



ADMINISTRATIVE LAW SECTION NEWSLETTER

Vol. XXXI, No. 1

Amy W. Schrader, Editor

September 2009

The APA Provides a Remedy Overlooked by Employers Who Receive a Stop-Work Order From the Department of Financial Services

by David C. Hawkins

The Department of Financial Services (“Department”) exerts extraordinary power when it issues, without a pre-termination hearing, a stop-work order (“SWO”) demanding that an employer immediately cease all business operations.¹ The authority derives from the Workers’ Compensation Law (“Law”),² which directs the Department to issue an SWO when it determines that an employer failed to

secure the payment of compensation for his or her employees or failed to timely produce business records. The Florida Legislature deemed these circumstances to present an “immediate serious danger” to the public sufficient to warrant the issuance of an SWO.³

The Department’s show of force, however, disregards an essential condition in section 120.569(2)(n),

Florida Statutes, of the Administrative Procedure Act (“APA”). This section authorizes an agency head on finding an immediate danger to the public to issue an “immediate final order” (“IFO”), provided the IFO recites “with particularity the facts underlying such finding.”⁴ Enforcement of that requirement is provided by a right of judicial review

See “APA,” page 9

From the Chair

by Seann M. Frazier

As the Administrative Law Section begins a new Bar year, I am honored and excited to serve as your Chair. This year, the Section will continue to provide high quality, continuing education programs, advocate legislative positions adopted by the Section, and work to improve access directly by supporting pro bono efforts intended to assist recipients of payments for disabilities. On behalf of the Executive Council, I’d also like to encourage you to participate in the programs and services the Section provides. I’d

like to mention just a few.

First, if you are not a member of the Section, please join us. Our membership dues are low and, somewhat like a credit card, Section membership has its privileges. In addition to receiving this Newsletter, members often receive discounts at many of the Section’s continuing education programs. Active participation in the work of the Section provides additional rewards. Whether you are a member or not, you can also partici-

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CHAIR'S MESSAGE*from page 1*

pate in one or more of the Section's many committees. Committee work affords an opportunity to meet your fellow administrative practitioners in a non-adversarial setting, and will keep you abreast of the latest legislative and judicial changes that make our APA one of the more dynamic areas of Florida law.

Participation in one of the Section's committees is also an excellent way to get to know members of the Executive Council and its Nominating Committee. Many of the members of the Executive Council have had the honor of serving on the Council for many years, but vacancies are becoming more frequent. This year, we've added a few new voices to our Council and we encourage the participation of even more. I would also like to personally extend a warm welcome to those of you working in the public sector. While there are no official statistics, recent surveys at CLE events demonstrate that about half of our members serve in the public sector. In order to best reflect the membership of our Section, I encourage our governmental lawyers to engage in the activities of the Section and to join the Executive Council. Attend a meeting. I think you'll find that we're a fairly friendly bunch.

This year, we will continue our productive CLE programs. Bruce Lamb has agreed to continue to serve as our Chair of the CLE Committee. By the time you receive this Newsletter, the Section will have co-sponsored a CLE with the Government Lawyer Section regarding public records and Florida's Sunshine laws. In the Fall, the Section will bring back the successful Practice Before DOAH program. The program will be co-sponsored by the Environmental and Land Use Law Section and co-chaired by Cathy Sellers, Francine Ffolkes and Luna Phillips. Information about the seminar is included in this Newsletter. Bruce and the CLE committee also plan to work with the Young Lawyers Division (and our YLD Liaison, Christine D. Graves) to present a crash course on the Florida APA.

The Public Utilities Committee is

also very active this year. Committee members, Michael Cooke and Cindy Miller, are hosting a seminar entitled, "Practice Before the Public Service Commission: Things You Should Know" on November 6th in Tallahassee.

The Section will continue its work on publications. Amy Schrader has agreed to continue her good work as the editor of this Newsletter. We're also pleased to see the return of Mary Ellen Clark, who has agreed to coordinate the Agency Snapshots that appear within this Newsletter. The Section also anticipates publishing a greater number of articles concerning administrative law in *The Florida Bar Journal*. Paul Amundsen has agreed to head that effort. Anyone with ideas for an article is strongly encouraged to contribute. All of the Section's publications will be overseen by our Committee Chair, Scott Boyd.

As has been our practice for the last several years, the Administrative Law Section will turn to the experience and diligence of its Legislation Committee to monitor new bills and, when appropriate and in accord with the Section's legislative positions, lobby to ensure access to administrative remedies. I am very grateful that Judge Linda Rigot and Bill Williams have agreed to serve in this role once again this year. They will be joined by AHCA General Counsel, Justin Senior, who has offered to learn the ropes of the circus that is our annual legislative process.

The Section has also set aside funds to revamp the its web site. A committee chaired by Dan Nordby is soliciting proposals from a number of consulting firms. We hope that the result of this project will be a website that is slightly more user-friendly and up-to-date, as well as one that contains content that is relevant to your practice.

We are also reaching out to other sections as well. The Administrative Law Section is by definition, a Section concerned with procedures found in Chapter 120, Florida Statutes. Though administrative practitioners share a common set of procedures, we practice in a large variety of substantive areas. This year, Francine Ffolkes has agreed to serve as the liaison to the Environmental and Land Use

Law Section, and Allen Grossman will continue to serve as liaison to the Health Law Section. Clark Jennings will serve as our contact with the Government Lawyer Section. Cathy Sellers has agreed to serve as liaison to The Florida Bar's CLE Committee and, of course, we are very fortunate to have a tremendous asset in Larry Sellers who has agreed to continue to serve as the Section liaison to The Florida Bar Board of Governors. We are hopeful that our participation in these other Sections and the leadership of the Bar will make certain that the Administrative Law Section is offering services that meet the needs of our members.

Finally, Andy Bertron has been heading up the Section's efforts to assist with a pro bono program to assist persons receiving disability payments. As many of you know, the 2007 Legislature directed the Agency for Persons with Disabilities ("APD") to redesign the system by which it distributed disability payments. APD promulgated rules to implement a new system, and the rules survived a 120.56 challenge before an administrative law judge. Many recipients' payments were affected by the new system, and many sought redress through administrative proceedings. Andy has been working with other volunteers to advise those recipients and their advocates in administrative proceedings. Last year, the Section sponsored two seminars to review the basics of petition requirements and hearing procedures. This year, volunteers are assisting with individual cases. More volunteers are welcome. If you're interested, please visit: <http://www.floridaprobono.org/> and consider joining. On August 21, 2009, a panel from the First District reversed the ALJ's determination that the APD's rules were valid. See *Moreland v. Agency for Person with Disabilities*, ___ So. 3d ___, 2009 WL 2602298 (Fla. 1st DCA 2009). The decision struck APD's proposed rules. The dust hasn't yet settled from this decision. So your help may be needed now more than ever.

The Section is committed to providing all of these services while keeping the cost of membership down. An informal review of the dues for Bar sections reveals that

the Administrative Law Section remains one of the best deals around. At the same time, members of the Executive Council recognize our responsibility to act in a fiscally sound manner. There have been recent changes to the manner in which the "Big Bar" shares revenues with its Sections for seminars. Larger Bar Sections may be better able to absorb these changes, many of which result

in higher costs to the Section, while smaller Sections such as this one struggle to face these new challenges. We are fortunate to have Clark Jennings among our members because of his knowledge of these changing revenue structures, his participation in the Council of Sections and his ability to communicate with the larger Bar about the needs of smaller Sections like ours. Clark has agreed

to head an ad hoc committee to monitor changing fee structures so that our Administrative Law Section may continue to offer valuable services while keeping the costs of participation as low as possible.

We hope to have an active and successful year and to see you at a seminar, in a committee meeting or out volunteering. Please join us in whatever way you can.

APPELLATE CASE NOTES

by Mary F. Smallwood

Applicability of APA

First Quality Home Care, Inc. v. Alliance for Aging, Inc., 2009 WL 1675839 (Fla. 3d DCA 2009) (Opinion filed June 17, 2009)

First Quality Home Care ("First Quality") submitted a response to a request for proposals to Alliance for Aging, a designated area agency on aging ("AAA") providing services to the Department of Elder Affairs. As an AAA, Alliance contracted with the Department to provide and administer elder care services in a particular geographical area. An AAA has the authority to bid out contracts with private care providers using state and federal funds.

First Quality challenged the decision of Alliance to award a contract to another bidder under the internal protest procedures in the request for proposals. When it was unsuccessful, it sought a writ of mandamus requiring Alliance to forward the protest to the Division of Administrative Hearings pursuant to section 120.57(3), Fla. Stat., relying on the Fourth District Court's decision in *Mae Volen Senior Center, Inc. v. Area Agency on Aging Palm Beach/Treasure Coast, Inc.*, 978 So. 2d 191 (Fla. 4th DCA 2008), rev. den'd, 1 So. 3d 172 (Fla. 2009).

The Third District held that First Quality was not entitled to a hearing under Chapter 120, as it was not an agency of the state under the definition in section 120.52(1), nor under the state procurement statute,

Chapter 287, Fla. Stat. It specifically rejected the *Mae Volen* court's analysis that an AAA is a "board" under section 120.52(1)(b)3, and therefore, a state agency. Despite the role the AAA played in administering a state agency's programs, the court deemed it to be a private corporation not subject to the Administrative Procedure Act.

The court certified conflict to the extent the decision was in conflict with *Mae Volen*.

Dealer Tag Agency, Inc. v. First Hillsborough County Auto Tag Agency, Inc., 2009 WL 1874069 (Fla. 2d DCA 2009) (Opinion filed July 1, 2009)

The Hillsborough County Tax Collector's Office issued a proposal for a contract to provide auto tag services to car dealerships in the county. Dealer Tag Agency, Inc. was awarded the contract. When a competitor, First Hillsborough County Auto Tag Agency, Inc., tried to protest the award of the contract, it was informed by the county attorney's office that there were no applicable bid protest procedures. First Hillsborough filed suit in circuit court. On summary judgment, the court held that the contract process was subject to Chapters 287 and 120, Fla. Stat., as the Tax Collector was acting as an agent of the Department of Highway Safety and Motor Vehicles.

On appeal, the court reversed. It held that the Tax Collector was not a state agency and, therefore, was not

subject to either Chapters 287 or 120. It concluded that the Tax Collector's office is a constitutionally created entity, not a state agency.

Licensing

Abram v. Department of Health, 13 So. 3d 85 (Fla. 4th DCA 2009) (Opinion filed May 20, 2009)

The Department of Health filed an administrative complaint against Abram alleging a violation of section 456.072(1)(aa), Fla. Stat., which states that certain acts, including performing a wrong-site procedure, may constitute grounds for which disciplinary action can be taken. The complaint alleged that Abram had performed a procedure on a patient's T3 vertebra rather than the intended T4 vertebra.

Abram did not dispute any factual findings in the complaint and requested an informal hearing to present evidence in mitigation of the facts alleged. At the informal hearing, Abram's counsel argued that imposing liability for performing a wrong-site procedure where there was no allegation of a violation of a standard of care imposed strict liability on Abram. The Board of Medicine adopted the findings of fact and conclusions of law in the complaint and entered an order subjecting Abram to issuance of a letter of concern and requiring him to present a lecture at the hospital on wrong-site surgery. The Board noted that Abram had self-reported the problem and that there

continued, next page

CASE NOTES*from page 3*

was no injury to the patient. Abram appealed.

On appeal, Abram argued that the statute as applied to him was unconstitutional as it deprived him of due process of law by creating an irrebuttable presumption that a wrong-site procedure falls below the standard of care. The court agreed with the Department that the plain meaning of the statute did not include a presumption as to the standard of care. It noted that many of the violations included in section 456.072 had no relationship to any standard of care. Further, the court stated, in dicta, that if the statute did include such a presumption it would still meet constitutional requirements. Finally, the court noted that both parties had accepted the premise that the statute imposed strict liability for a wrong-site procedure. The court, however, noted that the statute's language was permissive, not mandatory, in that it provided that the agency "may" take disciplinary action and "may" impose a penalty.

Pendergraft v. Department of Health, 2009 WL 1883893 (Fla. 5th DCA 2009) (Opinion filed July 2, 2009)

The Department of Health filed an administrative complaint seeking suspension of Pendergraft's license to practice medicine based on his failure to comply with statutory or legal requirements by performing a third trimester abortion in his clinic, rather than a hospital, and failing to comply with the statutory requirement for third trimester abortions of having certification that it is necessary to protect the mother's health. Pendergraft appealed the final order of suspension on the grounds that he had not been convicted of a violation of the

applicable statutory provisions.

On appeal, the court affirmed. It held that it is not necessary for the Department of Health to show that the physician has been convicted of a crime as opposed to merely showing that a violation occurred. The court noted that disciplinary action may be taken against a physician's license even where he is acquitted under a criminal action.

Public Records and Government-in-the-Sunshine

Media General Operations, Inc. v. State of Florida, 12 So. 3d 239 (Fla. 2d DCA 2009) (Opinion filed May 6, 2009)

Media General Operations, publisher of the Tampa Tribune, sought a writ of mandamus ordering the release of an audio recording of a sentencing hearing after the Chief Judge for the Sixth Judicial Circuit refused to release it. Media General argued that the audio tape was an "electronic record" under the Rule of Judicial Administration defining court records.

The audio recording was produced by a digital electronic court reporting system that captured all aural communications in the court room. The court held that the audio recording was not a court record, but instead, a precursor to a court record, as it captured all sounds and conversation in the courtroom before during and after the hearing. The court noted that the recording could include non-record material such as privileged discussions between counsel and clients and comments from observers in the courtroom.

Standing

Palm Beach County Environmental Coalition v. Department of Environmental Protection, 2009

WL 1531786 (Fla. 4th DCA 2009) (Opinion filed June 3, 2009)

The Palm Beach County Environmental Coalition and several individuals challenged a permit the Department of Environmental Protection proposed to issue to Florida Power & Light for an underground injection well. The Coalition alleged that its substantial interests were affected because of the potential for impacts to the Loxahatchee National Wildlife Refuge which its members used. In addition, one of the individual petitioners alleged that she relied on a drinking water well that was 2.5 miles from the underground injection well. The administrative law judge issued a recommended order finding that the petitioners did not have standing and that the permit should be issued. The lack of standing was based on the findings that (1) the Loxahatchee Refuge would not be impacted by the deep well discharge, and (2) the individual's drinking water well would not be affected.

On appeal, the court reversed the decision as to the lack of standing. The court noted that, in both cases, the determination was dependent on finding that the petitioners did not prevail on the merits. The court held that the petitioners only had to present evidence at the hearing that they could reasonably be affected by the activities authorized by the permit, not that they actually were affected.

Mary F. Smallwood is a partner with the firm of Ruden, McClosky, Smith, Schuster & Russell, P.A. in its Tallahassee office. She is 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@Ruden.com.

***Ethics Questions? Call The Florida Bar's
ETHICS HOTLINE: 1/800/235-8619***

Agency Snapshot

Department of Business and Professional Regulation

by Reginald D. Dixon and Garnett W. Chisenhall

The Department of Business and Professional Regulation (DBPR) licenses and regulates one million professionals and businesses across some 200 license types. The Department licenses 1 in 16 Floridians ranging from talent agents, real estate agents, and construction contractors to alcohol and tobacco manufacturers and professional boxers. The Department's mission is to "License Efficiently, Regulate Fairly."

The Structure of the Department

The Department's regulatory functions are divided between two major areas: Business Regulation and Professions.

Under the direction and leadership of Deputy Secretary, Scott Ross, the Business Regulation side of the Department is responsible for licensing and regulating four major industries: (1) Alcoholic Beverages & Tobacco; (2) Condominiums, Timeshares, & Mobile Homes; (3) Hotels & Restaurants (including elevator safety); and (4) Pari-Mutuel Wagering.

The Division of Alcoholic Beverages and Tobacco licenses the alcoholic beverage and tobacco industries, enforces the laws and regulations governing those industries, and collects taxes and fees paid by the licensees. The Division of Florida Condominiums, Timeshares, and Mobile Homes provides protection for residents living in those communities through education, complaint resolution, mediation/arbitration and developer disclosure. The Division of Hotels and Restaurants oversees compliance and licensure, sanitation and safety inspectors and elevator safety. The Division of Pari-Mutuel Wagering regulates activities such as jai alai, horseracing, dog racing, card rooms and the slot machine gaming industry.

Under the direction and leadership of Deputy Secretary, Maureen Olson, the Professions side of the Department is responsible for licensing and regu-

lating individual professional licenses primarily through regulatory boards administratively housed within the Department. This side of the Department is responsible for licensing a very diverse group of professions, including certified public accountants, boxers, community association managers, construction and electrical contractors, child and farm labor contractors, cosmetologists, geologists, real estate appraisers, brokers and sales associates and veterinary physicians.

Each side of the Department has internal units that: (1) process applications for initial licensure and renewal; (2) investigate allegations of misconduct by licensees; and (3) monitor licensee compliance. The Department is very proactive in the regulation of its licensees. This is accomplished by proactively monitoring professionals and related businesses, aggressively pursuing and investigating complaints of wrongdoing and utilizing compliance mechanisms such as a mediation program, educational outreach, notices of noncompliance, citations and statutorily mandated inspections.

The Agency Head

On July 31, 2008, Charles W. Drago succeeded Holly Benson as the Department's Secretary. Prior to that appointment, Secretary Drago had served since January of 2007 as the Department's Interim Secretary and as the Deputy Secretary of Business Regulation.

Before joining the Department, Secretary Drago enjoyed a successful, 32-year career in law enforcement in the State of Florida. He served in the Fort Lauderdale Police Department for nearly 30 years and rose through the ranks to the position of Assistant Chief of Police. During that time, he worked in the areas of organized crime investigation, narcotics enforcement, vice, tactical operations and stalking.

In 1989, Secretary Drago was

honored with the Officer of the Year Award for the Fort Lauderdale Police Department and was the runner-up for the State of Florida Officer of the Year. In addition, he received dozens of departmental and public commendations for his community work and accomplishments in major criminal investigations.

The General Counsel

Reginald D. Dixon joined the Department in December of 2007 as one of the Department's three Deputy General Counsels. After serving as the Department's Acting General Counsel for three months, Mr. Dixon was selected as the Department's General Counsel in May of 2009.

Prior to joining the Department, Mr. Dixon practiced administrative law for more than 11 years. From October of 2005 through December of 2007, he worked in the Administrative Law Section of the Florida Attorney General's Office providing legal counsel to professional boards under DBPR and the Florida Department of Health. Prior to that time, Mr. Dixon spent over nine years accumulating a great deal of litigation and supervisory experience at the Florida Agency for Health Care Administration and the Department of Health.

Mr. Dixon earned his Juris Doctorate and Bachelors degrees from Florida State University. It is also worth noting that Mr. Dixon was a three-year letterman on Tallahassee's beloved Seminoles football team.

The Agency Clerk

Sarah Wachman has been the Department's Clerk since 1993. Ms. Wachman's dedication to the Department was recognized on May 6, 2009 when she received the Chief of Staff's Award of Merit as "the employee who does not pass the buck, takes responsibility for his/her work, and puts the Department first."

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AGENCY SNAPSHOT

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Documents can be filed with the Clerk’s Office via facsimile (850-488-5761), electronic mail (*Sarah.Wachman@dbpr.state.fl.us*), and regular mail. The mailing address is: 1940

North Monroe Street, Suite 33, Tallahassee, Florida 32399-2203. Also, Ms. Wachman can be reached by phone at (850) 921-0342.

Practice Tips

If representing an individual licensee subject to regulation by the

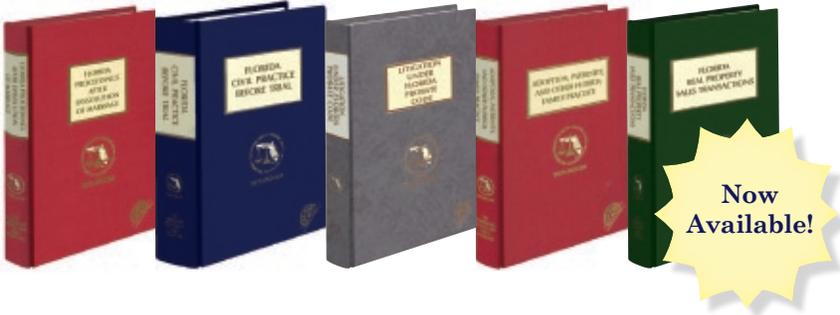
Department, it is very important to be familiar with the structure of the Department and the specific statutes pertaining to that client’s license. Legal practitioners should be very aware of the distinct differences between the two sides of the Department. On the Business Regulation side, the Division Directors are delegated the authority to take final agency action. On the Professions side, most final agency action is taken by the regulatory boards housed within the Department.

Legal practitioners should also be aware of the nuances associated with practicing before a Division Director versus practicing before a collegial body. The professional boards under the Division of Professions are subject to the public meetings requirement of Chapter 286, Florida Statutes, and must hold public meetings to conduct board business. Those public meetings occur over the phone or in-person at locations throughout Florida. The meetings are noticed in advance in the Florida Administrative Weekly. Department attorneys typically handle the prosecution of licensees and the professional boards are usually advised by independent counsel retained from the Florida Attorney General’s Office.



Announcement from The Florida Bar

Are your CLE books out of date?



You **will not** receive updates unless you have contacted us to confirm your subscriptions.

CALL NOW 1-800-533-1637

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

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Statements or expressions of opinion or comments appearing herein are those of the contributors and not of The Florida Bar or the Section.

Number of Attorneys on Staff

The Department employs approximately 43 attorneys. Most of those attorneys are based in Tallahassee, but a small number are based in Orlando and Miami. The Department’s legal staff is supplemented by approximately 24 law clerks.

Typical Cases

The majority of the Department’s litigation involves the discipline of licensees, and the Department initiates those cases through administrative complaints. Other cases pertain to rule challenges and licensure denials in which the Department is the respondent.



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

Practice Before D.O.A.H.

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

One Location:

**October 30, 2009 • Division of Administrative Hearings
1230 Apalachee Parkway • Tallahassee, FL 32301-3060 • 850-488-9675**

Course No. 0938R

8:00 a.m. – 8:30 a.m.

Late Registration

8:30 a.m. – 9:20 a.m.

Prehearing and Posthearing Matters

Cathy M. Sellers, Broad and Cassel

9:20 a.m. – 10:00 a.m.

Evidentiary Issues in Administrative Proceedings

Elizabeth W. McArthur, Radey Thomas Yon & Clark

10:00 a.m. – 10:20 a.m.

Break

10:20 a.m. – 11:10 a.m.

Preparation and Examination of Fact and Standing Witnesses

William L. Hyde, Gunster, Yoakley, & Stewart, P.A.

11:10 a.m. – 11:50 a.m.

Expert Witnesses: Selection, Preparation, and Examination

Paul H. Amundsen, Amundsen & Smith

11:50 a.m. – 1:15 p.m.

Lunch (on your own)

1:15 p.m. – 3:30 p.m.

Mock Administrative Hearing: Environmental Law Issue

ALJ: Honorable T. Kent Wetherell, II, DOAH

Moderator: Luna E. Phillips, Gunster, Yoakley, & Stewart, P.A.

Agency Attorney: Francine M. Ffolkes, DEP

Applicant's Attorney: William L. Hyde, Gunster, Yoakley, & Stewart, P.A.

Applicant's Expert Witness: J. Chris Herin, P.G., Geosyntec Consultants

Petitioner's Attorney: Uma Outka, FSU College of Law

Petitioner's Standing Witness: Brian Kenyon, DEP

3:30 p.m. – 3:45 p.m.

Break

3:45 p.m. – 5:00 p.m.

Q&A with the DOAH ALJs on Practice Pointers and Ethical Considerations

Honorable T. Kent Wetherell, II

Honorable Charles A. Stampelos

Honorable J. Lawrence Johnston

ADMINISTRATIVE LAW SECTION

Seann M. Frazier, Tallahassee — Chair
Cathy M. Sellers, Tallahassee — Chair-elect
Bruce D. Lamb, Tampa — CLE Chair

ENVIRONMENTAL & LAND USE LAW SECTION

Paul H. Chipok, Orlando — Chair
Joseph D. Richards, New Port Richey — Chair-elect
Nicole C. Kibert, Tampa — CLE Chair

CLE COMMITTEE

Paul H. Chipok, Orlando, Chair
Terry L. Hill, Director, Programs Division

FACULTY & STEERING COMMITTEE

Francine M. Ffolkes, Tallahassee — Program Co-Chair
Luna E. Phillips, Ft. Lauderdale — Program Co-Chair
Cathy M. Sellers, Tallahassee — Program Co-Chair

CLE CREDITS

CLER PROGRAM

(Max. Credit: 8.0 hours)

General: 8.0 hours

Ethics: .5 hours

CERTIFICATION PROGRAM

(Max. Credit: 8.0 hours)

City, County & Local Government: 8.0 hours

Civil Trial: 6.0 hours

State & Federal Gov't & Administrative Practice: 8.0 hours

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

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

TO REGISTER	ON-LINE: www.floridabar.org/CLE	MAIL: Completed form with check	FAX: Completed form to 850/561-5816
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REFUND POLICY: Requests for refund or credit toward the purchase of the audio CD or course books for this program **must be in writing and postmarked** no later than two business days following the course presentation. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid. A \$25 service fee applies to refund requests.

Register me for the “Practice Before D.O.A.H.” Seminar

ONE LOCATION: (315) DIVISION OF ADMINISTRATIVE HEARINGS, TALLAHASSEE (OCTOBER 30, 2009)

TO REGISTER OR ORDER AUDIO CD OR COURSE BOOKS BY MAIL, SEND THIS FORM TO The Florida Bar, Order Entry Department: 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831. ON-SITE REGISTRATION, ADD \$25.00. **On-site registration is by check only.**

Name _____ Florida Bar # _____
 Address _____
 City/State/Zip _____ Phone # _____

JMW: Course No. 0938R

REGISTRATION FEE (CHECK ONE):

- Member of the Administrative Law Section or the Environmental & Land Use Law Section: \$145
- Non-section member: \$170
- Full-time law college faculty or full-time law student: \$85
- Persons attending under the policy of fee waivers: \$0
Includes Supreme Court, DCA, Circuit and County Judges, Magistrates, Judges of Compensation Claims, Administrative Law Judges, and full-time legal aid attorneys if directly related to their client practice. (We reserve the right to verify employment.) Fee Waivers are only applicable for in-person attendees.

METHOD OF PAYMENT (CHECK ONE):

- Check enclosed made payable to The Florida Bar
- Credit Card (Advance registration only. Fax to 850/561-5816.)
 MASTERCARD VISA DISCOVER AMEX Exp. Date: ____/____ (MO./YR.)

Signature: _____
 Name on Card: _____ Billing Zip Code: _____
 Card No. _____

	<input type="checkbox"/> Check here if you require special attention or services. Please attach a general description of your needs. We will contact you for further coordination.
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COURSE BOOK — AUDIO CD — ON-LINE

Private taping of this program is not permitted. **Delivery time is 4 to 6 weeks after 10/30/09. TO ORDER AUDIO CD OR COURSE BOOKS**, fill out the order form above, including a street address for delivery. **Please add sales tax to the price of tapes or books. Tax exempt entities must pay the non-section member price.**

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

<input type="checkbox"/> COURSE BOOK ONLY Cost \$50 plus tax (Certification/CLER credit is not awarded for the purchase of the course book only.) TOTAL \$ _____	<input type="checkbox"/> AUDIO CD (includes course book) \$145 plus tax (section member) \$170 plus tax (non-section member) TOTAL \$ _____
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Related Florida Bar Publications can be found at <http://www.lexisnexis.com/flabar/>

APA*from page 1*

created in the section. The absence of a published appellate opinion expressly deciding whether a Department SWO must comply with section 120.569(2)(n), confirms that the remedy of judicial review has remarkably eluded employers.

This article does not fault legislative policy that holds employers accountable to the Law's coverage requirements or that delegates stop-work order authority to the Department.⁵ Instead, this article argues that when the Department issues an SWO to enforce coverage requirements, the Department is obliged to abide by the APA and recite facts that justify the exercise of emergency power. Because the Department issues a generic SWO that omits essential factual specifications pertaining to the named employer, the employer should be able to seek judicial review and ask a district court to reverse the SWO so that it becomes ineffective against the employer and the employer's business.

Stop-Work Orders under the Workers' Compensation Law

The Florida Legislature enacted the Law in 1935, although it did not delegate authority to issue a stop-work order until 1993.⁶ Unlike many agencies that prosecute administrative violations by complaint or notice, the Department's primary charging document under the Law is the SWO. In fiscal year 2007-2008, the Department issued 2,518 SWOs through its Division of Workers' Compensation, Bureau of Compliance.⁷

The Law instructs the Department to issue an SWO to an employer who the Department determines is required to secure the payment of compensation, but did not. Ordinarily an employer complies with the coverage requirements by obtaining a commercial lines workers' compensation insurance policy that adequately protects payroll. Also, the Law instructs the Department to issue an SWO to an employer who did not produce business records within five days after receipt

*continued...***Section Budget/Financial Operations**

	2008-2009 Budget	2008-2009 Actual	2009-2010 Budget
REVENUE			
Dues	29,190	28,293	28,750
Affiliate Dues	100	300	300
Dues Retained by Bar	(20,555)	(20,788)	(20,365)
Administrative Fee Adjustment	0	474	0
CLE Courses	9,000	6,426	7,000
Section Differential	1,875	4,289	2,000
Section Service Programs	5,000	0	2,500
Investment Allocation	13,379	(18,661)	3,669
Miscellaneous	150	0	0
TOTAL REVENUE	38,139	333	23,854
EXPENSE			
Staff Travel	1,341	288	1,334
Internet Charges	0	405	400
Postage	175	46	150
Printing	120	90	150
Officer Expense	500	0	500
Newsletter	5,400	6,433	6,000
Membership	500	0	500
Supplies	50	0	50
Photocopying	150	67	125
Officer Travel	2,500	640	2,000
Meeting Travel	3,000	0	3,000
CLE Speaker Expense	100	0	100
Committees	500	0	500
Council Meetings	600	290	630
Bar Annual Meeting	2,400	1,735	2,500
Section Service Programs	5,000	185	1,000
Retreat	4,500	974	3,000
Public Utilities	500	0	500
Awards	600	489	600
Writing Contest/Law School Liaison	4,900	0	4,900
Website	3,000	235	5,000
Legislative Consultant	5,000	0	5,000
Council of Sections	300	0	300
Misc.	500	41	100
Operating Reserve	4,422	0	4,108
TFB Support Services	2,586	2,440	2,737
TOTAL EXPENSE	48,644	14,358	45,184
BEGINNING FUND BALANCE	191,134	209,058	183,440
PLUS REVENUE	38,139	333	23,854
LESS EXPENSE	(48,644)	(14,358)	(45,184)
ENDING FUND BALANCE	180,629	195,033	162,110

SECTION REIMBURSEMENT POLICIES:

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

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of a request.⁸ Section 440.107(7)(a), Florida Statutes, provides:

Whenever the department determines that an employer who is required to secure the payment to his or her employees of the compensation provided for by this chapter has failed to secure the payment of workers' compensation required by this chapter or to produce the required business records under subsection (5) within 5 business days after receipt of the written request of the department, such failure shall be deemed an immediate serious danger to public health, safety, or welfare sufficient to justify service by the department of a stop-work order on the employer, requiring the cessation of all business operations.

The Law does not prescribe the form of an SWO and the procedures for its issuance are scarce, limited only to the requirement that Department serve the employer personally and post a copy at the worksite.⁹ A survey of cases

reported on the website of the Division of Administrative Hearings ("DOAH") reveals that SWOs are issued by the Department on a generic, pre-printed, single sheet, one-size-fits-all form. Space is provided for the name of the employer, employer address, worksite posting address and industry of the employer. The violation is indicated by a checked box in the manner of a Uniform Traffic Citation.

The teeth of the SWO appear in the following text, which boldly commands the employer: "TO CEASE ALL BUSINESS OPERATIONS FOR ALL WORKSITES IN THE STATE." The SWO is effective when served.¹⁰ The Department may seek an injunction to enforce an SWO and is further authorized to assess a penalty of \$1,000 per day for each day the employer conducts business operations in violation of an SWO.¹¹

The Law states that an employer must challenge an SWO "as provided in chapter 120."¹² This cross-reference to the APA links an employer to the procedures for administrative review in a formal or informal proceeding.¹³ The reverse side of the SWO form contains a Notice of Rights, instructing the employer on the APA procedures for requesting administrative review. The Notice of Rights, however, does not inform the employer of judicial remedies under the APA.

Immediate Final Orders under the Administrative Procedure Act

Section 120.569(2)(n), Florida Statutes, authorizes an agency to issue an IFO and directs the agency to specify the facts justifying use of emergency power:

If an agency head finds that an immediate danger to the public health, safety, or welfare requires an immediate final order, it shall recite with particularity the facts underlying such finding in the final order, which shall be appealable or enjoined from the date rendered.

The SWOs surveyed entirely omit the recitation of underlying facts, thereby implying an interpretation by the Department that the criteria for issuing an IFO do not apply to SWOs. Sound reasons discredit the Department's continued reliance on this interpretation.

First, the APA applies to "all forms

of agency decision making . . . 'unless specifically exempted."¹⁴ SWOs issued by the Department are not exempted from the scope of section 120.569(2)(n), Florida Statutes. Further, nothing in section 440.107, Florida Statutes, exempts the Department from the APA. To the contrary, section 440.107 expressly incorporates remedies available under the APA,¹⁵ which include the remedy of judicial review prescribed in section 120.569(2)(n). That section assures that an agency head will carefully consider the facts that justify the summary exercise of police power. Requiring an agency head to recite those facts provides the added benefit of protecting targeted persons from arbitrary decision making and promoting judicial review of IFOs. By omitting the underlying facts justifying issuance of an SWO, the Department assures that the reasons for exercising the police power against a particular employer will remain obscure and that meaningful review of the SWO will be denied.

Sections 440.107 and 120.569(2)(n), Florida Statutes, both pertain to the state's exercise of its emergency powers. Accepted rules of statutory construction harmonize related statutes as a means of giving effect to the intent of the Legislature.¹⁶ Instead of harmonizing these two statutes, however, the Department impliedly interprets the Law to trump the APA by failing to give employers notice of the underlying facts justifying the issuance of SWOs. There is no support for this interpretation.

Second, decisional law plainly interprets section 120.569 as applying to all summary agency action, and not just to those actions termed "immediate final orders." As the First District Court of Appeal plainly stated in *Commercial Consultants Corp. v. Department of Business Regulation, Division of Florida Land Sales & Condominiums*, 363 So. 2d 1162, 1164 (Fla. 1st DCA 1978):

Even if we could construe Section 478.171 to uphold the Division's cease and desist order, we could not so construe the Administrative Procedure Act, Chapter 120. The APA requires specific findings of fact to support summary agency action. . . . Although the order under review

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does not fit neatly under Section 120.59(3) [currently 120.569(2)(n)] . . . we perceive that the legislature has enacted in [this section] a consistent standard intended to apply to all summary agency action subject to the APA.^[17]

(Citation omitted.) Thus, just as First District Court held that the APA's requirement for factual specificity applies to a temporary cease and desist order issued by the Department of Business Regulation in *Commercial Consultants*, this requirement must necessarily apply to an SWO issued by the Department of Financial Services.

Section 120.569(2)(n) authorizes review of an IFO by direct appeal to the district court or by a complaint for injunctive relief in the circuit court. However, these two remedies do not provide an equivalent opportunity to test an IFO for facial compliance with the statutory criteria. Indeed, injunctive relief in the circuit court is unavailable unless administrative remedies are first exhausted.¹⁸ For this reason, an employer's preferred remedy is likely to be direct appeal to the district court.

The standard of review employed by a district court favors a party who receives an IFO that omits essential factual findings. Appellate review of an IFO is limited to the four corners of the instrument and proceeds without the need to develop a record.¹⁹ An agency cannot meet its burden with cursory allegations. "[I]t is not sufficient merely to allege a statutory violation; instead, the order must contain a factual recitation sufficient to demonstrate the existence of an imminent threat of 'specific incidents of irreparable harm to the public interest' requiring the use of the extraordinary device afforded by section 120.569(2)(n)."²⁰ Likewise, "a general conclusory prediction of harm" is insufficient to support an IFO.²¹

Established decisional law makes clear that an IFO must allege on its face facts sufficient to show the following:

- (1) Immediate, serious danger to the public health, safety, or welfare;
- (2) The order takes only that action necessary to protect the public considering the emergency (i.e., the remedy is tailored to the harm); and,
- (3) Procedural fairness under

the circumstances (the procedure provides at least the same procedural protection given by other statutes, or the state or federal Constitutions).^[22]

An IFO that fails to allege facts in keeping with section 120.569(2)(n) is subject to reversal.²³

It is difficult to imagine circumstances when an IFO does not interfere with rights that are protected by state and federal due process. Where an IFO deprives a party of its fundamental rights, such as where it shuts down an employer's business, additional criteria apply. For instance, "the agency's statement of reasons for acting 'must be factually explicit and persuasive concerning the existence of a genuine emergency.'"²⁴ An important consideration for determining whether there is an immediate, serious danger to the public health, safety or welfare is whether the complained of conduct is likely to continue.²⁵ Arguably the agency head must allege facts in an IFO that comply with the statutory as well as the heightened constitutional standard.

An SWO is summary agency action--in effect, an IFO. Both orders derive authority from the state's police power; are expressly intended to protect the public from harm; and are issued summarily, without a pre-deprivation hearing. Although the content of an SWO is not prescribed in the Law, the APA supplies essential criteria. An SWO that omits specific facts justifying the issuance of the SWO, as required by the APA, is an unjustified exercise of the police power, which itself violates due process.²⁶

Notice of Appeal

District court jurisdiction is invoked by filing an original notice of appeal with the agency clerk within 30 days of the rendition of the order to be reviewed.²⁷ Several challenges face the employer who seeks review of an SWO by direct appeal. First, the employer should not assume that a district court will accept jurisdiction on the mere filing of the notice of appeal and SWO. District courts have no experience reviewing SWOs on direct appeal and the SWOs surveyed lack indicia of a final order, such as

the date of filing with the clerk.²⁸ Very likely, the district court will issue an order directing the employer to show cause why the appeal should not be dismissed as premature. The employer may respond by explaining that the SWO is in the nature of an IFO, which the court has jurisdiction to review.²⁹

Second, the employer should anticipate the need to convince the court that the notice was not filed late. This problem arises because the SWOs surveyed indicate the date of service, but not the date of filing with the agency clerk. The latter is an element of a final order³⁰ and essential for establishing jurisdiction. The solution to this potential problem is left to the employer's resourcefulness.

Conclusion

As part of its strategy to enforce the coverage requirements of Florida's Workers' Compensation Law, the Department issues SWOs without a hearing, requiring the named employer to immediately shut down all business operations. A survey of cases shows that the SWO currently utilized by the Department is a one-size-fits-all form that completely ignores the requirement under section 120.569(2)(n) that an agency head allege with particularity, on the face of the instrument, the facts justifying summary action. By disregarding this requirement, the Department avoids the need to investigate and allege facts establishing that the agency took only that action necessary to protect the public and that the employer's conduct was likely to continue but for the SWO. As long as the Department persists in issuing a generic SWO, then employers have a ready remedy and opportunity to persuade a district court to hold the Department accountable to the heightened standard that applies when the state exercises emergency power.

Endnotes:

¹ §440.107(7)(a), Fla. Stat. (2008).

² Ch. 440, Fla. Stat. (2008).

³ §440.107(7)(a), Fla. Stat. (2008).

⁴ §120.569(2)(n), Fla. Stat. (2008).

⁵ Likewise, this article does not address related enforcement issues, such as whether the federal and state constitutions require the Department to provide a pre-termination hearing

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before it shuts down an employer's business, *Mathews v. Eldridge*, 96 S. Ct. 893, 903 (1976); whether the Department must utilize a "notice of compliance" in lieu of an SWO for "minor violations," §120.695(2)(a), Fla. Stat. (2008); whether options apart from complete closure of an employer's workplace are available to the Department, *Kodsy v. Department of Financial Services*, 972 So. 2d 999, 1003 (Fla. 4th DCA 2008); and whether the Department properly assessed associated penalties.

⁶ Ch. 93-415, Laws of Fla. (enacting §440.107, Fla. Stat.).

⁷ *Joint Report to the President of the Florida Senate and the Speaker of the Florida House of Representatives by The Florida Department of Financial Services, Division of Insurance Fraud / Bureau of Workers' Compensation Fraud and Division of Workers' Compensation* at 13 (Jan. 1, 2009).

⁸ See also §440.107(3)(g), Fla. Stat. (2008).

⁹ §440.107(7)(a), Fla. Stat. (2008).

¹⁰ *Id.* Thus the filing of a petition under section 120.57 does not render the SWO ineffective during the pendency of administrative review. An alternative policy applies in license revocation proceedings. *Capeletti Bros., Inc. v. Dep't of Transp.*, 362 So. 2d 346, 348 (Fla. 1st DCA 1978) (revocation of a contractor's certificate of qualification to bid on DOT jobs, deemed to be a license revocation, is ineffective until an order is entered after 120.57 proceedings).

¹¹ §§440.107(3)(j) and (7)(c), Fla. Stat. (2008).

¹² §440.107(13), Fla. Stat. (2008).

¹³ §§120.569, .57(1), and .57(2), Fla. Stat. (2008).

¹⁴ *School Bd. of Palm Beach County v. Survivors Charter Schools, Inc.*, 3 So. 3d 1220, 1230--1231 (Fla. 2009)(citation omitted).

¹⁵ §440.107(13), Fla. Stat. (2008).

¹⁶ *E.A.R. v. State*, 4 So. 3d 614, 629(Fla. 2009)(rec-

ognizing principle of statutory construction that construes together "statutes relating to the same subject or object")(citation omitted).

¹⁷ See also *Allied Educ. Corp. v. Dep't of Educ., Bd. of Indep. Postsecondary Vocational, Technical, Trade and Bus. Schools*, 573 So. 2d 959, 961 (Fla. 1st DCA 1991)("in order to construe section 246.2265 so as to find it constitutional, we read it in pari materia with section 120.60(8) and find the procedures set forth in the APA must be followed by the Board when issuing a cease and desist order to a licensee"); *Dubin v. Dep't of Bus. Reg.*, 262 So. 2d 273, 275 (Fla. 1st DCA 1972)(statute regulating horse trainer license renewal must be read in pari materia with APA procedural safeguards).

¹⁸ *Sapp Farms, Inc. v. Dep't of Agriculture and Consumer Servs.*, 761 So. 2d 347, 348 (Fla. 3d DCA 2000)("although the statute contemplates the possibility of injunctive relief, it does not eliminate the need to exhaust administrative remedies before seeking same"); *Criterion Ins. Co. v. Dep't of Ins.*, 458 So. 2d 22, 26 (Fla. 1st DCA 1984)("fact that an alternative judicial remedy is explicitly recognized by the [APA] does not mean that the exhaustion requirement may be dispensed with"); Katherine E. Giddings and Todd D. Engelhardt, Appeals of State Agency Immediate Final Orders and Emergency Suspension Orders, 81 Fla. Bar J. 36, 38 (Oct. 2007)(helpfully distinguishing the two statutory remedies and urging strict application of the standards governing the use of emergency orders).

¹⁹ *Commercial Consultants*, 363 So. 2d at 1164 ("[e]very element necessary to the order's validity must appear on its face"); *Allied Educ. Corp. v. Dep't of Educ., Bd. of Indep. Postsecondary Vocational, Technical, Trade and Bus. Schools*, 573 So. 2d 959, 961 (Fla. 1st DCA 1991)(reasons for finding an immediate danger must "must be fully set forth in the agency's emergency order itself").

²⁰ *Unimed v. Office of Ins. Reg.*, 884 So. 2d 963 (Fla. 1st DCA 2004)(quoting section).

²¹ *Id.*; *Crudele v. Nelson*, 698 So. 2d 879, 880

(Fla. 1st DCA 1997).

²² *All State Floridian Ins. Co. v. Office of Ins. Reg.*, 981 So. 2d 617, 623 (Fla. 1st DCA), review denied, 987 So. 2d 79 (Fla. 2008); *Allied Educ. Corp.*, 573 So. 2d at 961.

²³ See e.g., *Kodsy*, 972 So. 2d at 999; *Unimed*, 884 So. 2d at 963; *United Ins. Co. of Am. v. Dep't of Ins.*, 793 So. 2d 1182 (Fla. 1st DCA 2001); *Fla. Ass'n of Health Maintenance Orgs. v. Dep't of Ins.*, 771 So. 2d 122 (Fla. 1st DCA 2000).

²⁴ *Commercial Consultants*, 363 So. 2d at 1165 (citation omitted).

²⁵ *Bertany Assoc. for Travel and Leisure, Inc. v. Dep't of Fin. Servs.*, 877 So. 2d 854, 855 (Fla. 1st DCA 2004)(citation omitted).

²⁶ *Dade County Consumer Advocate's Office v. Dep't of Ins.*, 457 So. 2d 495, 499 (Fla. 1st DCA 1984).

²⁷ Fla. R. App. P. 9.110(c).

²⁸ §120.52(7), Fla. Stat. (2008).

²⁹ Art. V, §4(b)(2), Fla. Const.; §120.569(2)(n), Fla. Stat. (2008).

³⁰ §120.52(7), Fla. Stat. (2008); see also Fla. R. App. P. 9.020(h)(defining "rendition" as "when a signed, written order is filed with the clerk of the lower tribunal").

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