Administrative Law Section Newsletter

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A Different Perspective

by Suzanne Van Wyk

perspective [pər-'spek-tiv]
n
1. a way of regarding situations, facts, etc., and judging their relative importance
The Free Dictionary, 2013

With each new opportunity comes a different perspective. Having recently joined the ranks of DOAH Administrative Law Judges, I am adjusting to a new perspective on administrative practice. Once an agency lawyer, then a private practitioner, I am now both honored and challenged by the role of impartial fact-finder. The view from here is different.

I write not to share the wisdom that comes from years of experience (which I have not attained), but rather to share observations I have made in the last few months from this new perspective.

Response to the Initial Order

In my prior practice, I would never have dreamed of failing to file a response to the initial order. As an agency lawyer, I was responsible for coordinating the response. I took all steps necessary to coordinate dates of availability and file a timely response. In my role as private practitioner, even when not representing the petitioner, I would reach out to the agency or petitioner's counsel if I had not heard from them soon after receiving the initial order.

Yet, my colleagues and I are amazed at the number of cases in which the parties do not respond to the initial order, file unilateral responses, or respond with only one or two available dates. It occurs to me that advocates may not appreciate

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From the Chair: Thank You!

by F. Scott Boyd

Our newsletter "Editor Extraordinaire" Elizabeth McArthur is fond of telling incoming Chairs that they needn't worry about penning this last column, that it will "write itself." Well, I must report that I have procrastinated to the last possible minute, and there is absolutely no sign of any progress yet. I guess I had better start writing it myself.

I realize now that she may have meant that thanking everyone who worked so hard on Section activities over the year makes it easy to fill up the column inches . . . and there are a lot of people that I really do need to recognize. We had a busy year.

I can start with our Continuing Legal Education efforts, since they have always been a Section priority. Judge Li Nelson again took the lead in setting up our biennial Pat Dore Administrative Law Conference. Her committee did a superb job (this is why we keep asking you, Li) in developing the "Nursery Rhymes Style" theme and in putting together some great topics and wonderful presenters. I can't resist recounting the full list of speakers, a veritable

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"who's who" in Florida administrative law: Andy Bertron, Donna Blanton, Judge Linzie Bogan, Gar Chisenhall, Chief Judge Bob Cohen, Judge Gary Early, Allen Grossman, Mark Herron, Judge Bruce McKibben, Judge June McKinney, Brent McNeal, Patty Nelson, Dan Nordby, Lynette Norr, Judge Stephanie Ray, Gigi Rollini, Larry Sellers, Mary Smallwood, Layne Smith, Susan Schwartz, Dan Thompson, Jennifer Tschetter, Bud Vielhauer, Karen Walker, Rex Ware, Judge Kent Wetherell, and Bill Williams. All of these celebrities were topped off with a keynote address by the Honorable Curt Kiser. Wow! If you didn't learn anything at the conference, you were just asleep. (There's still time to repent, pick up the DVD!)

On the heels of the conference, CLE Committee Chair Bruce Lamb was hard at work organizing our webinar series. Timothy Atkinson and Colin Roopnarine opened with their presentation on "Deposing the Expert Witness" in December. Then in January, Robert Hosay and Brian Newman put on "The Nuts and Bolts of Bid Protests," and Bruce has three more webinars in the works. In addition, our Public Utilities Law Committee under the direction of Michael Cooke and Cindy Miller presented "Florida Energy, Cybersecurity, and Administrative Practice." Bruce has also twisted the arms of Francine Ffolkes and Li Nelson hard enough to get them to agree to co-chair our popular "Practice Before DOAH" program in the Fall, so our CLE future looks bright.

As you know, at last we have amendments to our Uniform Rules! Former Chair Cathy Sellers appointed a committee to review and suggest these updates a couple of years ago. It was chaired by Judge Linda Rigot and consisted of Paul Amundsen, Andy Bertron, Wellington Meffert, Judge Elizabeth McArthur, Judge Li Nelson, Larry Sellers, Shaw Stiller, and Judge Lynne Quimby-Pennock. Linda and others of this crew have been hard at work ever since drafting recommendations, urging the Administration Commission to take action, and providing expertise and information to the Commission as requested. All of that effort paid off this year when the bulk of the Section's recommendations finally took effect on February 5, 2013.

The Section's idea of focusing our Law School Liaison Committee's efforts this year has been very successful. Chair Patty Nelson organized an excellent program on administrative law research, complete with pizza and presentations by Francine Ffolkes, Judge Quimby-Pennock, Dan Nordby, Jowanna Oates, Brian Newman, and Steve Emmanuel. It was presented to a standing-room-only crowd at the FSU College of Law. Patty videotaped the presentation, and plans to contact other law schools around the state to offer it to them. In the past we have had some difficulty marshalling members to maintain liaison with all of the schools. Now, with just one or two local Section members to present the video and answer questions, we should be able to offer each school a helpful program on administrative law research.

Another success came in our project to offer some assistance to pro se litigants at DOAH. Chief Judge Bob Cohen talked about this concept with our Immediate Past-Chair Allen Grossman last year. Under the leadership of Richard Shoop, we worked with John Fenno of Legal Services of North Florida (LSNF) and a program is now set up. Beginning February 1, 2013, DOAH Initial Orders going out within the Second Judicial Circuit have advised that free consultation with an attorney at LSNF may be available to qualified pro se parties. The Section has provided LSNF with some extra Hotline volunteers and detailed reference materials outlining DOAH procedures. Other Section volunteers have agreed to act as consultants to the Hotline attorneys on specific administrative law topics. Chief Judge Cohen, Richard Shoop, and Judge Pete Peterson presented a CLE program on assisting pro se litigants at DOAH on April 23, 2013, for the volunteers. While it is too soon to fully evaluate this pilot project, hopefully once all of the kinks are worked out it can be expanded to all of the circuits across Florida.

The Section also began a project this year to see if public access to agency orders could be improved. Jowanna Oates agreed to serve as Chair of an ad hoc committee to look at this long-standing issue. The committee gathered information (special thanks to Patty Nelson) on various ways that each agency meets the current indexing requirements. Jowanna compiled this information in table form. A shorter version is in this newsletter, and the full table is now on the Section's website. The next time you are researching an agency's orders, take a look. Our site now contains information on where each agency's orders may be found, describes how they may be searched, and provides internet links to the orders whenever possible. Thanks, Jowanna, for taking on this project

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and for seeing it through so quickly and capably. With the project complete, hopefully in future years the committee will go on to undertake a detailed examination of sections 120.53 and 120.533, Florida Statutes, to see if the Section can't offer some suggestions for more efficient and effective access to all orders.

Many of our folks fill positions for the Section for years on end, often with little recognition. Judge Linda Rigot continues her tireless efforts to monitor proposed legislation that might impact the Section or its members. She has ably performed this major role for us for many years, and we could not be in better hands. At the time of writing, session is not yet over, and it remains to be seen what changes may be enacted, but Linda and her committee stand ready to organize and present the Section's expert analysis to sponsors and legislative committees upon request. Clark Jennings has also continued to represent us in the Council of Sections. We thank him for keeping up with that important responsibility. Larry Sellers, our Board of Governors Liaison, has always done so much more than the role requires that we sometimes just take it for granted, I'm afraid. We thank you, Larry, for your constant contributions in everything we undertake.

Communication is a big part of the Section's mission, and I am proud to say that our publications have been going strong. The ALS Newsletter's Co-Editor Judge Elizabeth McArthur is now working with a new Co-Editor, Jowanna Oates, who took over from Amy Schrader about halfway through the year. They lined up feature articles by Paul Amundsen, Gar Chisenhall, Eric Miller, Patty Nelson, and Judge Suzanne Van Wyk. Agency snapshots were contributed by Alyssa Cameron, Jowanna Oates, Kenneth Plante, Colin Roopnarine, Brent McNeal, and Russell Kent. Mary Smallwood and Larry Sellers contributed appellate case summaries for our ever-popular Appellate Case Notes. In addition to all of these regular features, Gar Chisenhall has now organized a group including Melinda Butler, Alyssa Cameron, Paul Rendleman, Kurt Schrader, Jaakan Williams, and Dustin Metz to produce DOAH Case Notes, a new column reporting on interesting DOAH orders and agency final orders as they come out. Francine Ffolkes has faithfully published her "ALS E-News" to catch us up on all of the latest information between newsletters. Finally, Paul Amundsen has continued to do a great job lining up and editing articles for the Florida Bar Journal. "Practice Pointers for Administrative Hearings: Use of Exhibits," by Judge Bram Canter, was published in August; "Practice Tips for Private Attorneys New to Administrative Law," by Gar Chisenhall, appeared in October, 2012; "Advancing the Legal Profession with Typography" by Suzanne Suarez Hurley was published in November; and "The Importance and Proper Use of Administrative Declaratory Statements," by Fred Dudley, came out in March, 2013. We understand that all of these publications, articles, and features represent an awful lot of work by many people to provide us with useful and up-to-date information and we are grateful.

If you hear one of Ross Perot's "giant sucking sounds" in the near future, it might be because a huge amount of judicial wisdom is suddenly exiting the Executive Council. Judges Elizabeth McArthur, Li Nelson, and Linda Rigot have all indicated that they will not be returning for another term. (Was my administration THAT bad?) Just a quick glance at the earlier paragraphs here is enough to confirm that these Three Musketeers have contributed far more than their fair share to our activities this year, and I can assure you, for many years past. We all owe them a tremendous debt, and thank them for their years of service. We know, however, that these three are so dedicated that none will really be cutting ties completely, and the Section will continue to depend upon them.

And speaking of dependence, it is time to say a word about Jackie Werndli. What on earth would we do without all of her behind-the-scenes work? It is her experience and wisdom that holds the Section together and moving forward. Jackie has served as our Section Administrator for as long as I can remember, and it is no secret that she is the guiding force behind the Section's every success. And now, in case you haven't heard, Jackie has had the temerity to tell us that she is going to retire at the end of the calendar year. Of course, that cannot be allowed. Amy will have to appoint a Committee to find some way to keep her. Can we perhaps tie up her retirement so that she will have no choice but to continue working? Seriously, Jackie, you are a treasure, and the Section will never be the same without you. Rest assured that this is not the last you will hear from us.

I guess that's about it. My sincere thanks to all of you for all that you have done. You have made my term as Chair an easy one, and I consider it an honor to have served with you. I must end by noting that while the ballots haven't yet been counted, it is clear that Chair-Elect Amy Schrader is going to have a top-notch team of Officers and Executive Council members again next year, and I know we will have another great year. Oh -- and Amy -- don't worry about that last column that you will have to submit to the newsletter, it will write itself.

Access to Agency Final Orders

by Jowanna N. Oates

"Persons have the right to examine agency precedent and the right to know the factual basis and policy reasons for agency action." Gessler v. Dep't of Bus. & Prof. Reg., 627 So. 2d 501, 503 (Fla. 4th DCA 1993).

The Administrative Procedure Act requires agencies to maintain final orders. *See* §120.53(1)(a)1., Fla. Stat. (2012). However, the inability to access agency orders has been a long-standing problem. Professor Pat Dore expressed her hope over 20 years ago that "in the not too distant future, the wealth of information buried in inaccessible and unavailable agency final orders will finally surface."[1] Yet, today there is still no central place where a practitioner or member of the public can go to find out how to access agency final orders.

Last year, Chair Scott Boyd expressed the desire to expand the Section's website to include information on how to research agency orders. Since late 2012, the ad hoc Committee on Orders Access has surveyed agencies concerning the indexing and availability of final orders. The members of the ad hoc Committee are: Gar Chisenhall, John Lockwood, Patty Nelson, Dan Nordby, Amy Schrader, and Richard Shoop. I must extend a very special "thank you" to Patty Nelson for her invaluable assistance with this endeavor. To date, the Committee has received nearly 40 responses from agencies; the surveys reveal that a majority of agencies provide access to their final orders either on the agency's website or on DOAH's website. A summary of the agencies' responses are provided below. A more detailed chart of agency responses is located at the Section's website: www.flaadminlaw.org. As we receive additional responses, the website will be updated.

Endnotes:

[1] Patricia A. Dore, *Florida Limits Policy Development through Administrative Adjudication and Requires Indexing and Availability of Agency Orders*, 19 Fla. St. U. L. Rev. 453-54 (1991).

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Agency Name	How to Access Final Orders	Directions For Obtaining Final Order Index
South Fla. Water Mgmt. Dist.	Orders before 1982: contact District Clerk's office. Orders after 1982: www.falr.com	Contact FALR
Dep't of Legal Affairs	Provided upon request in paper or pdf format.	Provided upon request
Office of Financial Reg.	https://real.flofr.com/ConsumerServices/SearchLegalDocuments/LDSearch.aspx	The electronic database is searchable
Education Practices Comm'n	www.falr.com	Contact FALR
Bd. of Professional Engineers	publicrecords@fbpe.org	No final order subject-matter index is maintained
Parole Comm'n	Public records requests	See rule 23-15.015
South Fla. Reg. Planning Council	N/A	N/A
Dep't of Health	www.falr.com (Since 1979) www.doah.state.fl.us/ALJ (since July 2, 2012) Copies of orders may be obtained via email, web, in-person, mail, and fax.	www.falr.com/Publications.shtml www.doah.state.fl.us/ALJ
Fla. Housing Finance Corp.	All final orders stored in OnBase. Orders from 2002-present: www.floridahousing.org/BusinessAndLegalActions/	Public records request, direct access to orders on website, or on-site use of OnBase
Northwest Fla. Water Mgmt. District	Public records request	Public records request

Agency Name	How to Access Final Orders	Directions For Obtaining Final Order Index
Southwest Fla. Water Mgmt. District	Public records request	Public records request
Dep't of Mgmt. Serv.	Public records request	Provided upon request
Reemployment Assist. Appeals Comm'n	Contact the Commission	Contact the Commission
Dep't of Elder Affairs	Public records request	Public records request
Suwannee River Water Mgmt. Dist.	Final orders are imaged and available in-house.	Public records request
Fla. Lottery	Contact the Agency Clerk	Contact the Agency Clerk
Dep't of Econ. Opportunity, Div. of Community Dev. (formerly DCA)	www.falr.com/SearchDB.shtml www.doah.state.fl.us/FLAIO Orders before Jan. 1, 1988: contact the Agency Clerk.	www.falr.com www.doah.state.fl.us
Dep't of Econ. Opportunity Div. of Workforce Serv. (formerly AWI)	www.floridajobs.org/office-directory/office-of-the-general-counsel/about-our-office/final-orders sitefinity.floridajobs.org/office-directory/division-of-workforce-services/reemployment-assistance-programs/reemployment-assistance-tax-liability-rate-and-reimbursement-final-orders Orders before 2000 and unemployment compensation orders before 2004 are available for physical inspection and copying.	www.floridajobs.org/office-directory/office-of-the-general-counsel/about-our-office/final-orders sitefinity.floridajobs.org/office-directory/division-of-workforce-services/reemployment-assistance-programs/reemployment-assistance-tax-liability-rate-and-reimbursement-final-orders
Dep't of Econ. Opportunity Div. of Strategic Bus. Dev. (former OTTED	www.doah.state.fl.us	www.doah.state.fl.us
PERC	www.westlaw.com http://perc.myflorida.com/co/codefault.aspx	Contact PERC Fla. Public Employment Reporter Fla. Career Service Reporter
State Bd. of Administration	Contact the Agency Clerk	Contact the Agency Clerk
Dep't of Environmental Protection	www.doah.state.fl.us/FLAIO FALR www.dep.state.fl.us/legal/Final_Orders/finalorders.htm Contact the Agency Clerk	www.doah.state.fl.us/FLAIO
Dep't of Financial Serv.	www.myfloridacfo.com/LegalServices/PublicRecords Orders prior to 2003: public records request	(www.myfloridacfo.com/LegalServices/PublicRecords) has a customized search template

Agency Name	How to Access Final Orders	Directions For Obtaining Final Order Index
Withlacoochee Reg. Water Supply Authority	The Authority has never issued a final order.	N/A
Dep't of Corrections	Public records request	Public records request
Agency for Health Care Admin.	apps.ahca.myflorida.com/dm_web/default.aspx	FALR
Dep't of Professional & Business Reg.	Orders from Jan. 1, 1992-June 30, 2011: public records request to the Agency Clerk. Orders on or after July 1, 2011: www.doah.state.fl.us	Public records request for orders Jan. 1, 1992-June 30, 2011 www.doah.state.fl.us (for orders after July 1, 2011)
Dep't of Veterans Affairs	Contact the Agency Clerk	Contact the Agency Clerk (see rule 55-1.032)
Dep't of Transportation	Orders prior to 1999: contact the Clerk of Agency Proceedings or make a public records request. Order on or after 1999: http://www.mccinnovations.com/weblink/	Orders prior to 1999: contact the Clerk of Agency Proceedings. Orders on or after 1999: http://www.mccinnovations.com/weblink/
Fla. Dep't of Law Enforcement	publicrecords@fdle.state.fl.us	Public records request
Dep't of Revenue	https://revenuelaw.state.fl.us/Pages/Search.aspx Public records request to the Agency Clerk for: stipulations; agreed settlements; consent agreements; license/permit denials or revocations; and child support enforcement.	Public records request to the Agency Clerk
Administration Comm'n	www.falr.com www.doah.state.fl.us	Public records request to the Agency Clerk
Fla. Land & Water Adjudicatory Comm'n	www.falr.com www.doah.state.fl.us	Public records request to the Agency Clerk
Office of Insur. Reg.	Public records request	Public records request
Dep't of Agriculture & Consumer Serv.	www.falr.com/SuperDB.shtml (Division of Licensing Final Orders) www.doah.state.fl.us/FLAIO (all other orders) Final orders from 2009 are electronically accessible. Orders from 1992-2008 are available upon request.	www.falr.com/SuperDB.shtml (for Division of Licensing) www.doah.state.fl.us/FALIO or written request to the Agency
Commission on Ethics	www.ethics.state.fl.us Orders before 1986: FALR	The Commission's website has a searchable electronic database; for orders before 1986: FALR index.
Office of Early Learning	www.doah.state.fl.us	www.doah.state.fl.us
Board of Governors	The Board does not issue final orders.	N/A
Dep't of Education	www.doah.state.fl.us/ALJ	Contact the Agency Clerk

APPELLATE CASE NOTES

by Mary F. Smallwood

Adjudicatory Proceedings

Lantz v. Commissioner of Education, 106 So. 3d 518 (Fla. 1st DCA 2013) (Opinion filed February 12, 2013)

The Educational Practices Commission filed an administrative complaint against Lantz alleging she acted in an unprofessional manner toward another teacher and an administrator in the presence of students. The dispute between the teachers arose from the use of Lantz' classroom by the second teacher to administer an FCAT test. Lantz took the position that the second teacher failed to restore her classroom to its original condition.

After a formal administrative proceeding, the administrative law judge found that the dispute was not as intense as represented by the other participants and that the students were not adversely affected by the confrontation. The judge concluded that Lantz' behavior did not interfere with the discharge of her professional responsibilities or create a hostile environment. The judge recommended that the complaint be dismissed.

After the Commissioner filed exceptions to the recommended order, the Commission held a hearing and rejected or modified a number of the findings of fact. It entered an order adopting the critical allegation in the administrative complaint.

On appeal, the court reversed. It held that the rejected or modified findings were based on the judge's weighing of the evidence. The case was remanded for entry of an order dismissing the complaint.

Prescription Partners, LLC v. Dep't of Financial Services, 109 So. 3d 1218 (Fla. 1st DCA 2013) (Opinion filed March 28, 2013)

Pursuant to Chapter 440, Fla. Stat., workers' compensation physicians who dispense prescription medication to injured claimants are entitled to seek reimbursement from the claimants' employers or the employers' insurance carriers. If a payor denies or adjusts a reimbursement claim, the physician is entitled to challenge the denial or reimbursement amount by filing a petition for dispute resolution with the Department.

Prescription Partners, LLC (Partners) contracted with various physicians to purchase and process their workers' compensation claims for reimbursement for prescription medication. Pursuant to the contracts, Partners paid the physicians a percentage of the claims' value, and the physicians assigned all of their rights, title and interest in the claims to Partners.

In late 2011 and early 2012, Partners filed a number of petitions with the Department challenging payor denials of reimbursement claims. A number of requests for payment were granted, but others were denied on the grounds that they were not filed within the statutory 30-day deadline. With each notice of a denied petition, Partners was notified of its right to request an administrative hearing pursuant to sections 120.569 and 120.57, Fla. Stat.

When Partners filed petitions for administrative hearings, however, the Department dismissed them with leave to amend, in part on the grounds that Partners lacked standing to challenge the reimbursement decisions.

Partners filed amended petitions seeking formal proceedings under section 120.57(1), Fla. Stat., to which Partners attached the contracts with the various physicians. The Department denied the requests for formal proceedings and referred the petitions to a hearing officer for informal hearings. The Department argued that there were no issues of material fact and the timeliness of the initial petitions was purely a legal issue. The hearing officer recommended dismissal of the petitions and the Department issued a final order adopting the recommendation. The Department concluded that Partners was not a party as defined in section 120.52(13), Fla. Stat, and that Partners failed to meet the standing test in *Agrico Chemical Co. v. Department of Environmental Regulation,* 406 So. 2d 478 (Fla. 1st DCA 1981), because its economic interests were not within the zone of interests intended to be protected by the statute.

On appeal, the court reversed. It held that the Department had incorrectly applied the definition of party and the *Agrico* test. Because Partners had received the assignment of rights to reimbursement from the physicians, the court concluded that Partners stood in the shoes of the physicians, entitled to their rights as the parties whose substantial interests were being determined, pursuant to section 120.52(13)(a). The two-pronged standing test in *Agrico* was not applicable, because that test only applied to third-party standing under section 120.52(13)(b). The court went on to rule that even if *Agrico* were applicable, the zone-of-interest test was met, in that the reimbursement dispute provisions in Chapter 440, Fla. Stat., were clearly intended to protect the financial interests of the physicians, and by assignment, Partners.

Rulemaking

Subirats v. Fidelity National Property, 106 So. 3d 997 (Fla. 3d DCA 2013) (Opinion filed February 20, 2013)

The Subiratses filed a claim under their property insurance policy with Fidelity. Approximately two weeks after the claim was filed, Fidelity gave the Subiratses notice of their right to participate in mediation prior to proceeding with the appraisal process; the Subiratses chose to proceed directly to the appraisal process. After a portion of the claim was paid, Fidelity's appraiser and the Subiratses' appraiser reached an agreement on the remainder of the claim. However, the Subiratses' appraiser failed to sign

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the final report. Fidelity closed its file after the Subaratses failed to respond to a notice that the claim would be considered abandoned if their appraiser did not cooperate.

The Subiratses filed an action in circuit court alleging a breach of contract by Fidelity. The trial court stayed the action pending completion of the appraisal. The Subiratses appealed the stay order.

On appeal, the Subiratses argued that Fidelity had waived its right to appraisal because it failed to follow a Department of Financial Services rule requiring insurers to provide notice of the availability of mediation to a policyholder within five days of the policyholder's filing of a claim. By statute, the failure of an insurer to give a policyholder notice of the availability of mediation constitutes a waiver of the insurer's right to invoke the appraisal process; the five-day deadline was established by the rule.

The appellate court affirmed the trial court's stay order. The court rejected the Subiratses' argument that failure to provide notice within five days should result in waiver of the right to appraisal. Instead, the court held that Fidelity met the statutory requirements by providing notice of the availability of mediation. As to the failure to meet the rule's five-day deadline, the court determined that the Department exceeded its statutory authority by adopting a five-day deadline by rule. The court concluded, "We presume the failure of the legislature to authorize the adoption of the rather draconian five-day deadline was intentional."

Department of Financial Services v Brown, 108 So. 3d 723 (Fla. 1st DCA 2013)
(Opinion filed March 1, 2013)

Brown was a general contractor for construction of the First District Court of Appeal. He subcontracted with Signature Art Gallery for all art work in the courthouse for a price of $357,000 plus additional charges under a change order.

The Department paid in part, citing a statutory limit of $100,000 for art in public buildings. Upon resubmission of the invoice, the Department again denied payment based on rule 69I-40.103(6), Fla. Admin. Code, which prohibited expenditures of state funds for decorative items such as framed photographs.

Signature first filed suit in circuit court for payment. When the Department raised the rule as an affirmative defense, Signature challenged the rule under the Administrative Procedure Act on the grounds that it exceeded the authority granted under the statute.

The administrative law judge issued a final order invalidating the rule because it exceeded statutory authority. The ALJ noted that section 17.29, Fla. Stat., authorized the Chief Financial Officer to process requests for payments, but did not contain authority to restrict payments. The ALJ also determined that the rule was vague and was subject to inconsistent application.

The appellate court affirmed the final order, adopting the ALJ's conclusions and reasoning.

Public Records

Rhea v. Bd. of Trustees of Santa Fe College, 109 So. 3d 851 (Fla. 1st DCA 2013) (Opinion filed March 13, 2013)

Rhea, an adjunct professor at Santa Fe College, filed a request with the chair of the academic foundation department requesting a complete copy of an email from a student in one of Rhea's classes who had complained about Rhea. The email had previously been provided to Rhea with the student's name redacted. The College asserted that the student's name was protected by the federal Family Educational Rights and Privacy Act (FERPA). Rhea argued that he was effectively prevented from responding to the complaint. Ultimately, Rhea's contract was not renewed.

Rhea filed a mandamus action alleging a violation of FERPA. The trial court concluded that the student's name was protected as an education record under FERPA and the Florida Public Records Act, Chapter 119, Fla. Stat.

The appellate court affirmed. It noted that the Legislature had adopted an exemption to the Public Records Act for "education records," adopting the FERPA definition of that term, which includes a requirement that the record contain information "directly related" to a student. The court held that the student's email complaint was an education record as the information contained therein, including the student's name, his impressions of the educational atmosphere in the classroom and Rhea's teaching methodology, was directly related to the student. In so holding, the court rejected the line of cases from other jurisdictions holding that in order for a record to be "directly related" to a student, the record had to be "primarily related" to the student.

Marino v University of Florida, 107 So. 3d 1231 (Fla. 1st DCA 2013) (Opinion filed February 26, 2013)

Marino submitted a public records request to the University of Florida seeking certain information related to 33 non-human primates identified in a United States Department of Agriculture report. The University produced the documents with redactions obscuring the locations of physical housing of the primates. In redacting information in the documents, the University relied on sections 119.071(3) and 281.301, Fla.Stat., which create an exemption from the Public Records Act for security plans. Rejecting arguments by Marino that the exemption did not apply, the trial court held that the animal research security plan set forth measures to safeguard the research facilities and University personnel, including the location of such facilities.

On appeal, the court reversed. It noted that exemptions under the Public Records Act must be construed narrowly. The court concluded that since the Legislature had failed to provide a specific exemption for the location of animal research facilities while including a specific exemption for the location of other types of facilities, such as medical facilities engaged in anti-terrorism efforts, the security exemption did not apply to animal research facilities.

Appeals

M.B. v. Agency for Persons with Disabilities, 38 Fla. L. Weekly 659 (Fla.

3d DCA 2013) (Opinion filed March 20, 2013)

M.B., a developmentally disabled adult who was receiving behavior assistant services through the Agency for Persons with Disabilities, received notice that the agency intended to terminate services. M.B. requested an administrative hearing to challenge the termination. A hearing was scheduled before a hearing officer of the Department of Children and Families' Office of Appeals Hearings. Prior to the hearing, counsel for M.B. reached an agreement with the agency's counsel, whereby the agency agreed to withdraw its termination of services. A written agreement was signed by M.B.'s lawyer the day before the hearing, and sent to the agency's counsel, with a transmittal asking whether their agreement meant that it was not necessary for M.B. and her lawyer to appear at the hearing the next day. The agency's lawyer confirmed to counsel for M.B. that it was not necessary to attend the hearing. Based on the representation of the agency's counsel, neither M.B. nor her counsel attended the hearing. The agency's lawyer also notified the hearing officer in writing that the agency had decided to withdraw its termination of services.

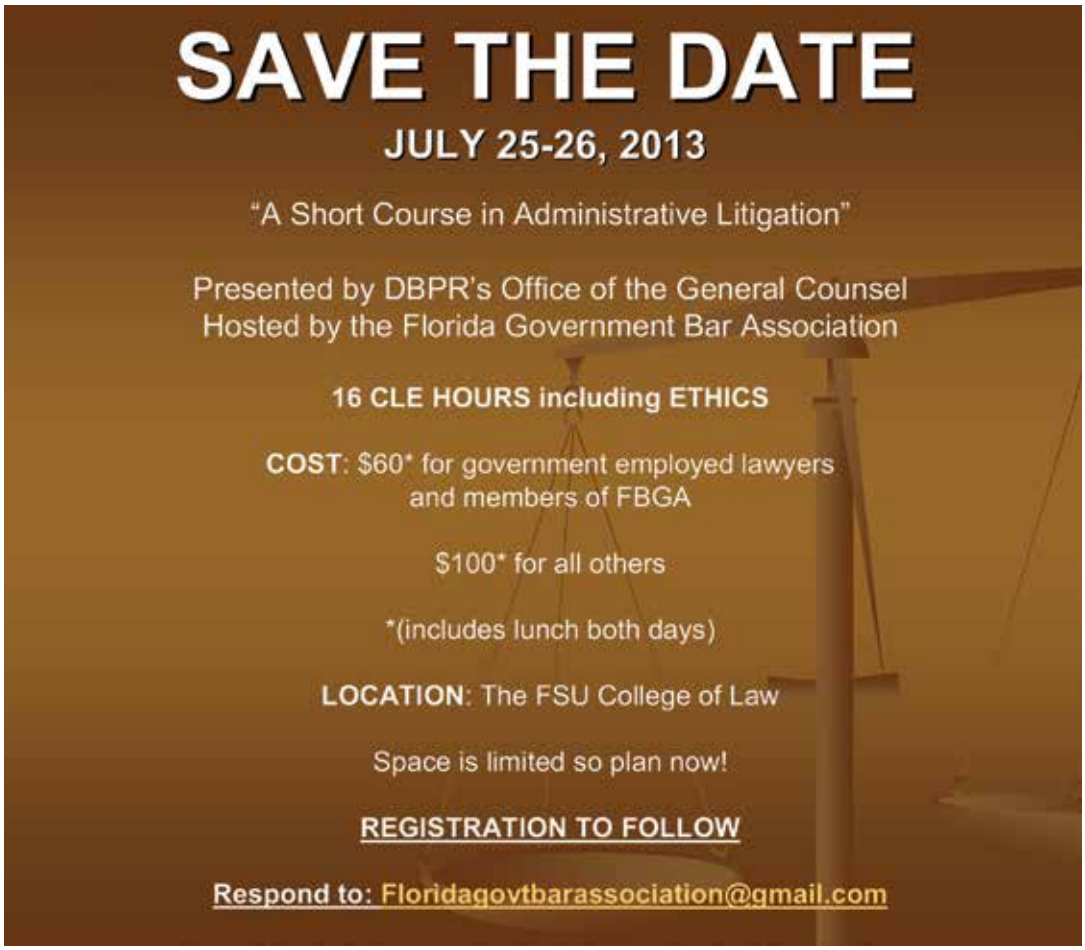
One week after the scheduled hearing date, the hearing officer issued a recommended order of dismissal of M.B.'s appeal. The hearing officer found that because M.B. failed to appear at the hearing, the appeal was considered abandoned. The next day, the agency clerk entered a final order dismissing M.B.'s appeal.

During the 30-day window to appeal the final order, counsel for M.B. contacted counsel for the agency to ask that the final order be vacated, as it had apparently been issued in error. The agency's counsel agreed and represented that a request would be made to amend the final order to adopt the agreement and withdraw the termination of services.

When the matter had not been resolved by the end of the 30-day appeal window, M.B. filed a notice of appeal. The agency retained new appellate counsel, who disavowed the agreement with M.B. Instead, the agency took the position that the final order should be affirmed because M.B. did not object to the hearing officer's recommended order of dismissal and because M.B. failed to notify the hearing officer that the case had been resolved.

The court reversed the final order, and remanded with directions that M.B.'s petition challenging the termination of services be dismissed as moot: "We summarily enforce the Agency's original agreement[.]" The court also ordered the agency's appellate counsel of record, and the agency itself through separate counsel, to show cause why they should not be sanctioned for maintaining a frivolous defense of the appeal. The court rejected as "absurd" the agency's first argument regarding M.B.'s failure to object, pointing out that the final order was rendered just one day after the recommended order, without giving M.B. the required 15-day window to file exceptions. The court rejected the agency's second argument as inconsistent with the agency's position below, as expressed by its counsel below, who conceded that the final order was entered in error.

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.*



DOAH CASE NOTES

SUBSTANTIAL INTEREST HEARINGS

Margot Seefried v. Dep't of Transp., DOAH Case No 12-1512 (Recommended Order Feb. 21, 2013); DOT Case No. 12-042 (Final Order Mar. 25, 2013).

FACTS: Michael Monroe submitted an application to DOT for site approval to construct a private airport on his property. Rule 14-60.005, Fla. Admin. Code, describes the airport site approval application process, and paragraph (5) of that rule sets forth the requirements that must be met by an applicant for airport site approval. After review of the application, DOT issued an airport site approval order to Mr. Monroe to allow the construction of a private airport on his property.

PROCEDURAL HISTORY: Ms. Seefried, who owns land adjacent to Mr. Monroe's property, filed a timely challenge to the site approval order, and DOT referred the case to DOAH for a formal administrative hearing.

OUTCOME: The ALJ recommended that DOT deny Mr. Monroe's site approval application. The ALJ pointed to section 330.30(1)(a), Florida Statutes, which provides that DOT "shall grant the site approval if it is satisfied" that "safe air-traffic patterns can be established for the proposed airport with all existing airports and approved airport sites in its vicinity." DOT rule 14-60.005(5)(j) requires applicants to provide written confirmation demonstrating that safe air traffic patterns can be established for the proposed airport with all existing airports sites within 3 miles. Mr. Monroe failed to satisfy that requirement.

DOT argued it had the authority to waive that requirement pursuant to section 330.30(1)(d), which states: "Site approval may be granted subject to any reasonable conditions [DOT] deems necessary to protect the public health, safety, or welfare." However, the ALJ concluded that when the entire statute was read in context, it was apparent that section 330.30(1)(d) did not give DOT "authority to waive the clearly stated requirement of subparagraph (a)4. Nowhere in the statute is it stated that [DOT] may waive any of the enumerated criteria for site approval. If such were the case, paragraph (d) would swallow the rest of the statute, giving [DOT] carte blanche to set its own 'reasonable conditions' without regard to the criteria established by the Legislature. The better reading is that paragraph (d) gives [DOT] authority to establish additional 'reasonable conditions,' over and above those set forth elsewhere in subsection (1), where specific circumstances make such additional conditions necessary to protect the public health, safety or welfare."

No exceptions were filed. DOT adopted the recommended findings of fact and conclusions of law, and issued a final order denying Mr. Monroe's private airport site approval application.

Last Stand, Inc. and George Halloran v. Fury Management, Inc. and Dep't of Envtl. Prot., DOAH Case No. 12-2574 (Recommended Order Dec. 31, 2012), DEP Case No. 12-1275 (Final Order Feb. 7, 2013)

FACTS: Fury Management, Inc. ("Fury"), a water attraction business, applied for a consolidated environmental resource permit and modified sovereignty submerged land lease for a proposed "entertainment destination" off the coast of Key West, Florida. Fury's proposal entailed permanently mooring platforms for water toys and equipment such as jet skis and kayaks to support recreational water activities, and to conduct educational marine environment programs in the Florida Keys National Marine Sanctuary, a designated Outstanding Florida Water. Section 403.061(27), Florida Statutes, states such waters are worthy of special protection because of their natural attributes. In June 2012, DEP issued a notice of its intent to issue Fury the permit and lease.

PROCEDURAL HISTORY: George Halloran, a Key West resident, and Last Stand, Inc., an environmentally-focused corporation seeking to protect, promote and preserve the quality of life in Key West and Monroe County, petitioned for an administrative hearing to challenge the permit and lease.

OUTCOME: In the course of recommending issuance of the permit and lease, the ALJ discussed a fundamental change in the burden of proof in proceedings arising under chapters 373, 378, or 403, by the enactment in 2011 of section 120.569(2)(p). In these proceedings, an initially-approved applicant is now able to establish a prima facie case for approval through an "abbreviated presentation" that is limited to "entering into evidence the application and relevant material submitted to the agency in support of the application, and the agency's staff report or notice of intent to approve the permit, license, or conceptual approval." At that point, the challenger "has the burden of going forward to prove the case in opposition to the license, permit, or conceptual approval . . ." The new law thus changes the "fundamental principle" established by case law that applicants bear the ultimate burden of persuasion, and instead, places that burden on the challenger.

The ALJ also discussed how evidentiary issues are changed by the burden-of-proof change in section 120.569(2)(p). Previously, applicants had to prove contested aspects of their permit applications through normal evidentiary formalities. In proceedings under section 120.569(2)(p), "all aspects of the applicant's prima facie case of entitlement to the permit should now be subject to less formal proof through the admission into

evidence of the permit application and supporting material." Accordingly, the application and supporting materials could be considered for the truth of the matters asserted, without being subject to hearsay objections.

DEP adopted the recommended order in all material respects.

Fla. Wildlife Fed'n v. CRP/HLV Highlands Ranch, LLC & Dep't of Envtl. Protection, DOAH Case No. 12-3219 (Recommended Order April 11, 2013)

FACTS: A mitigation credit is a "standard unit of measure which represents the increase in ecological value resulting from restoration, enhancement, preservation, or creation activities." Fla. Admin. Code R. 62-345.200(8). When the recipient of an environmental resource permit must offset adverse impacts to wetlands, the permittee may purchase credits from a mitigation bank. Mitigation banks are projects involving restoration, enhancement, preservation, and/or creation activities that provide an increase in ecological value. DEP has concurrent jurisdiction with the State's water management districts for permitting mitigation banks. The permits include an award of mitigation credits based on the degree of increased ecological value provided. A DEP rule contains the "Uniform Mitigation Assessment Method" (UMAM) used to determine the increase in ecological value.

On August 4, 2010, following an administrative hearing, the St. Johns River Water Management District ("SJRWMD") issued a permit allowing Highlands Ranch to construct and perpetually manage a 1,575.5 acre mitigation bank, for which 193.56 mitigation credits were awarded. That award was based on a "two-step" approach to valuing the ecological value of the project, found to be an appropriate interpretation of the UMAM rule in that case.

Highlands Ranch later filed an application with DEP for a new permit for the same project previously permitted by SJRWMD. On August 17, 2012, DEP issued a notice of intent to grant Highlands Ranch a new permit for the same mitigation bank, awarding 424.81 mitigation credits. DEP's proposed action was based on a "one-step" approach developed by DEP and counsel for Highlands Ranch. The one-step approach was set forth in a "guidance memo" developed without input from the public. The guidance memo, which rejected the two-step approach and required use of the one-step approach, was intended by DEP to provide a uniform interpretation of the UMAM rule.

PROCEDURAL HISTORY: The Florida Wildlife Federation timely challenged DEP's notice of intent to grant a new permit, and DEP referred the petition to DOAH for a formal hearing.

OUTCOME: The ALJ recommended that DEP issue a new permit to Highlands Ranch that awards no more than 280.33 mitigation credits. Although the ALJ concluded that the guidance memo was an unadopted rule and thus could not be relied on pursuant to section 120.57(1)(e), the UMAM rule still applied, and could reasonably be interpreted to allow either a one-step or two-step approach. Thus, although the guidance memo could not be applied to require use of the one-step approach, DEP was not precluded from utilizing the "one-step" approach because DEP "established and explained its reasoning with competent, substantial evidence at the final hearing." In support of this conclusion, the ALJ cited Beverly Enterprises-Florida, Inc. v. Dep't of HRS, 573 So. 2d 19 (Fla. 1st DCA 1990) for the proposition that an agency may apply non-uniform policy on a case-by-case basis in section 120.57 hearings provided the agency explicates, supports, and defends such policy with competent, substantial evidence.

Because SJRWMD had already issued a permit for the subject property, the ALJ addressed whether administrative finality foreclosed DEP from issuing the challenged permit. See Delray Med. Ctr., Inc. v. AHCA, 5 So. 3d 26, 29 (Fla. 4th DCA 2009). The ALJ concluded that there were changes made to the application for and conditions of the permit, and that these changes were sufficient to avoid application of administrative finality under the holding of Delray and prior administrative finality cases.

DISCIPLINARY/ENFORCEMENT ACTIONS

Dep't of Health, Bd. of Massage Therapy v. Guiping Diamond, L.M.T., DOAH Case No. 12-3825PL (Recommended Order April 9, 2013).

FACTS: In order to become a licensed massage therapist, one must complete a course of study at a massage school approved by the Board of Massage Therapy ("Board") or an apprenticeship program that meets standards adopted by the Board. Board-approved massage schools are permitted by Board rule to accept credits transferred from other massage schools, after evaluation and determination that the credits satisfy criteria established by the Board. With a certification by the Board-approved massage school that the transfer credits meet the Board's standards, those credits could be used to count towards graduation requirements of the Board-approved schools. The Florida College of Natural Health ("FCNH") is a Board-approved massage school. During the relevant time period, FCNH's registrar was responsible for evaluating potential transfer credits and certifying that a student's credits from another school were acceptable in lieu of the student taking FCNH courses. FCNH eventually discovered that the registrar had been fabricating transcripts, certificates, and FCNH diplomas for people who had never enrolled at FCNH. When FCNH notified the Board that some students may not have satisfied graduation requirements, the Department initiated an investigation, identifying 200 FCNH graduates whose credentials could not be confirmed. Guiping Diamond is an FCNH graduate who became a Florida-licensed massage therapist in 2009. The FCNH 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, if Ms. Diamond paid

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a cash fee of $418.98 to transfer the credits (which was not a fee imposed by FCNH). There was no evidence that Ms. Diamond was aware of the falsified documentation, which the FCNH registrar submitted directly to the Board.

PROCEDURAL HISTORY: The Department 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, through an error by the Department, and that Ms. Diamond violated the licensure laws by not graduating from a Board-approved school, contrary to what her FCNH diploma showed.

OUTCOME: The ALJ recommended that the Board enter a final order finding Ms. Diamond not guilty. The ALJ found that there was no evidence of any fraudulent misrepresentation by Ms. Diamond. Instead, the evidence suggested that Ms. Diamond may have been a victim of FCNH's registrar, on whom Ms. Diamond reasonably relied.

The ALJ also rejected the Department's alternative argument that Ms. Diamond committed a disciplinable offense when Department staff failed to notice a deficiency in her FCNH transcript. The ALJ concluded that the Department's argument was contrary to section 120.60, Florida Statutes, which requires an agency to notify an applicant (within 30 days of receiving an application) of any errors or omissions, and prohibits the denial of an application for errors or omissions of which the agency did not timely notify the applicant. According to the ALJ, "to allow the agency later to revoke a license pursuant to section 456.072(1)(h) based solely on a purported deficiency in the licensee's application of which the agency failed to give timely notice under section 120.60 not only would erode the protection that the latter statute affords specific licensees, but also would undermine the integrity of licenses in general." The ALJ also concluded the applicant must knowingly use the agency's error to his or her advantage, which he found was not the case here. The ALJ also recommended dismissal of a charge that Ms. Diamond violated the licensure laws by not graduating from a Board-approved massage school. The ALJ rejected the suggestion that he could reach that conclusion by finding Ms. Diamond's diploma a nullity. Instead, the ALJ concluded that such questions "are not amenable to adjudication in this administrative proceeding." "Neither the Department nor the Board has the authority to revoke or rescind the Diploma, rendering it a nullity, any more than either agency could revoke a degree from, say, Harvard University or Tallahassee Community College." "Only FCNH has the authority to revoke the Diploma, provided it does so in accordance with due process of law . . ."

Dep't of Health, Bd. of Med. v. Grekos, M.D., DOAH Case No. 11-4240PL (Recommended Order March 11, 2013), DOH Case No. 2010-14317 (Final Order May 14, 2013).

FACTS: Dr. Grekos is a Florida-licensed medical doctor who performs stem cell treatments. He is board-certified in cardiovascular disease and board-eligible in internal medicine. In February 2010, Dr. Grekos' patient of three years inquired as to whether stem cell therapy could help her peripheral neuropathy. Dr. Grekos stated that an injection of stem cells from her bone marrow into the arterial circulation of her brain could possibly improve her neurological deficits with no negative consequences.

Dr. Grekos performed the procedure on March 24, 2010. The patient remained in recovery for 1.5 hours before going home. A few hours later, the patient fell onto the floor and began vomiting uncontrollably. Emergency medical services transported her to a hospital where she was diagnosed as having had a stroke that caused debilitating and irreparable damage to the cerebellum and medulla of her brain. The patient never recovered and died on April 4, 2010.

PROCEDURAL HISTORY: The Department filed an administrative complaint, alleging in part that the stem cell treatment performed by Dr. Grekos was below the standard of care, and was performed without the patient's informed consent. Dr. Grekos disputed the charges and requested a DOAH hearing.

OUTCOME: The ALJ recommended that the Board of Medicine revoke Dr. Grekos' license and impose a $20,000 fine, based on clear and convincing evidence that the stem cell treatment fell below the standard of care: "The infusion of approximately 240 cc's of unconcentrated, grossly filtered [bone marrow aspirate] into the cerebral circulation of the patient via the vertebral arteries had virtually no hope of success because of the very high probability that it would cause the patient to have a serious stroke. Grekos should have known this and should not have attempted the procedure." The ALJ also found that the patient did not give informed consent, because Respondent did not inform the patient "that the treatment Respondent was attempting had virtually no hope of success and had a very high probability that it would cause the patient to have a serious stroke."

The Board of Medicine adopted the recommended findings, conclusions, and penalties, after denying Respondent's exceptions.

Dep't of Transp. v. Ronald Puleo, DOAH Case No. 12-3524 (Recommended Order Feb. 14, 2013), DOT Case No. 10-170 (Final Order May 14, 2013).

FACTS: Mr. Puleo operates a car rental business on property fronting South Tamiami Trail in Sarasota. Since 2003, the paved area in front of his building has been used for parking by employees and visitors, and to display parked rental cars with small "Rent Me" signs. DOT asserted ownership of land 40 feet in from the sidewalk as right-of-way, and told Mr. Puleo he could not park or advertise

there. In 2007, DOT sued Mr. Puleo in circuit court to stop his parking and advertising on DOT's right-of-way. However, title work revealed that Mr. Puleo actually owned most of the frontage, including land abutting the road used by DOT for sidewalks, street lights, and underground utilities. In 2009, to settle the lawsuit, Mr. Puleo gave DOT an easement to use the frontage he owned, and DOT agreed to let Mr. Puleo continue his historic use of the remaining frontage that was DOT right-of-way. DOT also issued a general use permit allowing Mr. Puleo to construct and use an asphalt pad on DOT right-of-way next to Mr. Puleo's property. The permit, made part of the settlement agreement, described the new asphalt pad as an extension of Mr. Puleo's "parking area." The new asphalt pad was constructed, and Mr. Puleo began using it as an extension of his parking area, for parking and display of rental cars. In a 2010 letter, DOT informed Mr. Puleo that the permit was issued "in error." Without offering Mr. Puleo hearing rights, DOT voided the 2009 permit and issued a new permit that deleted the "extend parking area" description and added conditions that prohibited parking and advertising on the new asphalt pad.

PROCEDURAL HISTORY: DOT issued a complaint alleging that Mr. Puleo's parking and advertising on the new asphalt pad violated the 2010 permit. Mr. Puleo was notified of his right to an administrative hearing, which he requested, contending that DOT acted unlawfully by revoking the 2009 permit and issuing a different permit, and that DOT was equitably estopped from denying the validity of the 2009 permit.

OUTCOME: The ALJ recommended entry of a final order determining that the 2009 permit remains in effect and the 2010 permit is void, and dismissing the complaint. The ALJ determined that a DOT general use permit is a form of license, as recognized in a DOT rule, and thus is subject to the APA's licensing statute, section 120.60. When DOT issued a letter unilaterally revoking the 2009 permit and replacing it with the 2010 permit, DOT's action "was unlawful under the APA," in that the DOT letter was "neither an administrative complaint nor an emergency suspension order conforming to section 120.60." Therefore, DOT could not lawfully take enforcement action predicated on the 2010 permit conditions. According to the ALJ, DOT "had no legal right to unilaterally add conditions that it wished it had put on the 2009 permit - - a permit that was not only issued by [DOT] but also made a part of the settlement agreement."

The ALJ also found that Mr. Puleo proved all elements of equitable estoppel as a defense to the enforcement action. "Having secured [Mr. Puleo]'s agreement to resolve the circuit court litigation with the bait of the 2009 permit, [DOT] is equitably estopped from switching the terms of the 2009 permit, even if its representatives made mistakes in issuing that permit and in making it a part of the settlement agreement."

No exceptions were filed. DOT adopted the recommended findings of fact and conclusions of law in its final order.

AHCA v. Sharing Facility Group Home, DOAH Case Nos 12-1664MPI & 12-1841MPI (Recommended Order Feb. 21, 2013), AHCA Rendition No. AHCA-13-410-FOF-MDO (Final Order April 29, 2013).

FACTS: AHCA administers Florida's Medicaid program, and the Respondent is a Medicaid provider that must retain Medicaid-related records for five years after the date of furnishing goods and/or services to Medicaid recipients. After AHCA investigators visited the Respondent's facility to review Medicaid-related records, the Respondent received a letter from AHCA requesting that additional documentation be provided within 15 calendar days. Even though the Respondent sent numerous documents to AHCA, some of the requested documentation was inadvertently excluded, although Respondent had the documents in its possession. Two months later, in a telephone conversation with the AHCA investigator, the Respondent learned that documents were inadvertently omitted. The investigator advised the Respondent to forward the documents in question "as soon as possible." No more than four days later, the Respondent provided additional documents, including a certificate documenting that a particular employee had completed required infection control and zero tolerance training. Nevertheless, AHCA issued a sanction letter seeking to fine the Respondent for its alleged failure to provide proof of current infection control and zero tolerance training for the aforementioned employee.

PROCEDURAL HISTORY: The Respondent requested a formal hearing to dispute AHCA's imposition of a $4,000 fine.

OUTCOME: The ALJ recommended that AHCA dismiss all allegations and not impose any sanctions. The ALJ found that the Respondent did provide the infection control and zero tolerance training documentation, just not within the 15 calendar day deadline in AHCA's letter. The ALJ also found that when other Medicaid providers in the past have furnished required documentation in an untimely manner, AHCA's practice had been to excuse the untimeliness and to "move on to the next case. . . . It has been the practice of AHCA (through MPI), when faced with similar provider behavior, to find no sanctionable conduct[.]" The ALJ described AHCA's action toward the Respondent as "an unexplained departure from that practice. . . . AHCA has not offered, nor does the undersigned find, any justification for deviating from this agency practice in Respondent's case. Accordingly, consistent with this practice, the [allegations] should be dismissed."

AHCA's final order adopted the ALJ's findings of fact, conclusions of law, and recommended dismissal.

Crim. Justice Standards Comm'n v. Hart, DOAH Case No. 12-3606PL (Recommended Order Mar. 1, 2013), CJSTC Case No. 31916 (Final Order May 24, 2013).

FACTS: Brian Hart was employed

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as a Tallahassee Police Department ("TPD") certified officer. In early 2011, TPD investigated complaints alleging that Mr. Hart committed battery on a woman at a sports bar and had committed multiple batteries on his girlfriend.

Criminal charges were brought against Mr. Hart in circuit court for the alleged battery in the sports bar. The court issued its judgment and sentence, withholding adjudication and sentencing Mr. Hart to 12 months of probation; it was not clear from the court's judgment whether Mr. Hart pled guilty or nolo contendere, or was tried and found guilty. TPD terminated Mr. Hart's employment.

PROCEDURAL HISTORY: The Commission filed an administrative complaint that charged Mr. Hart with two counts of failing to maintain good moral character, predicated on the two separate battery complaints, for which the Commission sought to take disciplinary action against Mr. Hart's law enforcement certificate.

OUTCOME: The ALJ found clear and convincing evidence proving that Mr. Hart committed multiple batteries on his girlfriend. Based on these acts, the ALJ concluded that Mr. Hart failed to maintain good moral character. The ALJ recommended that the Commission suspend his certificate for one year, followed by one year of probation.

The ALJ recommended dismissal of the count addressing the alleged battery in the sports bar, because neither the alleged victim nor anyone else with personal knowledge of the incident had testified during the administrative hearing. Importantly, the ALJ noted that Mr. Hart's criminal conviction was inadmissible for the purpose of proving that the battery had occurred, which was the factual predicate for the charge of failing to maintain good moral character. The criminal judgment would have been sufficient to support a charge that Mr. Hart had been convicted of the crime of battery, but the administrative complaint did not include that charge.

The ALJ determined the recommended penalty upon consideration of the Commission's disciplinary guidelines. In addressing domestic violence as a potential aggravator, the ALJ concluded Mr. Hart had not committed domestic violence, as that term is statutorily defined. Pursuant to section 741.28(2), Florida Statutes, domestic violence is defined as certain acts, including battery, against a "family or household member by another family or household member." The phrase "household members" is defined in section 741.28(3), Florida Statutes, as "former spouses, persons related by blood or marriage, persons who are presently residing together as if a family or who have resided together in the past as a family… [The] family or household member must be currently residing or have in the past resided together in the same dwelling unit." The ALJ concluded that Mr. Hart's girlfriend did not qualify as a household member during the pertinent time, because even though she stayed most nights at Mr. Hart's apartment, she maintained her own apartment.

No exceptions were filed. The Commission adopted the recommended findings, conclusions, and penalty.

RULE CHALLENGES

Rosaida Healthcare, Inc. v. AHCA, DOAH Case No. 12-3551RU (Final Order Feb. 18, 2013).

FACTS: AHCA amended Rule 59G-13.082(2) in 2008 to incorporate by reference a document called the Procedure Codes and Maximum Units of Service, January 1, 2008. Prior to the amendment, the rule incorporated by reference an earlier version of the same document. According to this document, Medicaid providers are allowed to bill for up to 40 quarter hours of companion services on a single billing claim line. In the course of the 2008 rule amendment process, AHCA filed with the Department of State a different document, called the Billing Code Matrix, rather than the 2008 version of the Procedure Codes and Maximum Units of Service. According to the Billing Code Matrix, Medicaid providers were only allowed to bill for 24 quarter hours per claim line.

After auditing the Medicaid billings submitted by Rosaida Healthcare from December 4, 2008 through December 31, 2010, AHCA sought to recoup $418,563.87 in overpayments and associated charges. AHCA's determination was based on the Billing Code Matrix even though the amended version of rule 59G-13.082(2) explicitly incorporated the Procedure Codes and Maximum Units of Service. AHCA did not single out Rosaida Healthcare in this regard; AHCA has been applying the Billing Code Matrix to Medicaid provider billings since December 3, 2008, which was the effective date of the rule amendment.

PROCEDURAL HISTORY: In addition to requesting a formal hearing to challenge AHCA's overpayment determination, Rosaida Healthcare filed an unadopted rule challenge, alleging that the Billing Code Matrix was a rule, but was not adopted pursuant to the rulemaking procedures in section 120.54, Florida Statutes. The hearing regarding the alleged overpayments was stayed pending the outcome of the unadopted rule challenge.

AHCA sought dismissal of the rule challenge, by filing a Notice of Correction of Scrivener's Error, and arguing that the rule challenge had been rendered moot. According to the Notice of Correction of Scrivener's error, AHCA took the position that its amendment to rule 59G-13.082(2) should have identified the Billing Code Matrix, January 1, 2008, as the document incorporated by reference, but that by virtue of a "scrivener's error," the rule amendment text identified the Procedures Codes and Maximum Units of Service, January 1, 2008, as the document incorporated by reference. AHCA stated that to correct this "scrivener's error," the Department of State's official website had been "subsequently" altered so as to make it appear that the archived version of Rule 59G-13.082(2) had explicitly incorporated

the Billing Code Matrix when it was amended in 2008.

OUTCOME: The final order determined that the Billing Code Matrix was an unadopted rule, and that AHCA must immediately discontinue reliance upon the Billing Code Matrix as a basis for agency action. In reaching that determination, the ALJ found that "[i]t is impossible to conclude, on these facts, that [AHCA] incorporated the Billing Code Matrix in the 2008 rule amendment that explicitly incorporated a different document. To relieve [AHCA] of the consequences of its carelessness and incorporate the Billing Code Matrix would be an exercise in rulemaking, not rule interpretation."

The ALJ also concluded that AHCA's "failure to have incorporated the Billing Code Matrix in the 2008 amendment of rule 59G-13.082(2) is not remedied by the recent alteration of the 'archived' rule maintained on the Department of State official website." Rather than being a grammatical or typographical error that the Department of State was authorized to correct (until that authority was repealed in 2012), the ALJ concluded that "[t]he error at issue clearly affects the construction or meaning of the rule that [AHCA] amended in 2008." The ALJ rejected AHCA's contention that the regulated community should be subjected, as of 2008, to the Billing Code Matrix requirements, determining instead that the Medicaid provider community was never put on notice through the 2008 rule amendment process that the prior approved billing procedure would be changing pursuant to the different requirements in the Billing Code Matrix.

BID PROTESTS

Prison Rehab. Indus. & Diversified Enter., Inc. d/b/a Pride Enter. v. Dep't of Highway Safety & Motor Vehicles, DOAH Case No 13-0494BID (Recommended Order April 10, 2013), (Final Order May 22, 2013).

FACTS: Prison Rehabilitative Industries and Diversified Enterprises, Inc. ("PRIDE") is a not-for-profit corporation that has provided license plates to the State of Florida for approximately 30 years. The Department issued Invitation to Negotiate ("ITN") 012-13 on December 28, 2012, seeking proposals for the manufacture and distribution of approximately 18 million license tags. The Department's stated intent was "to acquire a complete working system" for ordering plates, monitoring shipment of orders, and billing. As for the ITN's terms, a section entitled "Mandatory Requirements" stated "[t]he evaluation criteria set forth herein, and their relative weights, are . . . subject to modification in the negotiation process." Another term required prospective bidders to provide a license plate sample and failure to do so would result in a bid being deemed non-responsive. The Department also sought the ability to change certain aspects of future license plate design in ways that could only be met by one or two companies.

PROCEDURAL HISTORY: PRIDE filed a notice of intent to protest and a formal written protest, to request an administrative hearing pursuant to section 120.57(3), to challenge the ITN specifications. The Department sent PRIDE's protest to DOAH to conduct the requested hearing.

OUTCOME: The ALJ recommended that the Department withdraw ITN 012-13 after concluding certain aspects of the ITN were "contrary to the competitive bidding process." For instance, the Department's description of the "complete working system" was so ill-defined that prospective bidders had no way of ascertaining what the Department was seeking to procure. The ALJ also concluded "prospective bidders cannot know the actual ITN criteria" because the "Mandatory Requirements" were subject to change. In addition, by requiring prospective bidders to produce a sample, the Department limited "the entities that could possibly propose options to only those entities that have the current ability to produce the requisite sheeting." Finally, while stating the Department's desire for flexibility in future designs was "laudable," the ALJ concluded the Department "created an exclusionary process that is contrary to competition because it limits the entities to only those companies that actually make the sheeting."

In its final order, the Department determined that the case was moot because it had voluntarily withdrawn the ITN and because of intervening legislation.

NEW DOAH CASE NOTES TEAM MEMBER

The original DOAH Case Notes Team membership was published in the April 2013 issue of the Newsletter, with brief biographical sketches for each member; readers interested in this information should refer back to that issue, available online at the section's website, flaadminlaw.org. For this and future Newsletters featuring DOAH Case Notes, only changes to the original Team membership will be published.

Added to the DOAH Case Notes Team:

Dustin Metz *received his Juris Doctor from the Florida State University College of Law in 2008 and worked for the State Attorney and the Department of Children and Families prior to becoming a prosecutor for the Department of Business and Professional Regulation in July 2011. In his free time, Mr. Metz serves his community as a volunteer firefighter and Guardian ad litem.*

Agency Snapshots

Department of Education

by Brent McNeal

The Department of Education (Department) is the agency responsible for ensuring the quality provision of free education from pre-kindergarten through state college. The Department operates under the supervision of the State Board of Education, which consists of seven members appointed by the Governor to staggered four-year terms. The State Board of Education in turn appoints the Commissioner of Education. Below is a snapshot of the Department from the perspective of the Office of the General Counsel.

The Office of the General Counsel is responsible for providing legal advice and representation to the State Board of Education, the Commissioner of Education, and all units within the Department. The office also fosters cooperation and collaboration with counsel for the sixty-seven school districts, as well as counsel for charter schools and state colleges. The General Counsel is available for consultation at all State Board of Education meetings and is available at the call of the Commissioner of Education and Board members for research and advice. Areas for which the General Counsel is called upon routinely include: statutory interpretation; public records; open meetings; ethics; rulemaking procedures; legislative procedures; personnel; procurement; and the management of all agency litigation. The office takes a hands-on role to assist the Department in meeting the complex federal requirements that must be met to secure and maintain federal education funding. The General Counsel supervises the work of twelve attorneys, three paralegals, and six support staff.

The Educational Programs unit of the Office of the General Counsel provides general legal assistance to all program units of the Department to ensure that agency action complies with the state Education Code, the Florida Constitution, and federal laws and grants. The unit assists with implementing the state's educational initiatives such as differentiated accountability, drop-out prevention, and various choice options, including virtual programs, charter schools and private schools that accept students with McKay scholarships.

The Business Operations unit of the Office of the General Counsel handles all contract reviews and provides significant assistance in contract preparation and negotiation and preparation of competitive procurements and grant solicitations. The Business Operations unit also handles a wide variety of litigation, including personnel appeals and arbitrations, bid protests, McKay scholarship denials, rule challenges, risk management cases, and challenges over district funding issues. Questions relating to bond finance, education funding, growth management, labor relations, garnishments, general services, technology, and other finance and operations issues are also referred to this unit.

The Professional Practices Services unit of the Office of the General Counsel represents the Commissioner of Education in educator licensing proceedings through which teaching or administration certificates may be denied or sanctioned. This unit provides advice to investigators, recommends probable cause determinations to the Commissioner of Education, drafts administrative complaints, negotiates settlements, handles hearings before the Education Practices Commission and the Division of Administrative Hearings, and defends cases on appeal. The Education Practices Commission serves as agency head in determining educator license violations and corresponding penalties.

The Vocational Rehabilitation/Blind Services unit of the Office of the General Counsel provides legal services to the Division of Vocational Rehabilitation and the Division of Blind Services. The Vocational Rehabilitation/Blind Services unit of the Office of the General Counsel represents the Department in such matters as appeals by employees of these divisions in cases involving discharges, unemployment compensation appeals, appeals of administrative final orders, and claims of discriminatory treatment. This unit also provides staff counseling in matters of contracts, vendor certification, legal process, legislative proposals, and policy. Finally, the unit manages the subrogation rights to reimbursement of vocational rehabilitation services expenditures from third-party payments.

Head of the Agency:
Dr. Tony Bennett, Commissioner
Office of the Commissioner
Turlington Building, Suite 1514
325 West Gaines Street
(850) 245-0505
(850) 245-9667 (fax)
Commissioner@fldoe.org

Agency Clerk:
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Turlington Building, Suite 1514 (Suite 1520 for filings)
325 West Gaines Street
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Hours for Filings:
8:00 a.m. - 5:00 p.m. Monday –Friday (except for holidays)

General Counsel:
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Mr. Carson received his J.D. from the University of Florida Levin College of Law in 2004. Prior to serving as General Counsel for the Department, he was an attorney at Rumberger, Kirk & Caldwell, where he represented clients in the areas of education law, civil rights, constitutional law, and casualty defense in state and federal court.

Number of Lawyers on Staff:
12

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AGENCY SNAPSHOTS
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Department of Legal Affairs, Office of the Attorney General

by Russell S. Kent

The Attorney General is a member of the Florida Cabinet and serves as the State's chief legal officer. The Attorney General is responsible for protecting Florida consumers from various types of misconduct. Additionally, the Attorney General pursues cases of Medicaid fraud, defends state agencies in civil litigation cases, and represents the State when criminals appeal their convictions in state or federal courts. Within the Attorney General's Office is the Office of Statewide Prosecution, which targets widespread criminal activities, including identity theft, drug trafficking, and gang activity. The Attorney General's Office also conducts various programs to assist victims of crime. Finally, the Attorney General defends the constitutionality of state statutes and issues formal legal opinions to certain public officials on issues of state law.

Head of the Agency:
Pam Bondi, Attorney General
Department of Legal Affairs
The Capitol, PL-01
Tallahassee, FL 32399-1050
(850) 414-3300
http://www.myfloridalegal.com

A native of Tampa, Pam Bondi was sworn into office as Florida's 37th Attorney General on January 4, 2011. Attorney General Bondi is focused on protecting Floridians and upholding Florida's laws and the Constitution. A few of her top priorities are: defending Florida's constitutional rights against federal overreach; strengthening penalties to stop pill mills; aggressively investigating mortgage fraud and Medicaid fraud; and ensuring Florida is compensated for the *Deepwater Horizon* oil spill. Attorney General Bondi is a graduate of the University of Florida and Stetson Law School and served as a prosecutor for more than 18 years.

Agency Clerk:
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Hours for Filings:
8:00 a.m. - 5:00 p.m. Monday - Friday (except holidays)

Number of lawyers on staff:
Over 400 lawyers located throughout the state.

Kinds of Cases / Responsibilities:
- Protects Floridians by enforcing the Florida Deceptive and Unfair Trade Practices Act, Florida Antitrust Act, and other applicable laws.
- Prosecutes multi-circuit organized crime schemes.
- Serves as counsel to professional licensure and disciplinary boards.
- Mediates public access disputes and offers training on public record and Sunshine laws.
- Represents the state in criminal appeals.
- Provides services to victims of crimes.
- Houses various administrative commissions.
- Conducts Lemon Law cases.
- Promulgates administrative rules.
- Investigates and takes legal action against violations of state civil rights laws.
- Defends state agencies in civil litigation cases at DOAH and in trial or appellate courts.
- Safeguards taxpayer monies by investigating and bringing False Claims actions.
- Issues advisory legal opinions at the request of various public officials.

Practice Tips:
Pursuant to rule 2.516, the Office has established certain email boxes to be used when the assigned attorney has not designated another e-mail address. For more information, go to http://myfloridalegal.com and select "e-Service" under the "Legal Resources" menu bar.

Public records requests should be sent to the Office's Public Records Coordinator:
Leslie Jacobs
Department of Legal Affairs
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Tallahassee, FL 32399-1050
(850) 245-0192
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Law School Liaison

Spring 2013 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 delighted to provide this update for the Administrative Law Section Newsletter. We are honored that the latest U.S. News & World Report ranked our Environmental Program in the top 20 nationwide again this year, for the 9th consecutive year. We provide below a summary of recent events and accomplishments:

Recent Events at the College of Law

• Fall 2012: The College of Law worked with the Administrative Law Section of The Florida Bar to offer an innovative program on researching state administrative law issues. Leading members of the Section participated, including: Francine Ffolkes, Administrative Law Counsel/Senior Attorney, Florida Department of Environmental Protection; The Honorable Lynne Quimby-Pennock, Division of Administrative Hearings; Daniel Nordby, General Counsel, Florida Department of State; Jowanna Oates, Senior Attorney, Joint Administrative Procedures Committee; Brian Newman, shareholder, Pennington, Moore, Wilkingson, Bell & Dunbar, P.A.; and Stephen Emmanuel, shareholder, Ausley & McMullen, P.A. Patricia Nelson, Deputy Director of the Office of Fiscal Accountability & Regulatory Reform, moderated this special program.

• Spring 2013 *Environmental Forum: Effectively Governing Shale Gas Development:* this *Forum* featured leading national commentators on hydraulic fracturing, including Professors Emily Collins (Pittsburgh), Keith Hall (LSU), and Bruce Kramer (Texas Tech).

• Spring 2013 Distinguished Environmental Lecture: Wendy Wagner, the Joe A. Worsham Centennial Professor of the University of Texas School of Law, presented this spring's Distinguished Environmental Lecture, on *Racing to the Top: How Regulation Can be Used to Create Incentives for Industry to Improve Environmental Quality*.

• Spring 2013 Symposium on 100 Years of the Federal Income Tax: this Symposium featured a distinguished array of experts on tax policy and practice.

• Spring 2013: The College hosted Professor Lana Ofak, University of Zagreb, as a fellow with the Junior Faculty Development Program (JFDP) of the Bureau of Educational and Cultural Affairs (ECA), U.S. Department of State, for the spring semester. Lana, who is an administrative law professor in Croatia, audited our energy, environmental, and land use classes to better understand how she can work toward forming an environmental law program in Croatia. She also compared notes with FSU law professors on differences and similarities between our administrative law systems.

The College of Law's Externship Program with a Special Focus on our Externships with DOAH

The College of Law offers an Externship Program that enables its students to earn academic credit by working with a variety of administrative agencies, as well as the Division of Administrative Hearings (DOAH). The College of Law typically places one to three students per semester at DOAH with administrative law judges. Students are exposed to the diverse types of cases that DOAH handles and have the opportunity to see how Florida's administrative procedures operate in practice. Students observe firsthand how ALJs manage hearings, find facts, and apply legal standards. Judicial externs from all tribunals, including DOAH and the federal and state courts, meet regularly; it is invaluable for students working with DOAH to compare and contrast how different forums address issues such as opinion writing, the admissibility of hearsay, and ensuring access for self-represented persons.

Welcoming Agency General Counsels to Campus

Organized by the Florida State University College of Law Placement Office, this semester's events give students an opportunity to network and learn about various state agencies from the general counsels of the Department of Health, Department of Agriculture, Department of Military Affairs, Department of Economic Opportunity, Department of Business and Professional Regulation, Department of Children and Families, Agency for Health Care Administration, Elections Commission, Office of State Court Administrator, the Florida Lottery, and others. Students also heard from top attorneys within the Attorney General's Office, Department of Transportation, Guardian ad Litem, Department of Corrections, Parole Commission, and Commission on Ethics. These legal leaders talked to students about the administrative law process, rulemaking, public records, and the state government law practice environment.

The College of Law's Environmental Enrichment Series

This Enrichment Series for our Environmental Certificate and Environmental LL.M. students featured leading local leaders as well as scholars from throughout North America. Local speakers included L. Mary Thomas, Assistant General Counsel, Executive Office of Governor and Kelly Samek, Senior Assistant General Counsel, Department of Environmental Protection.

We hope you will join us for one or more of our programs. For more information about our programs, 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.

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how important the response is from this perspective.

The response to initial order is a key tool for the ALJ. The response allows the ALJ to schedule the final hearing on a date that is convenient for all parties, meets any applicable statutory timeframe, and allows for meaningful discovery. Failing to respond, or responding without mutually agreeable dates, may result in the parties having to proceed to hearing at a time and place not to their liking. In light of an unsatisfactory response, an ALJ may ask his or her assistant to contact the parties to prompt coordination of available dates. But an ALJ is not obliged to do so. Nor is an ALJ obliged to reschedule a hearing that was set without input from the parties or their counsel, even if inconvenient for them.

Unilateral responses often indicate that counsel attempted to reach the other side, but has not received a response. I am amazed by the number of these responses that disclose the attempt to reach the other side was the day the response was due. As a matter of professionalism, always allow your opponent a day to respond before representing they were not responsive.

A response with only one or two mutually-agreeable dates provides little help to the ALJ. I might have done this in prior practice when opposing counsel and I were gravitating toward a particular week for hearing. Now that I am juggling a full calendar, I see that more dates are always needed from the parties.

Also surprising are the responses which provide different dates of availability for the parties which do not overlap. Take the opportunity to demonstrate, through your response to initial order, that you can work together to move a case along, rather than how divisive the case will be going forward. The response really sets the tone for the remainder of the case.

The response to initial order is also a tool for the ALJ to set a hearing date that conforms to the performance standards of the division. The initial order requests dates between 30 and 70 days of the date of the order, in most cases. This is an important timeframe from the ALJ perspective, and failing to provide any date of availability within that timeframe can be frustrating for the ALJ. Don't be surprised if your case is set for hearing within the original timeframe despite your request for dates outside the timeframe.

In addition, the response helps the ALJ determine whether the matter should be consolidated with related cases for efficient resolution of issues, whether the case is appropriate for video hearing, and what geographic location is best for the parties and their witnesses. Without a meaningful response to the initial order, the ALJ is, once again, flying blind, and will have no choice but to schedule the hearing location and method without the parties' input.

Response to Motions

In a recent case, a pro se respondent filed four separate motions to dismiss the agency's petition -- one the day of the hearing and three post-hearing. Much to my surprise, the agency attorney filed no response to any of the motions. The motions raised novel issues, one of which was whether the agency had designated any of its rules as "minor violations," pursuant to section 120.695, Florida Statutes. The grounds no doubt appeared meritless from the agency attorney's perspective, but a response in opposition would have been helpful in shaping my eventual rulings.

It is always risky to assume a motion is so obviously lacking merit that no response is necessary. Even a short response pointing out the obvious flaws and requesting denial is better than no response at all.

Requests for Official Recognition

I am surprised by the number of requests for official recognition of statutes and rules governing agency decisionmaking. Attorneys for both sides routinely file these requests when they mean to provide the legal framework of the case rather than evidence on which findings of fact can be made. Such requests may be meant to assist the ALJ, but are unnecessary. If you wish to provide courtesy copies of the current applicable statutes and rules, you may do so without a request for official recognition. Otherwise, you are likely adding bulk to the file without adding substance to the record on which findings will be based.

Certainly, if the version of the statute or rule that applies is not the version currently in effect, official recognition may be appropriate. As a matter of course, always provide a copy, for both the ALJ and opposing counsel, of any matter for which you are requesting official recognition.

Pro Se Petitioners

My colleagues have addressed in prior articles the challenges posed by pro se litigants. Without belaboring the point, I want to emphasize a single issue – a pro se petitioner should be told in perfectly clear terms that the agency lawyer is not their lawyer. As an agency lawyer, I remember the responsibility to be helpful to the public, even when they were challenging your client's decisions. The agency lawyer must maintain the delicate balance between public service and client advocacy. However, allowing a petitioner to proceed to hearing believing that the agency lawyer is acting on their behalf in any respect is dangerous. If the pro se petitioner doesn't get it after a couple of phone calls, put it in writing, diplomatically of course. That way, you will have documentation when the pro se petitioner claims to have been misled.

Stipulations

Believe it or not, by the date of final hearing the ALJ has read your prehearing stipulation, and has likely already conducted some research on your case. We appreciate a joint prehearing stipulation in which the parties have put forth real effort to narrow the issues of both fact and law in dispute, clearly set forth their respective positions, and indicate evidentiary disputes that will require rulings at hearing.

Unilateral stipulations are practically meaningless, and some of my colleagues have stricken that option from the standard prehearing instructions. A joint prehearing stipulation that simply recites the alleged facts set forth in the petition, or worse, refers to the petition as the facts in dispute, is likewise unhelpful. If real effort is put into the prehearing stipulation, the issues will be well-defined, leading to efficient rulings on evidentiary matters and less confusion at hearing.

Finally, some parties dedicate a significant amount of hearing time estab-

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lishing facts to which the parties have previously stipulated. In doing so, parties sometimes fail to focus on the factual issues that are truly in dispute. Review your stipulations, touch on anything that may need clarification, and move to the evidence related to issues in dispute as soon as possible.

Opening/Closing Statement

I am surprised by the number of parties, and their counsel, who do not make opening statements. Use this opportunity to lay a roadmap for the ALJ: What will you show with respect to each issue in dispute? What is the other side's position and how is it incorrect? This is helpful to the ALJ in following your case.

Some lawyers waive opening and indicate they will offer a closing statement, but neglect to make the closing statement. Perhaps because the hour is late, the lawyer perceives the ALJ is tired or would consider the closing redundant. From my perspective, I appreciate the closing to tie the pieces together and highlight the evidence you think most important (or what was missing from the other side's case).

Conclusion

I hope these observations are helpful to all lawyers appearing in DOAH proceedings. Sometimes it helps to see things from another's point of view; to get a different perspective.

Suzanne Van Wyk *joined the Florida Division of Administrative Hearings as an Administrative Law Judge in August 2012. Judge Van Wyk was formerly a shareholder with Bryant Miller Olive in Tallahassee, where she focused her practice on land use and local government law. Prior to joining Bryant Miller Olive, Judge Van Wyk spent 10 years in government practice, representing statewide and local boards, state agencies, and a Florida Senate committee. Judge Van Wyk is Board Certified in City, County and Local Government Law.*