (2011) (mandating that "[t]he agency shall allow each party 15 days in which to submit written exceptions to the recommended order."). Over the course of my career defending appeals for state agencies, I have won many cases simply because attorneys new to administrative practice often fail to appreciate the significance of this paragraph. As explained below, it is vitally important that an attorney not overlook this unique aspect of administrative litigation.

While the paragraph at the end of every recommended order states that "[a]ll parties have **the right** to submit written exceptions," exceptions are absolutely essential if one has any intention of appealing a final order adopting an unfavorable recommended order. Just like in criminal litigation and other types of civil litigation, errors supposedly committed by an administrative law judge must be preserved for appeal; and it is well-established that exceptions are the means by which a party preserves arguments for appellate review. *See Rosenzweig v. Dep't of Transp.,* 979 So. 2d 1050, 1056 (Fla. 1st DCA 2008) (noting that "[i]t is well established that a claim of error, even in the administrative law context, cannot be raised for the first time on appeal."); *Couch v. Comm'n on Ethics,* 617 So. 2d 1119, 1124 (Fla. 5th DCA 1993) (holding that a party "cannot argue on appeal matters which were not properly excepted to or challenged before the Commission and thus were not preserved for appellate review."); *Worster, D.D.S. v. Dep't of Health*, 767 So. 2d 1239, 1240 (Fla. 1st DCA 2000)(holding that "[i]n an appeal from an administrative proceeding, a party cannot argue on appeal matters which were not properly excepted to or challenged before the agency."); *Fla. Dep't of Corr. v. Bradley*, 510 So. 2d 1122, 1124 (Fla. 1st DCA 1987) (holding that in administrative proceedings, a party unwilling to accept findings of fact in a recommended order must alert the agency to any perceived defects in the hearing officer's factual findings); *Comm'n on Ethics v. Barker*, 677 So. 2d 254, 256-57 (Fla. 1996)(holding the appellee preserved the issue of whether a hearing officer's findings were supported by competent, substantial evidence by filing exceptions to the recommended order).

Even pro se parties are not exempt from filing exceptions. *See Stueber v. Gallagher,* 812 So. 2d 454, 457 (Fla. 5th DCA 2002)(rejecting "Stueber's contention that the law of waiver should not be applied here because, as a non-lawyer representing himself before the EPC, he was not aware of the legal requirements relating to the preservation of error. In Florida, *pro se* litigants are bound by the same rules that apply to counsel.").

Even though it is not expressly required by any statute or rule, an attorney filing an exception to an administrative law judge's findings of fact must have a transcript. An agency can only reject an administrative law judge's finding of fact if a review of the entire record demonstrates the finding in question was unsupported by competent, substantial evidence. *See* §120.57(1)(*l*), Fla. Stat. (2011) (providing that "[t]he agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent, substantial evidence . . ."). As a result, it is impossible for the proponent of an exception to carry that burden without furnishing the agency with a transcript of the evidentiary hearing conducted by the administrative law judge.

An attorney who is faced with the task of preparing exceptions should make sure to devote sufficient effort to developing the arguments, because "[o]rdinarily, an issue will not be considered on appeal unless **the precise legal argument** forwarded in the appellate court was presented to the lower tribunal." *Verizon Business Network Serv., Inc. ex rel. MCI Communications, Inc. v. Dep't of Corr*., 988 So. 2d 1148, 1150 (Fla. 1st DCA 2008)(emphasis added).

While any significant discussion is beyond the scope of this article, it should be noted that a small handful of issues can be raised on appeal even if they were not set forth in exceptions to a recommended order. For example, one does not have to argue in exceptions that a statute is facially unconstitutional, because an agency is prohibited from declaring a statute unconstitutional. *See Key Haven Associated Enter., Inc. v. Bd. of Trs.,* 427 So. 2d 153, 157 (Fla. 1982); *Gulf Pines Mem'l Park, Inc. v. Oaklawn Mem'l Park, Inc.*, 361 So. 2d 695, 699 (Fla. 1978).

However, the vast majority of arguments not set forth in exceptions can only be raised on appeal if the alleged error was fundamental in nature. *See Henderson v. Dep't of Health, Bd. of Nursing*, 954 So. 2d 77, 81, n. 2 (Fla. 5th DCA 2007)(explaining "[m]atters not excepted to or raised properly before a licensing board may still be raised where an appellant can show excusable neglect or fundamental

continued...

PRACTICE TIPS
from page 3

error."). As anyone familiar with appellate practice can attest, one should take all measures necessary to avoid being in the unenviable position of arguing that a lower tribunal committed fundamental error, or worse, arguing that one's neglect was excusable.

In addition to filing exceptions setting forth the precise legal argument one intends to raise in a potential appeal, one must file TIMELY exceptions. Unless the agency that will rule on the exceptions grants a motion for extension of time, exceptions must be filed within 15 days following entry of the recommended order. *See* Fla. Admin. Code R. 28-106.217(1)(providing that "[p]arties may file exceptions to findings of fact and conclusions of law contained in recommended orders with the agency responsible for rendering final agency action within 15 days of entry of the recommended order . . ."). If this deadline is missed, then a party runs the risk of having its exceptions stricken and the arguments raised therein deemed unpreserved for appellate review. *See Colonnade Medical Center, Inc. v. Agency for Health Care Admin*., 847 So. 2d 540, 542 (Fla. 4th DCA 2003)(holding "Colonnade failed to timely file exceptions to the recommended order and the exceptions were stricken. Because Colonnade failed to properly challenge the factual findings before AHCA, Colonnade cannot do so for the first time on appeal.").

Not only must exceptions be precise and timely-filed, they must also be filed in the right place. Even though the paragraph at the very end of every recommended order states "[a]ny exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case[,]" I have occasionally seen attorneys file their exceptions with DOAH rather than with the agency responsible for issuing the final order. While misfiled exceptions may ultimately find their way to the agency responsible for rendering the final order, a party runs the risk of having its exceptions stricken as untimely if they are filed with the wrong government office. *See* Fla. Admin. Code R. 28-106.217(1)(providing "[p]arties may file exceptions to findings of fact and conclusions of law contained in recommended orders **with the agency responsible for rendering final agency action** . . .")(emphasis added). Therefore, before one's exceptions are due to be filed, contact the clerk of the agency in question and ascertain the precise mailing address of the clerk's office (not just the general mailing address for the agency) and inquire as to whether the exceptions can be filed electronically or by facsimile.

It is also important that exceptions satisfy the requirements of Rule 28-106.217(1) of the Florida Administrative Code. For instance, the Rule mandates that "[e]xceptions shall identify **the disputed portion of the recommended order by page number and paragraph**, shall identify the legal basis for the exception, and shall include any appropriate and specific citations to the record." (emphasis added). I have often seen agencies deny exceptions simply because a party neglected to "identify the disputed portion of the recommended order by page number and paragraph." Therefore, in order to avoid having your well-taken exceptions denied on non-substantive grounds (or because the agency could not easily find the target of your exceptions), take the time to comply with Rule 28-106.217(1).

If one has prevailed at DOAH and received a recommended order completely favorable to his or her client, there is obviously no need to file exceptions. However, the opposing party may file exceptions, and attorneys new to administrative practice should be aware that they have the right to respond. *See* Fla. Admin. Code R. 28-106.217(3)(providing "[a]ny party may file responses to another party's exceptions within 10 days from the date the exceptions were filed with the agency."). While responding to an opposing party's exceptions is not mandatory, one should think twice before passing up this opportunity. Not responding to exceptions is very much like not responding to a motion, and a party could be undermined by failing to state its position for the record. Consider responses to exceptions as your opportunity to tell the agency not only why, but how, it should deny each of your adversary's exceptions.

ATTEND THE BOARD OR COMMISSION MEETING

If one is litigating against an agency managed by a Secretary (such as the Agency for Health Care Administration or the Department of Environmental Protection), then one simply waits to receive the final order after any exceptions and responses to exceptions are filed. However, if the agency in question is a collegial body that meets periodically in order to manage its affairs (such as the Board of Medicine or the Florida Real Estate Commission), then a conscientious attorney will plan to attend the meeting during which his or her client's case will be considered. In my experience, the attorneys who appear before a collegial body in support of their exceptions have more success than those who do not make an appearance. Therefore, those who make a personal appearance may ultimately save themselves (and their clients) the time, expense, and effort associated with appealing an unfavorable final order.

Even if one has received a recommended order from DOAH that is completely favorable to his or her client's position, one should definitely attend the board or commission meeting if opposing counsel filed exceptions. Even if those exceptions are meritless, they may be granted if no one is present to advocate on your client's behalf.

Anytime one is attending a board or commission meeting on a client's behalf, it is an excellent idea to obtain the contact information of whoever is recording the meeting. *See* Fla. Admin. Code R. 28-106.306(1) (providing that the "[r]esponsibility for preserving the testimony at final hearings shall be that of the agency responsible for taking final agency action. Proceedings shall be recorded by a certified court reporter or by recording instruments."). If an appeal becomes necessary, a transcript is essential. *See generally Esaw v.*

Esaw, 965 So. 2d 1261, 1264 (Fla. 2d DCA 2007)(noting "[t]he most salient impediment to meaningful review of a trial court's decision is not the absence of findings, but the absence of a transcript."). In fact, one should consider bringing his or her own certified court reporter to the meeting. By doing so, you increase the likelihood of having an intelligible transcript to include in the Record on Appeal. *See* Fla. Admin. Code R. 28-106.306(2) (providing "[a]ny party to a hearing may, at its own expense, provide a certified court reporter if the agency does not . . . At the hearings reported by a court reporter, any party who wishes a transcript of the testimony shall order the same at its own expense. If a court reporter records the proceedings, the recordation shall become the official transcript.").

POINTS TO REMEMBER ABOUT ADMINISTRATIVE APPEALS

If the agency in question renders a final order adverse to your client, your first reaction may be to file a motion for rehearing or reconsideration. If the agency in question is a collegial body that meets monthly or bi-monthly, your motion will probably not be heard before your time for filing a notice of appeal has run. If the agency in question is not a collegial body, then a motion for rehearing or reconsideration is a more viable option. However, regardless of the type of agency you are dealing with, you must be very careful to not allow your time for filing a notice of appeal to expire. Like typical civil and criminal cases, a notice of appeal in an administrative law case must be filed within 30 days from the day the final order at issue was rendered. *See* Fla. R. App. P. 9.110(c)(mandating that "[i]n an appeal to review final orders of lower administrative tribunals, the appellant shall file the original notice with the clerk of the lower administrative tribunal within 30 days of rendition of the order to be reviewed . . ."). However, unlike typical civil and criminal cases, a motion for rehearing or reconsideration **does not** toll rendition of a final order in an administrative law case unless a procedural rule authorizes such motions. *Compare Suelter v. Dep't of Mgmt. Servs., Div. of Retirement*, 977 So. 2d 697, 698 (Fla. 1st DCA 2008)(holding the appellant's motion for reconsideration did not delay rendition of the administrative order and the court thus lacked jurisdiction to consider the appeal because "the Agency has not promulgated a rule authorizing motions that delay rendition of its orders and has chosen instead to prohibit the use of such motions.") *with* Philip J. Padovano, *Florida Appellate Practice*, §2:4 (2011-12 ed.)(discussing motions extending rendition and explaining that "the filing of a timely and authorized motion under rule 9.020(h) suspends the date of rendition of the final order until the date of filing a signed written order disposing of the motion."). As a result, if you elect to file a motion asking an agency to reconsider its final order, then you should have a notice of appeal ready to be filed if your motion is denied or not ruled upon by day 30.

Unlike a typical civil appeal in which the original notice of appeal and one copy have to be filed with the lower tribunal, an appellant in an administrative law case must file the original notice of appeal with the agency in question and a copy with the appropriate district court of appeal. *Compare* Fla. R. App. P. 9.110(b)(providing "[j]urisdiction of the court under this rule shall be invoked by filing an original and 1 copy of a notice, accompanied by any filing fees prescribed by law, with the clerk of the lower tribunal within 30 days of rendition of the order to be reviewed.") *with* Fla. R. App. P. 9.110(c) (providing that "[i]n an appeal to review final orders of lower **administrative** tribunals, the appellant shall file the original notice with the clerk of the lower administrative tribunal within 30 days of rendition of the order to be reviewed, and file a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the court.")(emphasis added).

Even though Rule 9.110(c) could lead a reasonable person to conclude an appeal must be perfected by filing a timely notice of appeal with the agency AND the appellate court, do not panic if only one of your notices is timely-filed. In my experience, a timely notice of appeal with the agency OR the appellate court is sufficient to invoke the appellate court's jurisdiction.

Unlike the typical civil appeal, section 120.68(2)(a) of the Florida Statutes may give you some flexibility with regard to which court hears your administrative appeal. *See* §120.68(2)(a), Fla. Stat. (2011)(providing that "[j]udicial review shall be sought in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law."). Most state agencies are headquartered in Tallahassee, so the First District Court of Appeal is often an option. However, if your client resides within the jurisdiction of an appellate court other than the First District, consider whether you have a better chance of prevailing in the other district. There may be favorable precedent in the other district that is not present in the First District. Or the two appellate courts may have issued conflicting rulings on the same issue. Either way, before selecting your appellate forum, identify your DCA options and then do some research into whatever issue or issues you intend to raise.

If the final agency action from which you are appealing imposed an immediate detriment on your client, such as a fine, then your client will probably want you to seek a stay. Some private attorneys unfamiliar with administrative law erroneously assume filing a notice of appeal results in an automatic stay of the final order. However, that is usually not the case, and a motion for stay will be necessary. *See* Fla. R. App. P. 9.190(e)(1)(providing "[t]he filing of a notice of administrative appeal or a petition seeking review of administrative action shall not operate as a stay, except that such filing shall give rise to an automatic stay as provided in rule 9.310(b)(2) or chapter 120, Florida Statutes, or when timely review is sought of an award by an administrative law judge on a claim for birth-related neurological injuries.").

Even if the final order in question suspended or revoked your client's license, a motion for stay is still required, and you should file that motion directly with the appellate court. *See* Fla. R. App. P. 9.190(e)(2)(C)(providing that "[w]hen an agency has suspended or revoked a license other than on an emergency basis,

continued...

PRACTICE TIPS
from page 5

a licensee may file with the court a motion for stay on an expedited basis."). The good news is that your motion for stay will be granted unless the agency can persuasively argue in its response that your client's continued practice is a probable danger to the health, safety, or welfare of the state. *Id*. (mandating that "[u]nless the agency files a timely response demonstrating that a stay would constitute a probable danger to the health, safety, or welfare of the state, the court shall grant the motion and issue a stay."). *See also* §120.68(3), Fla. Stat. (2011) (providing that "[t]he filing of the petition does not itself stay enforcement of the agency decision, but if the agency decision has the effect of suspending or revoking a license, supersedeas shall be granted as a matter of right upon such conditions as are reasonable, unless the court, upon petition of the agency, determines that a supersedeas would constitute a probable danger to the health, safety, or welfare of the state.").

As for where to file a motion for stay when your client's license has not been suspended or revoked, case law and Rule 9.190(e)(2)(A) suggest the motion should be filed with the lower tribunal. *See* Fla. R. App. P. 9.190(e)(2)(A)(providing that "[a] party seeking to stay administrative action may file a motion either with the lower tribunal or, for good cause shown, with the court in which the notice or petition has been filed."); *MSQ Properties v. Fla. Dep't of Health & Rehab. Servs.,* 626 So. 2d 292, 293 (Fla. 1st DCA 1993)(holding that "in most cases we shall continue to adhere to the general requirement of rule 9.310(a) that an applicant should first seek relief in the lower tribunal. By doing so, this court will continue to serve in its primary function as a court of review. The lower tribunal is in a superior position to determine whether a bond or other conditions should be required before an order is stayed and, if so, the amount of the bond or the nature of the conditions. These determinations may require fact finding which is not a function of this court."). However, if the agency is a collegial body that only meets periodically, then you have good cause for bypassing the agency and filing the motion for stay directly with the appellate court.

If the motion for stay is filed with the agency and is denied, then a stay can be sought from the appellate court. *See* Fla. R. App. P. 9.190(e)(2)(A)(providing that "[r]eview of orders entered by lower tribunals shall be by the court on motion.").

CONCLUSION

In closing, I sincerely hope this article proves beneficial to private attorneys new to administrative law. Just like any other practice area, administrative law has its own unique aspects that attorneys must be aware of in order to successfully represent their clients.

Endnotes:

[1] If there are no disputed issues of material fact, then the agency will conduct an informal hearing pursuant to the procedures set forth in section 120.57(2) of the Florida Statutes and will issue a final order that is directly appealable.

Gar Chisenhall *is the Chief Appellate Counsel for the Department of Business and Professional Regulation, Florida's largest regulatory agency. Prior to becoming the Department's appellate chief, Gar worked in the Administrative Law Section of the Attorney General's Office and served as the Chief Appellate Counsel at the Agency for Health Care Administration.*

APPELLATE CASE NOTES

by Mary F. Smallwood

Adjudicatory Proceedings

Avalon's Assisted Living, LLC v. Agency for Health Care Administration, 80 So. 3d 347 (Fla. 1st DCA 2011) (Opinion filed November 30, 2011)

The Agency for Health Care Administration (AHCA) filed a four-count complaint against two related companies alleging certain violations and seeking termination of the facilities' licenses. On appeal, the court held that three of the counts should be dismissed as they were based on uncorroborated hearsay evidence. The only issue addressed specifically in the appellate opinion was whether the owners/administrators of the appellants had operated a third assisted living facility without obtaining a license. Section 429.02(5), Fla. Stat., defines an "assisted living facility" as one which provides housing, meals and one or more personal services for a period exceeding 24 hours to one or more adults who are not relatives of the owner/administrator.

At the administrative hearing, AHCA offered testimony from an employee who worked an 8:00 a.m. to 8:00 p.m. shift at the facility, and who stated that she never saw a resident leave the facility. A visiting nurse testified she had arrived at the facility on one occasion at 6:30 in the morning and awakened a patient for testing. No one testified that they had worked at the facility between 8:00 p.m. and daybreak. The visiting nurse testified that the two patients she interviewed did not identify either the administrator or owner of the facility as relatives.

In the recommended order, adopted by AHCA, the administrative law judge found that there was no evidence presented by the appellants that residents at the facility were transported to another location at night or that that they were related to the owner/administrator of the facility.

On appeal, the court held that the administrative law judge had improperly shifted the burden of proof to the licensee when it was AHCA's burden to establish by clear and convincing evidence that the facility was an unlicensed assisted living facility. The court concluded that AHCA had not met its burden of proof and reversed the final order.

Attorney's Fees

Agency for Health Care Administration v. MVP Health, Inc., 74 So. 3d 1141 (Fla. 1st DCA 2011) (Opinion filed December 2, 2011)

The Agency for Health Care Administration (AHCA) withdrew an application by MVP Health, Inc. for a license to operate a home health care facility on the grounds that the application contained insufficient information to verify the controlling interest in the entity and that it had lost accreditation. MVP challenged that decision and the administrative law judge concluded that AHCA had incorrectly withdrawn the application. AHCA adopted the recommended order.

MVP then sought attorney's fees pursuant to section 57.111(4)(a), Fla. Stat., arguing that there was no substantial justification for AHCA's action. The administrative law judge awarded attorney's fees to MVP.

On appeal, the court reversed. It held that at the time AHCA acted it had substantial justification to question the ownership of the applicant, because the application itself stated there was ongoing litigation involving the ownership. In addition, AHCA had been informed by the Joint Commission on Accreditation of Healthcare Organizations that it was taking action to revoke MVP's accreditation, although it was still in place at the time the application was submitted. Accordingly, the court found that AHCA was substantially justified in its withdrawal of the application.

Appeals

Sumner v. Bd. of Trustees, City of Pensacola Firefighters' Relief and Pension Fund, 78 So. 3d 123 (Fla. 1st DCA 2012) (Opinion issued January 30, 2012)

Sumner appealed an order of the Board of Trustees of the City of Pensacola's Firefighters' Relief and Pension Fund. The court dismissed the appeal as premature as the administrative order had not been rendered by the agency by filing it with the agency clerk. The appellant argued that the agency could not properly render the order as it had not designated an agency clerk. However, the court held that where no clerk was specifically designated by an agency, the person whose duties and functions most closely resemble a clerk is the "clerk" for purposes of filing the administrative order.

Taylor v. Department of Children and Families, 37 Fla. L. Weekly 473 (Fla. 4th DCA 2012) (Opinion filed February 22, 2012)

Taylor sought Sun Cap benefit eligibility and food stamp benefit recovery. She had requested and been granted a hearing. When she sought a continuance, the hearing officer denied the request. Taylor failed to appear at the final hearing. The Department subsequently treated her claims as abandoned. However, no final order was ever issued by the Department. Several months later, Taylor sought a hearing on the same claims. At that hearing, the Department moved to dismiss the matter on the grounds that she had abandoned the claims. The hearing officer concluded that he could not grant a rehearing and that Taylor's only remedy would have been a judicial appeal.

On appeal, the court reversed. It held that the agency's failure to reduce its decision to writing as required by section 120.569, Fla. Stat., prevented Taylor from seeking judicial review.

Griffis v. Department of Business and Professional Regulation, 69 So. 3d 958 (Fla. 1st DCA 2012) (Opinion filed February 23, 2012)

Griffis filed an appeal of the Department of Business and Professional Regulation's order revoking certain of his licenses. The court dismissed the appeal as untimely. Griffis argued that he was not able to file the appeal because he had been incarcerated at the time the final order was issued and was not aware of it until released. The court held that, as a licensee, he had an obligation to provide the Department with updated information on his location. His failure to do so did not relieve him from the necessity of filing his appeal within thirty days of the rendition of the order.

Mary F. Smallwood *is a partner with the firm of GrayRobinson, P.A. in its Tallahassee office. She 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. She practices in the areas of environmental, land use, and administrative law. Comments and questions may be submitted to* mary.smallwood@gray-robinson.com.

THE FLORIDA BAR CLE

The Florida Bar Continuing Legal Education Committee, the Administrative Law Section, the Environmental & Land Use Law Section and the Government Lawyer Section present

State and Federal Government and Administrative Practice (SFGAP) Certification Review Course II - Federal

• Live
• Live Webcast
• Audio CD
• Video DVD

COURSE CLASSIFICATION: ADVANCED LEVEL

Live and Webcast Presentation: Friday, April 27, 2012

Tallahassee-Leon County Civic Center • 505 West Pensacola Street
Tallahassee, FL 32301 • 850-222-0400

Course No. 1380R

Those who have applied to take the certification exam may find this course a useful tool in preparing for the exam. It is developed and conducted without any involvement or endorsement by the BLSE and/or Certification committees. Those who have developed the program, however, have significant experience in their field and have tried to include topics the exam may cover. Candidates for certification who take this course should not assume that the course material will cover all topics on the examination.

8:00 a.m. – 8:30 a.m. **Late Registration**

8:30 a.m. – 8:35 a.m.
Welcome and Introductions
Warren J. Pearson, Tallahassee

8:35 a.m. – 9:30 a.m.
Federal APA Adjudication (Formal and Informal)
Steve R. Johnson, FSU College of Law

9:30 a.m. – 10:20 a.m.
Federal APA Rulemaking
Winston K. Borkowski, Hopping Green & Sams, P.A.

10:20 a.m. – 10:30 a.m. **Break**

10:30 a.m. – 12:00 p.m.
Federal APA: Judicial Review of Agency Action (Scope and Availability of Judicial Review)
Daniel H. Thompson, Berger Singerman, LLP

12:00 p.m. – 1:30 p.m. **Lunch (on your own)**

1:30 p.m. – 2:20 p.m.
11th Amendment Immunity
Barbara C. Wingo, University of Florida

2:20 p.m. – 3:10 p.m.
Civil Rights Action under 42 U.S.C. Section 1983
Stephanie A. Daniel, Office of the Attorney General

3:10 p.m. – 3:20 p.m. **Break**

3:20 p.m. – 5:00 p.m.
FOIA, FACA, and Federal Government in the Sunshine
Kenneth B. Hayman, Department of Environmental Protection

WEBCAST CONNECTION:

Registrants will receive webcast connection instructions two days prior to the scheduled course date via e-mail. If The Florida Bar does not have your e-mail address, contact the Order Entry Department at 850-561-5831, two days prior to the event for the instructions.

CLE COMMITTEE

Candace S. Preston, Wauchula, Chair
Terry L. Hill, Director, Programs Division

FACULTY & STEERING COMMITTEE

Warren J. Pearson, Tallahassee — Program Chair

CLE CREDITS

CLER PROGRAM

(Max. Credit: 8.0 hours)
General: 8.0 hours
Ethics: 0.0 hours

CERTIFICATION PROGRAM

(Max. Credit: 8.0 hours)
State & Federal Gov't & Administrative Practice: 8.0 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).

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

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.

Register me for the "State and Federal Government and Administrative Practice (SFGAP) Certification Review Course II - Federal" Seminar

ONE LOCATION: (288) LEON COUNTY CIVIC CENTER, TALLAHASSEE (APRIL 27, 2012)

TO REGISTER OR ORDER AUDIO CD / DVD OR COURSE BOOKS 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. ON-SITE REGISTRATION, ADD $25.00. **On-site registration is by check only.**

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. 1380R**

ELECTRONIC MATERIALS: Every CLE course will feature an electronic course book in lieu of a printed book for all live presentations, live webcasts, webinars, teleseminars, audio CDs and video DVDs. This searchable, downloadable, printable material will be available via e-mail several days in advance of the live course presentation or thereafter for purchased products. We strongly encourage you to purchase the book separately if you prefer your material printed but do not want to print it yourself. Effective July 1, 2010.

LOCATION (CHECK ONE):

- ❑ **Tallahassee, April 27, 2012**
  (288) Leon County Civic Center
- ❑ **Live Webcast / Virtual Seminar* April 27, 2012**
  (317) Online

***Registrants who participate in the live webcast will receive an email with a web-link and log-in credentials two days prior to the seminar to include access to the course materials. Call The Florida Bar Order Entry Department at (800) 342-8060, ext. 5831 with any questions.**

❑ 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.

REGISTRATION FEE (CHECK ONE): WEBCAST:

- ❑ Member of the Administrative Law Section; Environmental & Land Use Law Section or Government Lawyer Section: $145 ❑ $245
- ❑ Non-section member: $170 ❑ $270
- ❑ Full-time law college faculty or full-time law student: $85
- ❑ Persons attending under the policy of fee waivers: $0

Members of The Florida Bar who are Supreme Court, Federal, DCA, circuit judges, county judges, magistrates, judges of compensation claims, full-time administrative law judges, and court appointed hearing officers, or full-time legal aid attorneys for programs directly related to their client practice are eligible upon written request and personal use only, complimentary admission to any live CLE Committee sponsored course. Not applicable to webcast. (We reserve the right to verify employment.)

METHOD OF PAYMENT (CHECK ONE):

- ❑ Check enclosed made payable to The Florida Bar
- ❑ Credit Card (Advance registration only. Fax to 850/561-9413.)

❑ MASTERCARD ❑ VISA ❑ DISCOVER ❑ AMEX Exp. Date: ___/___ (MO./YR.)

Signature: _____

Name on Card: _____

Billing Zip Code: _____

Card No. _____

COURSE BOOK — AUDIO CD — DVD – ON-LINE — PUBLICATIONS

Private recording of this program is not permitted. **Delivery time is 4 to 6 weeks after 4/27/12. TO ORDER AUDIO CD / DVD OR COURSE BOOKS,** fill out the order form above, including a street address for delivery. **Please add sales tax. Tax exempt entities must pay the non-section member price.** Those eligible for the above mentioned fee waiver may order a complimentary audio CD in lieu of live attendance upon written request and for personal use only.

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the media must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

❑ **COURSE BOOK ONLY (1380M)**	❑ **AUDIO CD (1380C)**	❑ **DVD (1380D)**
Cost $60 plus tax	(includes electronic course material)	(includes electronic course material)
(Certification/CLER credit is not awarded for the purchase of the course book only.)	$145 plus tax (section member)	$250 plus tax (section member)
	$170 plus tax (non-section member)	$275 plus tax (non-section member)
TOTAL $ _____	**TOTAL $ _____**	**TOTAL $ _____**

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

2012 AMENDMENTS
from page 1

and it provides express legislative authorization for the direction and supervision by elected officials over the exercise of administrative authority by appointees of those officials.

Repeal of Unused Statutory Rulemaking Authority. CS/HB 7029 also repeals or revises over 50 statutory provisions authorizing rulemaking, including statutes that are no longer necessary or for other reasons have never been used. In addition, the bill directs the Office of Statutory Revision to include duplicative, redundant, or unused statutory rulemaking authority among its recommended repeals in reviser's bill recommendations. Rulemaking authority is considered unused if the provision has been in effect for more than 5 years and no rule has been promulgated in reliance thereon during that time.

Nullification and Repeal of Administrative Rules. HB 7029 amends the APA to provide that the repeal of a substantive statute also acts to repeal the administrative rules adopted to implement that statute, to the extent the rule implements the repealed statute. A rule is nullified if the only provisions of law it implemented subsequently are repealed. The repeal of one or more provisions of law implemented by a rule, but not all statutes implemented by the rule, requires an agency to publish a notice of rule development within 80 days of the effective date of the act, stating which parts of the rule are nullified by the new act. In other instances when the repeal of a statute creates uncertainty about the continued enforceability of a rule, the Department of State (DOS) is to use the summary removal process described below. In all cases, DOS is directed to remove such rules from the *Florida Administrative Code* (FAC) as of the effective date of the law repealing the specific law implemented.

HB 7029 also creates a summary removal process to repeal published rules that DOS identifies, as part of the continuous revision system authorized by s. 120.55, that may be no longer in full force and effect. This process includes notice to and review by the affected agency (or the Governor, where no agency may be identified). If DOS is advised that the rule is no longer in effect or receives no timely response from the agency, DOS is to provide notice of such and that the rule will be repealed summarily and removed from the FAC. An objection to the summary repeal must be filed as a petition challenging a proposed rule within 21 days of publication of notice in the *Florida Administrative Weekly*.

HB 7029 also provides for the nullification and repeal of 270 existing rules that are no longer needed or for which the specific law implemented has been repealed. These include 165 rules of five separate water management districts identified as a result of reviews conducted by the districts and OFFAR that found these rules are outdated or otherwise unnecessary for effective program function.

The repealed rules also include another 105 "orphan rules" for which the adopting agency was abolished, the grant of rulemaking authority repealed, or the specific law implemented was repealed. Where no agency appears to have authority to repeal these rules, legislative action is required to remove them from the FAC. The orphan rules also include rules implementing statutes for which responsibility has been transferred to another agency or the specific statute was repealed but reenacted under a different agency, without a clear transfer of the rules or rulemaking authority to the new agency. Examples of orphan rules include rules of the former Department of Commerce, the former Department of Health and Rehabilitative Services, the former Advisory Council on Intergovernmental Relations and the former Department of Labor and Employment Security.

Florida Administrative Register. HB 541 revises provisions in the APA with respect to the *Florida Administrative Code* and the *Florida Administrative Weekly*. The bill provides that the online version of the *Florida Administrative Code* is the official version for the state, and that DOS is no longer required to publish a printed version. In addition, the bill changes the name of the *Florida Administrative Weekly* to the *Florida Administrative Register*. The online version of the *Florida Administrative Register* is the official version.

DOS is no longer responsible for reviewing submissions to the *Florida Administrative Register* for formatting, grammatical, or typographical errors. Entities are responsible for proofreading their documents and assume full responsibility for the accuracy of documents submitted.

New Duties for Rule Ombudsman. CS/HB 7043 amends the APA by transferring to the rules ombudsman in the Executive Office of the Governor certain rulemaking duties previously performed by the Small Business Regulatory Advisory Council and the Department of Economic Opportunity.

Summary Hearing for Challenges to Deepwater Ports. Section 42 of SB 1998 and section 80 of HB 599 provide that, notwithstanding s. 120.569 or s. 120.57, a challenge to a consolidated environmental resource permit or any associated variance or any sovereign submerged lands authorization proposed or issued by the Department of Environmental Protection in connection with the state's deepwater ports shall be conducted pursuant to the summary hearing provisions of s. 120.574 with some variations. Notably, the summary proceeding must be conducted within 30 days after a party files a motion for a summary hearing, regardless of whether the parties agree to the summary proceeding, and the administrative law judge's decision shall be in the form of a recommended order and does not constitute final agency action of the Department. The Department must issue the final order within 45 working days after receipt of the administrative law judge's recommended order. These summary hearing provisions apply to pending administrative proceedings.[3]

Ratification of NFPA Rule. HB 7121 ratifies the Department of Agriculture and Consumer Services rule updating the minimum standards for the storage and handling of liquefied petroleum gases. The statement of estimated regulatory costs for Rule 5F-11.002, Standards of National

Fire Protection Association Adopted, showed the rule would have a specific, adverse economic effect or would increase regulatory costs by more than $1 million over the first 5 years of implementation of the rule. Accordingly, the rule must be ratified by the Legislature before it may go into effect.[4] The rule is ratified for the sole and exclusive purpose of satisfying this rulemaking condition and, as such, appears to remain subject to legal challenge pursuant to s. 120.56.[5]

DEP Numeric Nutrient Criteria Rule Exempt from Legislative Ratification. HB 7051 exempts from the legislative ratification requirement certain proposed amendments to Chapters 62-302 and 62-303, establishing numeric nutrient criteria, published by the Department of Environmental Protection.

Publication of Notices. CS/CS/HB 937 amends the APA to delete the authorization to publish the administrative complaint in Leon County if the licensee's last known address is located in another state or in a foreign jurisdiction. The bill also makes a number of changes to various notice provisions when contact cannot be made by the Department of Business and Professional Regulation (DBPR) regarding an administrative complaint for failure of a licensee to notify DBPR of a change of address, including deleting certain newspaper notice requirements and instead requiring the notice to be posted on the front page of DBPR's website; and requiring DBPR to send notice via e-mail to all newspapers of general circulation and all news departments of broadcast network affiliates in the county of the licensee's last known address of record.

***

This article was submitted for publication shortly after the end of the Regular Session, and as of that time none of these bills had yet been submitted to the Governor. So, stay tuned!

Endnotes:

[1] 36 Fla. L. Weekly S 451 (Fla. Aug. 16, 2011). For a discussion of the Court's decision in *Whiley v. Scott*, see Lawrence E. Sellers, Jr., *Governor's Rules Freeze: Supreme Court Says Legislative Power Trumps "Supreme Executive Power,"* Administrative Law Section Newsletter, Vol. XXXIII, No. 1 (Sept. 2011).

[2] Both of these executive orders have been superseded; Executive Order 11-72 expressly supersedes Executive Order 11-01, and Executive Order 11-211 expressly supersedes Executive Order 11-72.

[3] It appears there are such pending administrative proceedings at DOAH involving challenges to a consolidated notice of intent to issue certain approvals that would authorize the widening and deepening of several portions of the Miami Harbor channels and turning basins. *See* DOAH Case Nos. 11-6242, -6243 and -6244. in which the final hearing is currently scheduled to commence on August 14, 2012.

[4] For a discussion of the legislative ratification requirement, see Lawrence E. Sellers, Jr., *The 2010 Amendments to the APA: Legislature Overrides Veto of Law to Require Legislative Ratification of "Million Dollar Rules,"* 85 Fla. B. J. 37 (May 2011).

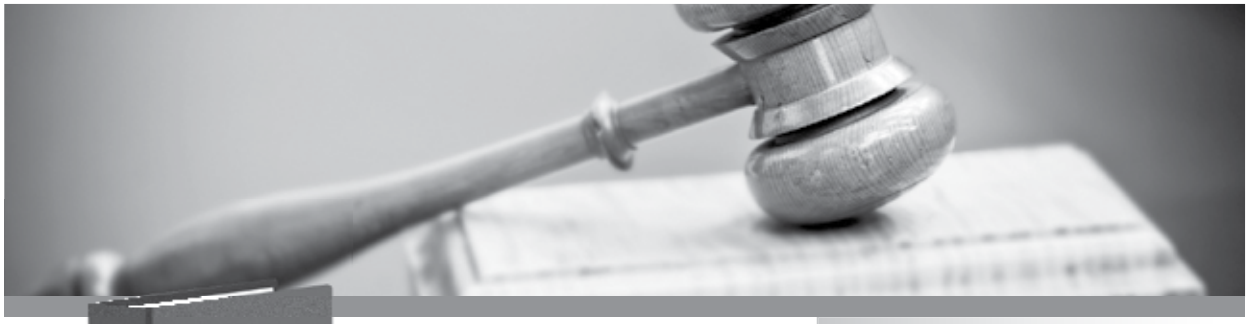
[5] The bill expressly provides: "This act does not alter rulemaking authority delegated by prior law, does not constitute legislative preemption of or exception to any provision of law governing adoption or enforcement of the rules cited, and is intended to preserve the status of any cited rule as a rule under chapter 120, Florida Statutes. This act does not cure any rulemaking defect or preempt any challenge based on a lack of authority or a violation of the legal requirements governing the adoption of any rule cited."

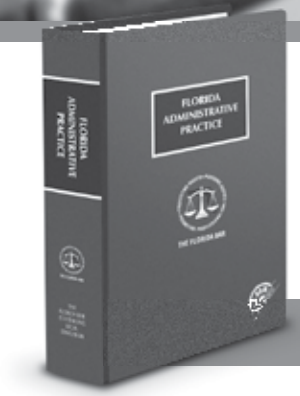
Larry Sellers *is a partner with Holland & Knight LLP, practicing in the firm's Tallahassee office.*

THE FLORIDA BAR

The Florida Bar
651 E. Jefferson St.
Tallahassee, FL 32399-2300

PRSRT-STD
U.S. POSTAGE
PAID
TALLAHASSEE, FL
Permit No. 43





Florida Administrative Practice

NINTH EDITION WITH CD-ROM

new edition

Florida Administrative Practice is the only practice manual to provide an in-depth discussion of the procedural aspects of administrative litigation. The Administrative Procedure Act is a dynamic area of the law, and the new Ninth Edition brings you up-to-date with the most recent statutory changes, including discussion of:

- 2011 changes to the APA
- New requirements for statements of estimated regulatory costs of proposed rules
- Executive Order 11-01, creating the Office of Fiscal Accountability and Regulatory Reform (OFARR)
- The new Department of Economic Opportunity (DEO)

Highlights include:

- The Administrative Process and Constitutional Principles
- Overview of the Administrative Procedure Act
- Rule Adoption and Review
- Administrative Adjudication
- Proceedings in Which There Are No Disputed Issues of Material Fact
- Professional and Occupational Licensing
- Florida Health Care Facility and Clinic Regulation
- Environmental Agencies
- Department of Revenue
- Public Service Commission
- Bid Dispute Resolution
- Judicial Review
- Attorneys' Fees and Cost Awards

$175

ISBN: 9781422497098 • PUB# 22781 • © 2011

Order Today!

www.lexisnexis.com/flabar
Call toll-free 1.800.533.1637

To receive a **20% discount** on future updates for these publications call 1-800-533-1637 to become a subscriber under the Automatic Shipment Subscription Program and to obtain full terms and conditions for that program.

RELATED PUBLICATION

Legal Forms and Worksheets

SECOND EDITION WITH CD-ROM AND 2010 SUPPLEMENT

This edition includes comprehensive forms for use in Dissolution of Marriage and Adoption proceedings. Chapters cover the following additional subject matters: Construction Liens, Corporations, Landlord and Tenant, Partnerships, Conveyancing of Real Property (including FAR/BAR Contract for Sale and Purchase and Comprehensive Rider), Prejudgment Proceedings, Postjudgment Proceedings, Homestead Exemption, Limited Liability Companies, Accounts Stated, Open Accounts, and Goods Sold, Mortgage Foreclosure, Criminal Law, Estate Planning, and Automobile Insurance Litigation.

The 2010 supplement includes new and updated forms and worksheets for proceedings related to adoption, dissolution of marriage, postjudgment proceedings, and limited liability companies.

Includes a Fillable Forms CD-ROM powered by HotDocs. CD launches the HotDocs player and uploads all Legal Forms and Worksheets Automated Forms in your computer, so you never have to put in the CD again. Whenever you need forms, simply go to your LexisNexis Automated Forms, Florida Legal Forms and Worksheets program, click on the forms you need, fill out the designated sections and your forms are ready to go!

$155

ISBN: 9780327036326 • PUB# 22939 • © 2011

LexisNexis®

30-DAY MONEY BACK GUARANTEE: Examine any publication for a full 30 days after receipt of the material. Satisfaction is guaranteed or we will return your payment. Plus sales tax, shipping, and handling where applicable. Prices subject to change without notice.