ADMINISTRATIVE LAW SECTION
Newsletter
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2015 Amendments to the APA: Agency Regulatory Plans, Indexing--and Another Veto!

by H. French Brown, IV and Larry Sellers

During the 2015 regular session, the Florida Legislature considered a number of bills affecting the Florida Administrative Procedure Act (APA). Several passed, including one measure requiring agencies to transmit certain final orders to an electronic database maintained by Division of Administrative Hearings (DOAH), and a second bill requiring agencies to prepare and publish an annual regulatory plan. Another comprehensive measure passed both chambers, but was vetoed by Governor Scott based on concerns that it "alters the long-standing deference granted to agencies by shifting final action authority to an administrative law judge." Other bills died, but may be back next year, including one that would further refine the required statement of estimated regulatory costs. Here's a quick summary:

PASSED

Indexing of Agency Final Orders (CS/HB 985)

Beginning July 1, 2015, agencies must transmit most final orders to a centralized electronic database maintained by DOAH within ninety days from the date the final order was rendered. The electronic final orders

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From the Chair

by Richard J. Shoop

It is a true honor and privilege for me to serve as chair of the Administrative Law Section for the 2015-2016 term. I want to first thank our Immediate Past Chair, Daniel E. Nordby, for leading the Section through a phenomenal year. Thanks to his efforts, along with those of the legislative committee and the ad hoc orders access committee, section 120.53, Florida Statutes, has been successfully amended through the passage of HB 985. As of July 1, 2015, all state agencies will now be required to index their final orders electronically with the Division of Administrative Hearings. This is a monumental accomplishment that will benefit everyone in the state, for there will now be, going forward, one central repository for all agency final orders required to be indexed under section 120.53 that can be easily accessed via the internet free of charge. In addition, the Section's CLE committee produced yet another successful Pat Dore Conference last fall, as well as co-sponsored a CLE on Advanced Topics in Administrative, Environmental and Government Law

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this past spring. It is obvious that I have my work cut out for me in order to carry that momentum forward through the coming year.

Second, I want to thank my fellow officers, Chair-Elect Jowanna N. Oates, Secretary Robert H. Hosay, and Treasurer Judge Garnett W. Chisenhall, Jr.; and executive council members J. Andrew Bertron, Jr., Michael G. Cooke, Frederick R. Dudley, Stephen C. Emmanuel, Francine M. Ffolkes, Clark R. Jennings, Bruce D. Lamb, Brent McNeal, Patricia A. Nelson, Brian A. Newman, Judge Lynne A. Quimby-Pennock, Christina A. Shideler, Amy W. Schrader, Frederick J. Springer and Judge Suzanne Van Wyk for their dedication and willingness to serve along with me. These individuals are among the "Who's Who" of Florida administrative practitioners and I am humbled by the opportunity to work with them. I have no doubt that these individuals will cause great things to happen for the Section in the upcoming year.

My main goal as chair is to increase the Section's outreach to both law students and young lawyers, since these two groups are the future of the Section and administrative law in general. In regard to outreach to law students, I have appointed nine members to the Section's law school liaison committee (which will be chaired by Judge Quimby-Pennock), including three first-time members, in the hopes that the committee will receive an infusion of fresh ideas and projects to further its goal of increasing the number of law students with an interest in administrative law. In regard to young lawyers, I have also appointed nine members to the ad hoc young lawyers committee, chaired by Christina A. Shideler. I applaud Christina for her efforts this past year in hosting several "Table for 8" events in Tallahassee that paired five young lawyers with a government attorney, private attorney, and administrative law judge (or, thanks to Judge T. Kent Wetherell of the First DCA, an appellate court judge) that have at least ten years of legal experience in order to discuss issues related to the practice of administrative law in an informal setting. She will continue to organize these events in the upcoming year, as well as plan other activities and programs of benefit to the young lawyer members of the Section, so please feel free to contact her if you have any suggestions or are interested in participating in such events.

Beyond that, I will ensure that our Section's newsletter editors, Judge Elizabeth W. McArthur and Jowanna N. Oates, have plenty of material for the upcoming newsletters, and our Journal editor, Stephen C. Emmanuel, receives an ample amount of articles. So be warned that I will not hesitate to ask, beg, plead, cajole, coerce, or use any and all other means necessary to obtain articles for them.

I am also a firm believer in serving others and helping those less fortunate than myself, and I try to encourage others to do so as well. To that extent, I have organized a service event for the members of the executive council to participate in later this fall. On October 24, 2015, members of the executive council will help the Second Harvest of the Big Bend stuff backpacks full of food for needy students of a local elementary school here in Tallahassee. I am proclaiming this date as the Administrative Law Section's "Day of Service," and I encourage and invite all members of the Section to use that date as an opportunity to engage in volunteer work as well. I want every member who does so to send me photos of your efforts, and I will try to publish as many as possible on the Section's website. Finally, I want to note that our CLE committee, chaired by Bruce D. Lamb, will be working hard on the Practice Before DOAH CLE seminar that will take place on October 2, 2015.

As you can see, this looks to be a very busy and productive year for the Section. I invite all of our members to get involved in some form or fashion. I also encourage you to contact me if you have any ideas or suggestions on ways in which the Section can serve you better. I look forward to serving you in the coming year.

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

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APPELLATE CASE NOTES

by Larry Sellers and Gigi Rollini

Administrative Orders—Required Findings of Fact

Agency for Health Care Administration v. Murciano, 163 So. 3d 662 (Fla. 1st DCA April 29, 2015).

The Agency for Health Care Administration (AHCA) filed a petition for writ of mandamus challenging the order of an Administrative Law Judge (ALJ) declining AHCA's remand for additional fact-finding following a formal administrative hearing.

Dr. Murciano, a physician, is a Medicaid provider. In January 2013, AHCA issued a final audit report to Dr. Murciano following a review of his claims for Medicaid payment. The report concluded that he had been overpaid by $1,051,992.99. AHCA found two reasons for the overpayment: (1) a peer consultant determined that some of the documentation he provided with his claims supported a lower level of office visit than the one for which he billed and received payment; and (2) some of the services for which he billed and received payments were not properly documented.

Dr. Murciano requested a formal administrative proceeding. Following the hearing, the ALJ issued a recommended order dismissing the final audit report. The ALJ concluded, as a matter of law, that the doctor who conducted the peer review of the claims, Dr. O'Hern, was not a "peer" as defined by section 409.9131(2)(c), Florida Statutes.

AHCA issued an order remanding the matter to the ALJ for additional factual findings, claiming "exceptional circumstances." Specifically, AHCA argued that the ALJ should have deferred to AHCA's interpretation of the statute, under which Dr. O'Hern would qualify as a "peer." In the alternative, even if Dr. O'Hern did not meet the statutory definition of "peer," AHCA insisted that the ALJ should have made factual findings on the claims that were not supported by sufficient documentation, because that determination did not need to be made by a peer reviewer.

The ALJ entered an order declining remand. AHCA then entered a partial final order and again remanded for factual findings. AHCA concluded, as a matter of law, that Dr. O'Hern was a "peer" as defined by the statute. It therefore remanded to the ALJ "to make factual findings regarding all the claims at issue of this matter with the understanding that Dr. O'Hern is a 'peer' of Dr. Murciano as defined by" statute. The ALJ again entered an order declining remand.

AHCA then filed a petition for writ of mandamus asking the appellate court to direct the ALJ to fulfill the statutory duty to make factual findings with regard to each Medicaid claim identified in the final audit report.

The court determined that the petition should have been brought as a petition seeking review of non-final agency action as authorized by section 120.68(1), Florida Statutes, and treated it as such. The court concluded that the ALJ departed from the essential requirements of law by failing to make factual findings on all of the contested Medicaid claims, as those factual findings are necessary before AHCA may issue a final order. The court noted that the ALJ is required by statute and rule to make findings of fact, and that when the ALJ has failed to perform this function, the appropriate remedy is not for the agency (or the appellate court), to make its own findings, but rather, to remand for the ALJ to do so.

Notably, the court declined to address the substantive issues, including whether the ALJ should have deferred to AHCA's interpretation of the word "peer," and whether the determination that some of the Medicaid claims were not supported by sufficient documentation must be made by a "peer," given that a recommended order on these matters was not before the court.

Accordingly, the court granted the petition and remanded the case to the ALJ with directions to make factual findings on each of the contested Medicaid claims.

Agency Authority—Policy Decisions

Security First Insurance Company v. Office of Insurance Regulation, 40 Fla. L. Weekly D1449 (Fla. 1st DCA June 22, 2015).

Security First Insurance Company (Security First) appealed a decision of the Office of Insurance Regulation ("OIR") which denied its request to amend a section of its homeowner's policies that would restrict the ability of policyholders to assign post-loss rights without the company's consent.

In support of its proposed amendment, Security First presented evidence that the proposed policy amendment stemmed from concerns regarding inflated or fraudulent post-loss claims filed by remediation companies; that policyholders may sign away their rights without understanding the implications; and that a "cottage industry" of "vendors, contractors, and attorneys" exists that use the "assignments of benefits and the threat of litigation" to "extract higher payments from insurers." OIR denied the proposed amendment nonetheless, on the basis that it would "violate the intent and meaning of Sections 627.411(1)(a), 627.411(1)(b), and 627.411(1)(e), Florida Statutes[, and] contain[ed] language prohibiting the assignment of a post loss claim under the policy, which is contrary to Florida law."

OIR held an informal hearing on the issue of whether post-loss rights under an insurance policy are freely assignable without the consent of the insurer. The hearing officer upheld

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OIR's decision, reasoning it was not clearly erroneous because the proposed restriction on assignments of post-loss rights would mislead a policyholder to believe that the validity of the assignment was contingent upon the written consent of the insurer, which is contrary to Florida law.

The appellate court upheld OIR's denial based on the volume of case law making it clear that policyholders have the right to assign such claims without insurer consent. While acknowledging and agreeing with the concerns expressed by Security First, the court explained that such are matters of policy that must be addressed by the Legislature.

Agency Authority—Rejection of Recommended Penalty
Quiller v. Duval County School Board, 40 Fla. L. Weekly D1616 (Fla. 1st DCA July 15, 2015).

Joyce Quiller appealed a final order by the Duval County School Board, arguing that the Board erred in rejecting the ALJ's recommendation that the Board follow the agreed-to disciplinary process in the collective bargaining agreement signed by the Board and the Duval County Teachers' Union.

The collective bargaining agreement establishes a progressive discipline structure of four steps: (1) verbal reprimand, (2) written reprimand, (3) suspension without pay, and (4) termination. The agreement provides, however, that "some more severe acts of misconduct may warrant circumventing the established procedure."

Based on complaints from students and parents that Quiller was using profanity in front of the students, the Board began its discipline of Quiller with a verbal reprimand, followed by a written reprimand. However, after receiving an additional complaint, rather than moving to the third step of the policy, the Board terminated Quiller's employment—the fourth step.

Quiller appealed her termination. After a hearing, the ALJ found that the Board should not have skipped step three because there was no evidence of "severe acts of misconduct" as contemplated by the collective bargaining agreement. The ALJ therefore recommended that the Board rescind its termination of Quiller, and enter a final order suspending her for a period of time without pay. The Board adopted the ALJ's findings of fact and conclusions of law, but rejected the ALJ's recommendation and entered a final order terminating Quiller.

The court reversed and remanded with instructions for the Board to adopt the ALJ's recommended penalty. The court noted that the Board failed to state particular reasons for rejecting the recommended penalty and, indeed, adopted the ALJ's finding and conclusion that Quiller's use of profanity was not a severe act of misconduct. As such, the Board's rejection of the recommended penalty did not comport with the collective bargaining agreement.

Judge Osterhaus concurred in the decision to reverse and remand, but would have allowed the Board to decide whether to adopt the ALJ's recommended penalty, or to clarify the final order's conflict and treatment of the ALJ's findings and conclusions on remand.

Agency Authority—Rule Compliance
Putnam County Environmental Council v. Johns River Water Management District, 168 So. 3d 296 (Fla. 1st DCA June 26, 2015).

The Putnam County Environmental Council (PCEC) filed a petition for writ of mandamus seeking to compel the Florida Land and Water Adjudicatory Commission (FLWAC) to review an order of a water management district pursuant to section 373.114(1), Florida Statutes. That statute provides that the Governor and Cabinet, sitting as FLWAC, have exclusive authority to review any order or rule of a water management district. The statute also provides that a request for review shall be heard by FLWAC not more than 60 days after receipt of the request for review, unless waived by the parties.

In 2009, PCEC filed a request for review of the St. Johns River Water Management District (SJRWMD) Regional Water Supply Plan, Fourth Addendum. PCEC requested FLWAC to: (1) determine that the Fourth Addendum improperly identified surface water withdrawals from the St. Johns River and the Ocklawaha River as "alternative water supplies" under section 373.109(1), Florida Statutes; and (2) order that such designations be stricken and/or specifically limited to capture during wet weather flows. PCEC's request for review was stayed by the FLWAC Secretary in 2009, pending

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resolution of other challenges to the Fourth Addendum.

On January 31, 2012, the Secretary issued an order declining review because the Secretary determined that FLWAC was without jurisdiction pursuant to section 373.114, Florida Statutes. On appeal, the court reversed the Secretary's dismissal, finding that the Fourth Addendum raised a policy issue sufficient to invoke the jurisdiction of the full Commission. *See Putnam County Environmental Council v. SJRWMD,* 136 So. 3d 766 (Fla. 1st DCA 2014) [summarized in the September 2014 issue of this Newsletter].

Subsequently, PCEC filed a motion requesting that the Secretary schedule the request for review at the next Commission meeting. SJRWMD filed a motion to stay the request until DEP completed amendments to the water resource implementation rule. The Secretary granted the stay pending the completion of rulemaking by DEP.

PCEC sought a writ of mandamus, asserting that it is entitled to have FLWAC consider its request for review. The appellate court agreed, concluding that the relevant rule, Florida Administrative Code Rule 42-2.0132(6), provides that a request for review shall be heard by FLWAC not more than 60 days after the date the request for review has been received and determined by the Secretary to be sufficient, unless waived by all parties. As such, the court concluded that PCEC had a clear legal right to have the request for review timely considered by FLWAC.

Accordingly, the court granted the petition for writ of mandamus with directions to FLWAC to schedule consideration of PCEC's request for review within 60 days of issuance of the mandate.

Agency Jurisdiction—Modification of Final Order

William Kale v. Department of Health, 40 Fla. L. Weekly D1331 (Fla. 1st DCA June 4, 2015).

Dr. William Kale (Kale) appealed the final order of the Board of Psychology (Board) revoking his license to practice psychology and imposing a fine and costs. On appeal, the court affirmed, finding that the Board did not err in interpreting its authority or imposing the penalty.

The Department of Health filed an administrative complaint against Kale that alleged he was convicted in federal court of two counts of health care fraud. The Board held an informal hearing, during which Kale was represented by counsel. Because his criminal conviction was on appeal to the federal appeals court, Kale asked the Board to impose an "indefinite suspension" pending the resolution of his criminal appeal, at which time he would reappear before the Board and the Board would have the full range of penalties available to it "to make a more final decision."

The Board rejected Kale's position and entered a final order that imposed fines and costs and revoked Kale's license. The Board stayed the payment of the fine and costs for six months from the issuance of a mandate in the pending criminal appeal. The Board made this decision based on advice of its counsel that it could suspend Kale's license and retain jurisdiction to remove the suspension or impose other conditions, but it could not revoke his license based on his conviction not being overturned. The Board informed Kale that he could petition the Board to vacate its final order if the criminal charges on which the administrative complaint was based were later dismissed.

On appeal, Kale argued that the Board's final order must be vacated because the Board erroneously concluded that it could not conditionally suspend a license and retain jurisdiction to revisit that penalty under the circumstances of the case.

The court explained the difference between the standard applicable when interpreting statutes authorizing sanctions against a person's license (which are deemed penal in nature and must be strictly construed, with any ambiguity interpreted in favor of the licensee), and review of the Board's imposition of the penalty (which is reviewed for an abuse of discretion). The court also explained that when a penalty is imposed within the permissible statutory range, an appellate court has no authority to review the penalty.

After recognizing both the necessity for finality in administrative actions and an agency's limited inherent authority to modify its final orders, the court concluded that such orders may only be modified where there is a change in circumstances or a demonstrated public need. Accordingly, the court rejected Kale's contention that the Board had authority to suspend his license pending his criminal appeal and to retain jurisdiction to revoke his license if his conviction were not overturned.

The court explained that if Kale's conviction is affirmed, there will be no change in circumstances. However, if Kale's conviction is overturned, he may petition the Board to vacate its final order at that time.

Declaratory Statements

Citizens of the State of Florida, ex rel. Office of Public Counsel v. Florida Public Service Commission and Utilities, Inc., 164 So. 3d 58 (Fla. 1st DCA 2015).

The Office of Public Counsel (OPC) appealed the denial of its petition for declaratory statement by the Florida Public Service Commission (PSC). OPC sought a declaratory statement as to Public Counsel's right, if any, to conduct discovery in rate cases pending before the PSC under the proposed agency action (PAA) procedure, before proposed agency action is decided. The PSC denied OPC's petition on grounds that the petition failed to meet the requirements for obtaining a declaratory statement under section 120.565, Florida Statutes. On appeal, the court reversed and remanded with directions that the PSC consider the petition on the merits and issue a declaratory statement, without expressing any view on the merits.

OPC asserted that a declaratory statement was "necessitated by inconsistent and conflicting decisions which ha[d] created doubt for OPC regarding whether, going forward, the [PSC] will enforce OPC's statutory discovery rights in docketed PAA

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proceedings in which it intervenes[.]" Specifically, OPC claimed that three PSC orders recognized its right to obtain discovery in PAA rate cases prior to the issuance of a Notice of PAA, but one order ruling to the contrary purported to end its ability to do so (the no-discovery order). OPC maintained that the WMSI order departed from the PSC's past practice and "highlight[ed] the need for resolution and consistency going forward."

The PSC declined to reach the merits of OPC's petition for declaratory statement, stating the petition failed to meet the requirements for declaratory statements for four reasons, one of which was that the petition in effect challenged the validity or sought review of the no-discovery order.

On appeal, the court agreed with the PSC that a declaratory statement petition is not a vehicle for testing the validity of a statute or agency actions about which the declaration is sought. The court also agreed that the PSC is under no obligation to make declaratory statements as to rights being actively litigated either before it in another docket or elsewhere. However, the court found that OPC's petition was not a collateral attack on the no-discovery order. Instead, it sought the PSC's opinion as to whether and when the prohibition against discovery enunciated in that order applies in future cases.

In so holding, the court clarified that where contradictory orders make applicability of statutes or rules an administrative agency enforces uncertain as to particular circumstances, a declaratory statement may well be appropriate. The court rejected any contention that a party cannot avail itself of the declaratory statement provision of the Administrative Procedure Act to seek clarification of its rights, duties, and privileges if thrown into doubt by seemingly contradictory orders handed down by an administrative agency.

The court explained that the purpose of the declaratory statement procedure is "'to enable members of the public to definitively resolve ambiguities of law arising in the conduct of their daily affairs or in the planning of their future affairs' and 'to enable the public to secure definitive binding advice as to the applicability of agency-enforced law to a particular set of facts.'" The court concluded that is what OPC's petition for declaratory statement sought to do, and was based on a bona fide need to resolve a conflict based on a particular set of circumstances.

Statutory Construction—Gaming Licensure

Gretna Racing, LLC v. Department of Business and Professional Regulation, Div. of Pari-Mutuel Wagering, 40 Fla. L. Weekly D1293 (Fla. 1st DCA May 29, 2015) (motion for rehearing and rehearing en banc pending).

Gretna Racing, LLC (Gretna Racing) appealed the final order of the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (DBPR), denying Gretna Racing's application for a license to conduct slot machine gaming at its horse track facility in Gadsden County.

In November 2011, the Gadsden County Commission voted to place a referendum regarding slot machine gaming on the ballot for an election held January 13, 2012. At that election, a majority of those voting in the countywide referendum voted "yes" on the question, "shall slot machines be approved for use at the pari-mutuel horse track facility in Gretna, FL?" Almost two years later, in December 2013, Gretna Racing applied to DBPR for a license to conduct slot machine gaming at its horse track facility in Gretna.

DBPR denied the application, relying on an attorney general opinion interpreting the following definition of "eligible facilities" where slot machines may be located, appearing in section 551.102(4), Florida Statutes:

> any licensed pari-mutuel facility in any other county in which a majority of voters have approved slot machines at such facilities in a countywide referendum held pursuant to a statutory or constitutional authorization after the effective date of this section in a respective county, provided such facility has conducted a full schedule of live racing for 2 consecutive calendar years immediately preceding its application for a slot machine license, pays the required license fee, and meets the other requirements of this Chapter.

The opinion referred to this as the "third clause" in section 551.102(4).

DBPR's final order of denial concluded that "the January 31, 2012 referendum in Gadsden County was not held pursuant to a statute or constitutional provision: (1) specifically authorizing a referendum to approve slot machines, and (2) enacted after s. 551.102(4) of the Florida Statutes became effective on July 1, 2010."

The appellate court reversed, noting that the statute does not contain the word "enacted." As such, the court concluded that it is sufficient that the referendum simply be held after the effective date of the amendment to section 551.102(4), i.e., after July 1, 2010. The court remanded with directions to grant Gretna Racing's application for licensure.

The majority also certified the following question as one of great public importance:

> Whether the third clause of section 551.102(4), Florida Statutes (2010) authorizes the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering to license slot machines at qualifying licensed pari-mutuel facilities in any county, other than Miami-Dade County, in which voters approved such licensure by a countywide referendum, in the absence of additional statutory or constitutional authorization enacted or adopted after July 1, 2010?

Judge Makar dissented, opining that it is not clear that the Legislature has the constitutional authority to expand the use of slot machines beyond Broward and Miami-Dade counties as permitted by Article X, § 23 of the Florida Constitution. He also agreed with DBPR's interpretation of the statute, and would allow slot machines only in those counties where a referendum was held after the legal

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"authorization" for such referendum was enacted after the section's effective date.

Lake Shore Hospital Authority v. Lilker, 168 So. 3d 332 (Fla. 1st DCA July 8, 2015).

The Lake Shore Hospital Authority and its custodian of records appealed a trial court order granting Lilker's motion for summary judgment. The order concluded that the Authority violated the Public Records Act by placing unreasonable restrictions on Lilker's access to public records.

The trial court found that the Authority had placed unreasonable restrictions on Lilker's access to public records by referring Lilker to a website in response to his public records request, and by restricting Lilker's right to inspect and copy public records in the Authority's possession to between 8:30 a.m. and 9:30 a.m., Monday through Friday, with 24-hour notice.

The appellate court affirmed the trial court's conclusion that the Authority placed unreasonable restrictions on Lilker's access to public records by referring him to a website. The appellate court recognized that the duty under the Public Records Act may be met in this manner where the request is solely for electronic access. But the court noted that Lilker's request, while initially for electronic access, was ultimately for actual paper copies—a request made because Lilker allegedly had difficulty with the website. The appellate court noted that access to public records by remote electronic means is merely an additional means of inspecting or copying public records, and that this additional means is insufficient where a person requests paper copies.

The appellate court also affirmed the trial court's finding that the Authority violated the Public Records Act by restricting Lilker's right to inspect and copy public records to between 8:30 a.m. and 9:30 a.m., Monday through Friday, with 24-hour notice. The appellate court found that the Public Records Act authorizes inspection and copying of public records at "any reasonable time." While the custodian may reasonably restrict inspection to those hours during which his or her office is open to the public, the Authority went much further by limiting Lilker's access to a single hour on weekday mornings. The appellate court also found that there is no authority for automatically delaying production of records for inspection by imposing a 24-hour notice requirement.

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Gigi Rollini *is a shareholder with Messer Caparello, P.A., in Tallahassee, and AV-rated in both appellate and administrative law.*

DOAH CASE NOTES

Substantial Interest Hearings
The Collection, LLC, d/b/a The Collection v. Jaguar Land Rover North America, LLC, and Warren Henry Jaguar, LLC, d/b/a Warren Henry Jaguar, DOAH Case Nos. 13-0338, 13-4967, 14-0157 (Recommended Order May 22, 2015).

FACTS: A motor vehicle manufacturer, distributor, or importer intending to relocate an existing dealer to a community or territory where the same brand is represented by another franchised dealer must provide written notice to the Department of Highway Safety and Motor Vehicles ("DHSMV"). If the proposed relocation is challenged, then the manufacturer, distributor, or importer has the burden of proving that the existing franchised dealer in the community or territory of the proposed dealership is inadequately representing that brand. Jaguar Land Rover North America, LLC ("JLRNA") is a distributor that informed the DHSMV that it intended to allow Warren Henry Jaguar to relocate its Jaguar dealership from Northwest Second Avenue in Miami Gardens to a new facility on the east side of Biscayne Boulevard in North Miami. The Collection, LLC, d/b/a The Collection ("The Collection") is an authorized Jaguar dealer that timely protested the proposed relocation.

OUTCOME: The ALJ recommended that the DHSMV enter a final order dismissing The Collection's protests. In the course of doing so, the ALJ overruled The Collection's objection to the testimony of JRLNA's dealer network analyst. While section 90.702, Florida Statutes, authorizes opinion testimony imparting scientific, technical, or other specialized knowledge from a qualified witness under certain conditions, the ALJ concluded that section 90.702 does not apply to administrative hearings under the APA. In support thereof, the ALJ noted that section 120.569(2)(g), Florida Statutes, prohibits irrelevant, immaterial or unduly repetitious evidence, but the statute provides that "all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida." Therefore, section 120.569(2)(g) would have no meaning if it did not override the evidentiary provisions of chapter 90, including section 90.702. Also, the ALJ noted there is a split of authorities on whether section 90.702 applies in nonjury trials. Moreover, even if section 90.702 applies to administrative proceedings, the ALJ concluded The Collection was misapplying the statute. The Florida Legislature amended section 90.702 in 2013 to adopt the standards for expert testimony provided in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). The ALJ determined that the analyst's testimony satisfied the requirements of Kumho Tire because it was based on sufficient facts, resulted from reliable principles and methods, and the analyst applied the principles and methods reliably to the facts.

Brandy's Products, Inc. v. Dep't of Bus. & Prof'l Regulation, Div. of Alcoholic Beverages & Tobacco, DOAH Case No. 14-3496 (Final Order June 11, 2015).

FACTS: A tobacco distributor must pay an excise tax and a surcharge to the State of Florida when bringing tobacco products into the state or when shipping tobacco products to Florida-based retailers. Section 210.25(11), Florida Statutes, defines "tobacco products" to include "loose tobacco suitable for smoking . . ." In 2009, the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco ("the Division") decided that a cigar wrapper popularly known as a "blunt wrap" is "loose tobacco suitable for smoking" and would be taxed as a "tobacco product." Brandy's Products, Inc. ("Brandy's") is a wholesale distributor of "tobacco products." By letter issued on March 1, 2013, the Division notified Brandy's that it owed $71,868.23 based on untaxed purchases of blunt wraps. After a formal administrative hearing, the ALJ recommended that the Division enter a final order setting aside the entire assessment because section 210.25(11) does not extend to blunt wraps, despite their tobacco content. The Recommended Order is summarized in DOAH Case Notes in the June 2015 Newsletter.

OUTCOME: The Division rendered a Final Order on June 11, 2015, rejecting the ALJ's recommendation and ordering Brandy's to remit the $71,868.23 in unpaid taxes. In doing so, the Division concluded that "the Florida Legislature did not write section 210.25(11), Florida Statutes, with the intent to explicitly identify every discreet tobacco product subject to taxation. Instead, the plain language of the statute indicates the Florida Legislature intended for section 210.25(11), Florida Statutes, to encompass tobacco products that are not explicitly identified within the statute." Also, the Division noted that tobacco is one of the raw materials used to manufacture blunt wraps and stated "[i]t is wrong to conclude that a product taxable as loose tobacco would become exempt from taxation merely by combining it with other material to make a loose cigar wrapper." Finally, the Division rejected the ALJ's determination that the Division's effort to collect unpaid taxes from Brandy's was based on an unadopted rule. According to the Division, the phrase "loose tobacco suitable for smoking" clearly encompasses blunt wraps. Therefore, "it is unnecessary to use an unadopted rule to conclude that blunt wraps are tobacco products subject to tax."

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Brandy's appealed the Division's Final Order to the First District Court of Appeal, and the appeal is pending as Case No. 1D15-3101.

Disciplinary/Enforcement Actions

Office of Financial Regulation v. MS Money, Inc., DOAH Case No. 14-4153 (Recommended Order May 15, 2015).

FACTS: The Office of Financial Regulation ("OFR") enforces chapter 560, Florida Statutes, which governs check-cashing businesses. On April 14, 2014, OFR filed an eight-count Amended Administrative Complaint alleging MS Money, Inc. ("MS Money"), failed to comply with the record-keeping requirements for licensed check cashers. MS Money requested a hearing, and the matter was referred to DOAH for a formal administrative hearing.

OUTCOME: The ALJ concluded that OFR proved all of its allegations by clear and convincing evidence and recommended that OFR enter a Final Order imposing a $16,100 administrative fine. In the course of doing so, the ALJ rejected MS Money's argument that OFR erroneously applied a strict compliance, rather than a substantial compliance, standard during its review of MS Money's records. The ALJ observed that the pertinent statutory provisions use the term "must" and concluded the use of such terminology does not indicate that the Legislature authorized OFR to judge check-cashing businesses under a substantial compliance standard.

Dep't of Envtl. Protection v. South Palafox Properties, Inc., DOAH Case No. 14-3674, DEP Case No. 14-0415 (Final Order May 29, 2015).

FACTS: The Department of Environmental Protection ("DEP") enforces and administers chapter 403, Florida Statutes, including the permitting provisions for construction and demolition debris disposal facilities. Section 403.087, Florida Statutes, provides DEP with authority and grounds to revoke permits issued to construction and demolition debris disposal facilities. South Palafox Properties, Inc. ("South Palafox") operates the only construction and demolition debris disposal facility in Escambia County, serving 50 to 60 active customers and employing 16 people. On July 31, 2014, DEP issued a notice of proposed revocation of South Palafox's permit, based on charges of eight alleged violations. After South Palafox requested an administrative hearing, DEP referred the case to DOAH, and an Administrative Law Judge issued a Recommended Order on March 2, 2015, recommending that DEP enter a Final Order revoking South Palafox's permit.

OUTCOME: In its Final Order, DEP accepted the ALJ's recommendation and revoked South Palafox's permit. Of note, however, DEP granted an

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exception to the ALJ's conclusion that due process affords permit holders the right to present evidence in mitigation of the proposed penalty. In ruling that construction and demolition debris disposal facility permit holders have no right to present mitigating evidence, DEP noted that "section 403.087 does not authorize alternative remedies or consideration of mitigating circumstances." DEP contrasted that statute with another statute in chapter 403 that expressly provides for consideration of aggravating and mitigating circumstances.

Rule Challenges

Bayfront Med. Center, et. al. v. Agency for Health Care Admin., DOAH Case No. 14-4758RU (Final Order April 20, 2015).

FACTS: The Agency for Health Care Administration ("AHCA") administers Florida's Medicaid program, a collaborative state-federal program in which the state receives financial participation from the federal government for services to Medicaid-eligible recipients in accordance with federal law. Federal law generally disallows Medicaid reimbursement for services to undocumented aliens, but permits payment of claims for "emergency medical services" rendered to eligible, undocumented aliens. The Florida Medicaid Hospital Services Coverage and Limitations Handbook, June 2011 (incorporated by reference into Florida Administrative Code Rule 59G-4.160(2)), provided that Medicaid will not pay claims for services to undocumented aliens that are "continuous or episodic services after the emergency has been alleviated." Prior to July 1, 2010, AHCA did not review claims to ascertain when the emergency ended or when the emergency had been alleviated. Instead, it simply paid for whatever services were deemed medically necessary to treat the emergency medical condition, even if those services were provided beyond the emergency or stabilization point. In response to a federal audit revealing that AHCA was not enforcing the limitation on paying only for emergency medical services to undocumented aliens, AHCA notified Medicaid providers that, beginning July 1, 2010, medical services provided to inpatient aliens "on or after the date that the patient has been stabilized will not be reimbursed by Medicaid." In DOAH Case No. 12-2757RU, summarized in the June 2015 newsletter, DOAH concluded that AHCA's "stabilization" standard was an unadopted rule. In response, AHCA discontinued all reliance on the stabilization standard and started evaluating claims for emergency medical services to undocumented aliens, using the existing statutes and rules. On October 31, 2014, a group of 31 acute care hospitals enrolled as Medicaid providers filed a petition alleging, among other things, that AHCA was utilizing an unadopted rule by now enforcing the law regarding Medicaid reimbursement for emergency medical services to undocumented aliens, when AHCA's past practice was to not enforce that limitation.

OUTCOME: The ALJ held that the Petitioners failed to prove that AHCA was utilizing an unadopted rule. In doing so, the ALJ concluded that AHCA "is simply now enforcing statutes and rules that it had not been enforcing. Its actions are consistent with the statutes and rules. For that reason, the [Petitioners] have not proven that [AHCA] has or is using an unadopted rule."

County of Volusia, et al. v. Dep't of Juvenile Justice, DOAH Case Nos. 14-2799RP, 14-2800RP, 14-2801RP, & 14-4512RP (Final Order April 22, 2015).

FACTS: The Department of Juvenile Justice ("DJJ") administers the cost-sharing requirements for juvenile detention care. Section 985.686, Florida Statutes, provides that counties are only responsible for secure detention costs incurred prior to "final court disposition." On July 6, 2010, DJJ adopted rules 63G-1.011, 63G-1.013, 63G-1.016, and 63G-1.017. By doing so, DJJ replaced a definition of "final court disposition" with a definition of "commitment" and thereby transferred the costs for tens of thousands of detention days from the State to counties. On June 5, 2013, the First District Court of Appeal affirmed a Final Order of the Division of Administrative Hearings determining that the aforementioned rules were an invalid exercise of delegated legislative authority. DJJ responded by interpreting "final court disposition" to mean that all secure detention days incurred by probationers were postdisposition days. That included detention days for youths already on probation who committed new offenses and were then detained as a result of the new offenses or because of a probation violation resulting from the new offense. However, during the budgeting process for the 2014-15 state fiscal year, DJJ proposed rules 63G-1.011, 63G-1.013, 63G-1.016, and 63G-1.017 that changed DJJ's interpretation to make counties responsible for detention days when a youth on probation is charged with a new law violation. Twenty-seven counties and the Florida Association of Counties filed petitions challenging the proposed rules. In support thereof, the challengers argued that all detention days served by a juvenile on probation are the responsibility of the State rather than counties.

OUTCOME: The ALJ concluded that DJJ's revised interpretation of section 985.686 is not clearly erroneous "because the statute simply does not address the situation where a youth commits multiple substantive law violations over time and thus has the status of both postdisposition (commitment or probation) and predisposition (detained and awaiting final court disposition on a new charge)." Also, while DJJ's interpretation was "likely influenced by input from the Governor's Office," the ALJ concluded that "does not, in and of itself, render the new interpretation 'clearly erroneous.'" However, the ALJ ruled that other portions of the proposed rules amounted to an invalid exercise of delegated legislative authority.

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Baywood Nurseries Co., Inc. v. Dep't of Health, Case No. 15-1694RP (Final Order May 27, 2015).

FACTS: The Department of Health ("DOH") is charged with implementing the Compassionate Medical Cannabis Act of 2014 ("the Act"). The Act requires DOH (through the Office of Compassionate Use) to establish five dispensing organizations to cultivate, process, and dispense low-THC cannabis to qualified Florida patients. DOH is also responsible for adopting rules to implement the Act, but DOH's first attempt to do so was invalidated in Costa Farms, LLC v. DOH, DOAH Case No. 14-4296RP (Fla. DOAH Nov. 14, 2014). Following Costa Farms, DOH elected to use negotiated rulemaking to develop a second set of proposed rules, and the negotiating committee selected by DOH produced a second set of proposed rules that were published on February 6, 2015. Baywood Nurseries Co., Inc. ("Baywood") is located in Apopka, Florida, and has been operating as a registered nursery in Florida for over 30 years. Baywood challenged four of the proposed rules and argued in part that: (1) the $60,063 application fee for those seeking to be dispensing organizations is excessive and based on an inaccurate estimate of the number of applicants; and (2) the negotiated rulemaking process utilized by DOH was flawed.

OUTCOME: Before considering Baywood's arguments, the ALJ addressed DOH's assertion that Baywood lacked standing to challenge the proposed rules. Under the Act, an applicant to be a dispensing organization must possess a valid certificate issued by the Department of Agriculture and Consumer Services for the cultivation of more than 400,000 plants. Because Baywood lacked such a certificate when it filed its rule challenge petition on March 24, 2015, DOH argued that Baywood lacked standing to maintain its challenge. However, the ALJ noted that the "substantial interest" test examines whether a party's substantial interests "could be" affected by the proposed activity or whether the party's substantial interests "could reasonably be affected" by the proposed activities. Because Baywood established at the formal administrative hearing that it intended to apply for dispensing organization approval and that it had obtained the necessary certificate, the ALJ ruled Baywood had standing to maintain its challenge. In doing so, the ALJ concluded that "[i]n Jerry and Alice P., standing existed at some time prior to the filing of the rule challenges, but was subsequently lost, since no real and immediate 'injury in fact' remained by the time of hearing. Here, Baywood may not have met all three statutory prerequisites to apply for [dispensing organization] approval when it filed its rule challenge petition. However, by the time of hearing [the Department of Agriculture and Consumer Services] had issued Baywood a Certificate of Nursery Registration to cultivate more than 400,000 plants, thereby rendering Baywood eligible to apply for [dispensing organization] approval."

With regard to the merits of Baywood's arguments, the ALJ rejected Baywood's assertion that the negotiated rulemaking process utilized by DOH was flawed by noting that section 120.54(2)(d)3., Florida Statutes, provides in pertinent part that "[t]he agency's decision to use negotiated rulemaking, its selection of the representative groups, and approval or denial of an application to participate in the negotiated rulemaking process are not agency action." As stated by the ALJ, "[t]he statute's plain language addressing negotiated rulemaking unequivocally evidences the Legislature's intent that the selection and composition of a negotiated rulemaking committee, the negotiated rulemaking process, and a party's exclusion from the negotiated rulemaking process cannot be grounds for challenging or invalidating a proposed rule." The ALJ also rejected Bayfront's argument that the application fee was excessive by concluding that "[t]he mere fact that substantially more than 15 nurseries may be eligible to apply does not invalidate [DOH]'s estimate. Rather, the 15-applicant estimate developed at the negotiated rulemaking sessions is a reasonable, rational estimate based on sound input and should allow [DOH] to recover its costs of administering the statute, as required by the Act."

Philip Carter v. Fla. Int'l Univ., DOAH Case No. 15-2019 RU (Amended Final Order June 29, 2015).

FACTS: At all relevant times, Philip Carter was a student at Florida International University ("FIU"). Mr. Carter claimed that FIU improperly used or disclosed personal or confidential information gleaned from his educational records. Mr. Carter also claimed that certain documents in his student file were inaccurate. In response to a request from Mr. Carter for an administrative remedy, FIU issued a letter on March 23, 2015, denying an administrative hearing and explaining that Mr. Carter could seek judicial review "by filing a petition for certiorari review with the appropriate circuit court within thirty (30) days of this final University decision." On April 13, 2015, Mr. Carter filed a petition with DOAH alleging that FIU's statement about his right to judicial review amounted to an unadopted rule.

OUTCOME: The ALJ began his analysis by noting that only an "agency" can violate section 120.54(1)(a), Florida Statutes, by failing to adopt an agency statement defined as a rule within the meaning of section 120.52(16), Florida Statutes. Under the Administrative Procedure Act, "educational units" such as state universities are "agencies" only when they are acting pursuant to powers "other than those derived from the constitution." Article IX, section 7(d) of the Florida Constitution empowers the Board of Governors to adopt rules, and the Board of Governors has delegated to the university boards of trustees its constitutional authority to make rules. Because FIU acts pursuant to delegated constitutional authority when it promulgates a rule or implements an unadopted rule, the ALJ concluded that the statement challenged by Mr. Carter was not a "rule" within the meaning of section 120.52(16), Florida Statutes.

Agency Snapshot: Department of Elder Affairs

by Sarah Catherine Spillers

Constitutionally designated by Florida voters to "serve as the primary state agency responsible for administering human services programs for the elderly," the Department of Elder Affairs (DOEA) works to promote the health and well-being of elders and create an environment that enables them to live independently in their own homes and communities.

Through partnerships with 11 Area Agencies on Aging, DOEA provides community-based care to help seniors safely age with dignity, purpose, and independence. Working with community-based organizations across the state, DOEA provides information to elders and their caregivers on how to live healthy lives. DOEA, in partnership with Florida's aging services network, offers many services – such as adult day care or help with transportation – to elders based on various criteria, including income level and health status. During the most recent state fiscal year, DOEA provided services to nearly 1.2 million elder Floridians.

With approximately 4.8 million residents age 60 and older, Florida currently ranks first in the nation in the percentage of its citizens who are elders and will continue to do so for the foreseeable future. The elder population is expected to nearly double in the next 15 years. Currently, more than 1.7 million Floridians are age 75 and older. The population age 85 and older is currently the fastest-growing age group by percentage. Florida's future is linked to the financial health and physical security of its elder population.

In furtherance of its mission, DOEA partners with public and private organizations and agencies to combat ageism, create public awareness, promote volunteerism, and advocate on behalf of elders and their needs. DOEA also acts as a clearinghouse for Florida's elders and their families seeking information and assistance on issues particular to this population, such as determining the need and appropriate level for long-term care.

Contact Information:
Department of Elder Affairs
4040 Esplanade Way
Tallahassee, FL 32399
Phone: (850) 414-2000
Fax: (850) 414-2004
E-mail: information@elderaffairs.org
Website: elderaffairs.state.fl.us

Agency Secretary: Samuel P. Verghese

Governor Scott appointed Samuel Verghese as Secretary of DOEA on December 11, 2014. Secretary Verghese manages DOEA's activities, serves as an advocate for the issues and programs that affect Florida's 4.8 million seniors, and charts DOEA's overall direction. Secretary Verghese also represents the Governor on matters relating to Florida's elder population.

Deputy Secretary/Chief of Staff: Richard Prudom

Richard Prudom joined DOEA in July 2011 as the Chief Financial Officer, and he has served as the Deputy Secretary and Chief of Staff since October 2011. As Deputy Secretary, Mr. Prudom performs Chief of Staff functions for DOEA and oversees the Office of Strategic Initiatives, the Division of Statewide Community-Based Services, the Division of Internal & External Affairs, and the Division of Financial Administration.

Agency Clerk: Jason Nelson

Jason Nelson has been DOEA's Clerk since June 2013. Documents can be filed with the Agency Clerk from 8:00 a.m. to 5:00 p.m. via facsimile (850-414-2004), email (nelsonj@elderaffairs.org), and U.S. Mail.

General Counsel's Office: Attorneys in DOEA's Office of the General Counsel have a variety of responsibilities, including litigating cases involving DOEA, assisting with drafting and interpreting proposed legislation, providing statutory interpretation and legal counsel to DOEA employees, and coordinating all DOEA rulemaking endeavors. DOEA's attorneys also draft and review contracts that channel federal and state funds to Area Agencies on Aging in 11 planning and service areas (PSAs) around the state.

Law School Liaison

Fall 2015 Update from the Florida State University College of Law

by David Markell, Steven M. Goldstein Professor

This column provides a preliminary summary of the programs the College of Law will host this fall. It also highlights recent administrative law-related accomplishments of our College of Law students.

Fall 2015 Events

Our fall semester will include several interesting administrative law and environmental law programs. Our fall *Distinguished Lecture* will feature Jonathan B. Wiener, William R. and Thomas L. Perkins Professor of Law, Duke University School of Law. The fall *Forum* will focus on issues relating to animal law. More information on our fall programs will be available early in the fall at http://law.fsu.edu/academics/jd-program/environmental-energy-land-use-law/environmental-program-events. We hope Section members will join us for one or more of these events.

Recent Student Achievements

- Sarah Logan Beasley received the book award in Administrative Law.
- Sarah Fodge is externing at the U.S. Department of Justice Environment and Natural Resources Division in Seattle, Washington.
- Matthew Knoll has a summer externship with the Florida Department of Environmental Protection.
- Davis Moye was designated a Student Star by FSU and is currently being considered for Featured Student status. Featured Students (www.fsu.edu) highlight and acknowledge the outstanding contributions that students are making to the university community.
- Steven Specht received the book award in International Environmental Law.
- Kristina Torpy is externing with the Division of Administrative Hearings.

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must be fully searchable in order to enhance the ability for users to research and retrieve orders. Since 2008, many agencies have utilized DOAH's database in order to satisfy the index and maintenance requirements. Now, DOAH's database will be the official compilation of administrative final orders rendered after July 1, 2015.

The act became effective on July 1, 2015. Ch. 2015-155, Laws of Florida.

Annual Regulatory Plan (HB 7023)

Following the enactment of HB 7023, agencies are no longer mandated to initiate rulemaking within 180 days from the effective date of legislation requiring administrative implementation, nor are agencies required to complete formal biennial reviews of current rules. Instead, agencies must prepare, certify, and publish an annual regulatory plan by October 1st of each year. The regulatory plan must list all laws enacted or amended during the previous twelve months that create or modify the duties or authority of the agency and explain whether the agency will implement the law by rule. If the agency determines that rules are not required to implement a law, the agency must explain why. The regulatory plan must also include a list of any other laws the agency intends to implement by rulemaking before the following July 1st.

Once the annual regulatory plan is prepared, certified, and published, the agency must begin rule development by November 1st of the same year. The agency is required to publish its proposed rules by April 1st of the following year, or in the event the agency cannot publish its proposed rules by that date, it must publish a notice of extension that includes a concise explanation of the issues that are causing a delay in rulemaking. A notice of extension will expire on October 1st, unless further extended by the regulatory plan due the same day. The new regulatory plan system is designed to allow the Legislature and public to know when agencies are implementing laws by rule.

The act became effective on July 1, 2015. Ch. 2015-162, Laws of Florida.

Exemption from CON Review (HB 441)

HB 441, initially relating to reporting by home health agencies, was amended during the regular session to add a provision designed to address the apparent failure of a licensed health care facility to file a timely application for the renewal of its license.[1] The bill creates an exemption from certificate of need (CON) review for the establishment of a health care facility that was previously licensed in the last 21 days,

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failed to submit a timely application for renewal, had a license that expired after January 1, 2015, and meets certain other specific conditions.

The act became effective on May 14, 2015. Ch. 2015-33, Laws of Florida.

Ratification of DEP MFL Rule (HB 7081)

Since 2010, rules that have estimated regulatory costs exceeding $1 million over five years must be ratified by the Legislature.[2] This year, the Legislature approved two bills ratifying rules adopted by the Florida Department of Environmental Protection (DEP). HB 7081 bill ratifies the DEP rules setting minimum flows and levels (MFLs) for the Lower Santa Fe and Ichetucknee Rivers and associated springs.

The act became effective June 10, 2015. Ch. 2015-128, Laws of Florida.

Ratification of DEP C&D Liner Rule (HB 7083)

HB 7083 ratifies the DEP rules requiring liners and leachate collection systems at construction and demolition debris disposal facilities.

The act became effective June 11, 2015. Ch. 2015-164, Laws of Florida.

DIED

Repeal of Exemption from Ratification for Florida Building Code and Fire Prevention Code (CS/CS/CS/HB 915 & CS/CS/CS/SB 1232)

The requirement for legislative ratification does not apply to amendments and updates to the Florida Building Code or the Fire Prevention Code as expressly authorized by section 553.73, Florida Statutes.[3] A provision in CS/CS/CS/HB 915 as it passed the House would have deleted this exemption and would have subjected amendments to the Codes to the ratification requirement. This provision was controversial and the bill was not enacted.[4]

Exemption from Ratification for Maximum Reimbursement Allowance (CS/SB 1060 & CS/HB 1013)

CS/SB 1060 and CS/HB 1013 would have exempted all rules adopting maximum reimbursement allowances and manuals for workers' compensation medical treatment and care approved by the three-member panel from the ratification requirement. The Senate bill passed the Senate, but the bill died in the House.

Statements of Estimated Regulatory Costs (HB 7025 & SB 7058)

For the second year in a row, the Legislature attempted to further refine the Statement of Regulatory Costs (SERC) process by providing additional guidance and examples of the impacts an agency must consider. The proposed legislation would have created a presumption of an adverse impact on small businesses if a rule required ten hours or more of training, increased taxes or fees by $500 or more in the aggregate, increased operating costs by $1,000 or more annually, or was likely to restrict or increase the prices charged for goods and services. The proposed legislation would have also mandated agencies to consider the direct and indirect costs of the rule including any items suggested by any interested person, business organization, or representative. The intent of the legislation was to assist agencies, decisionmakers, and affected constituents to better understand the economic and policy impacts of proposed rules. The House bill was reported favorably by all committees of reference and died on the calendar. The Senate bill likewise was reported favorably by its initial committee of reference. So, look for these measures to be back in 2016.

VETOED

Administrative Procedure (CS/CS/CS/HB 435 & CS/SB 718)

CS/CS/CS/HB 435 and CS/SB 718 included a number of changes to the APA. Among other things, the legislation was intended to protect small businesses from an agency's use of an invalid or unadopted rule during an enforcement proceeding. The legislation would have allowed a person challenging an agency action involving disputed issues of material fact to contemporaneously allege a defense that the agency's rule was an invalid exercise of delegated legislative authority or that the agency's statement was an unadopted rule. The effect of the legislation would have allowed a single action combining the procedures from section 120.57(1), Florida Statutes, with those in section 120.56(3)(a) or 120.56(4)(a), Florida Statutes. The legislation would have prohibited the agency from rejecting the administrative law judge's conclusions of law related to the rule challenge, similar to how an administrative law judge renders a final order in an action solely under section 120.56, Florida Statutes.

This change appears to be what prompted the Governor to veto the bill, as his veto message stated that "the bill has the potential to inflict more harm on an agency's ability to operate in an efficient and accountable manner … [and] alters the long-standing deference granted to agencies by shifting final action authority to an administrative law judge."[5]

Another provision in the bill that attracted attention would extend the time to appeal certain final orders when notice to the party was delayed. Some suggested that this would have created practical problems. Others noted that it appeared to invade the exclusive jurisdiction of the Florida Supreme Court to determine the time for filing an appeal pursuant to Article V, § 2, Florida Constitution.

Less controversial provisions in the bill would expand the information published in the *Florida Administrative Register* to include rules filed for adoption in the previous seven days and a listing of all rules filed for adoption but awaiting legislative ratification. In addition, the bill would require agencies to publish a list of rules that would result in a minor violation.

Over the history of the APA, Governors often have initially vetoed many of the significant changes to the Act.[6] Most of these changes eventually became law--usually shortly

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thereafter.[7] Stay tuned to see what happens with these proposed changes.

H. French Brown, IV *is an attorney with Hopping Green & Sams, PA, in Tallahassee.*

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

Endnotes:

[1] AHCA denied the applicant's request for a hearing to dispute the agency's determination that the license was null and void due to the failure to timely file a renewal application. The appeal from that final order was voluntarily dismissed following the enactment of HB 441. *Compassionate Care Hospice of Central Florida v. AHCA*, Case No. 1D15-1307 (appeal dismissed on July 2, 2015).

[2] *See* Larry Sellers, *The 2010 Amendments to the APA: Legislature Overrides Veto of Law to Require Legislative Ratification of "Million Dollar Rules,"* 85 Fla. B. J. 37 (May 2011).

[3] §120.541(4), Fla. Stat.

[4] During Special Session A, the Legislature approved a bill deferring the effective date of certain provisions in the Florida Building Code relating to a second fire service elevator and to mandatory blower door testing and mechanical ventilation requirements. *See* s. 69, Ch. 2015-222, Laws of Florida.

[5] *See* veto letter dated June 16, 2015.

[6] *See* SB 536 (1995) (vetoed on July 12, 1995), SB 1010 (2005) (vetoed on June 22, 2005), HB 7182 (2007) (vetoed on June 27, 2007), and HB 1565 (2010) (vetoed on May 28, 2010).

[7] *See* Chs. 96-159, 2006-82, 2008-104 and 2010-279, Laws of Florida. The 2010 bill became law, notwithstanding the Governor's veto. *See* Sellers, supra n. 2.