ADMINISTRATIVE LAW SECTION
Newsletter
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The End of an Era: Judge Scott Boyd Retires

By Jowanna Nicole Oates and Cathy M. Sellers

For 35 years, Judge Scott Boyd has been an integral part of Florida administrative law. In October, Judge Boyd will retire from the Division of Administrative Hearings. Judge Boyd began his career with the State of Florida in 1984 as a reviewing attorney with the Joint Administrative Procedures Committee of the Florida Legislature. The Joint Administrative Procedures Committee (JAPC) was created in 1974 and is a joint committee comprised of members of the House of Representatives and Senate. A primary responsibility of JAPC is to ensure that rules adopted by executive branch agencies are within the authority specifically delegated by the Legislature.

As a Chief Attorney for JAPC, Judge Boyd worked closely with legislative staff and reviewed agency rules. In that capacity, he played a role in the 1996 rewrite of the APA (and subsequent revisions) and assisted in drafting the amicus brief filed by the Legislature in *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*, 717 So. 2d 72 (Fla. 1st DCA 1998).

In 2003, Judge Boyd became the second Executive Director and General Counsel of JAPC. In JAPC's 45-year existence, the committee has only had three Executive Directors.

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From the Chair

By Brian Newman

I am honored to begin my first chair column recognizing three outstanding contributors to the field of administrative law. I'll start with the Honorable Robert S. Cohen. You all know him but you may not know some of his professional accomplishments and accolades.

After practicing administrative law for twenty years, Judge Cohen was appointed by the Governor and Cabinet to be the Chief Judge of the Division of Administrative Hearings in October 2003 and served as Chief Judge under three administrations. Judge Cohen presently serves as vice chair-elect of the National Conference of the Administrative Law Judiciary, is a past president of the National Association of Administrative Law Judiciary, and is treasurer of the National Association of Workers' Compensation Judiciary. Locally, he serves on the Second Judicial Circuit Professionalism Committee, as an alumni member of the William Stafford Inn of Court, as a past president of the Tallahassee Bar Association, as a two-time past president of the

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Legal Aid Foundation, and has held or holds leadership roles in numerous community organizations. He is a fellow of The Florida Bar Foundation, the American Bar Foundation, and a charter life mentor of the National Administrative Law Judiciary Foundation. He is also a past recipient of The Florida Bar's Pro Bono Service Award for the Second Judicial Circuit and the Tallahassee Bar Association's Lifetime Professionalism Award. Judge Cohen is Board Certified by The Florida Bar in State and Federal Government and Administrative Practice.

At The Florida Bar convention in June, Judge Cohen was presented with the Administrative Law Section's S. Curtis Kiser Administrative Lawyer of the Year Award. This award is presented to a member of The Florida Bar who has made significant contributions to the field of administrative law in Florida. Judge Cohen also received the 2019 Claude Pepper Award from the Government Lawyer Section. This award is presented to the individual who has exemplified the highest ideals of decision, professionalism, and ethics in service to the public. It is hard to imagine one more deserving of both awards.

Jowanna Oates is a past chair of the Administrative Law Section and the well-deserved recipient of the Section's Outstanding Service Award for 2019. This award is presented to a member of the Administrative Law Section Executive Council who has provided outstanding leadership for the Section. No one worked harder for the Section this year than Jowanna. She is a current member of the executive council and chair of the nominating and publications committees. Additionally, Jowanna is the co-editor of The Florida Bar Administrative Law Section Newsletter (a role she has served in since April 2013). She was most recently published in The Florida Bar Journal: *A Primer on Emergency Rulemaking*, Florida Bar Journal, Vol. 92, No. 4 (Apr. 2018). In her spare time Jowanna was the co-chair of the 2019 Pat Dore Administrative Law Conference and was also a presenter on emergency rules and emergency orders at the conference. Jowanna also has a day job; she is a Chief Attorney for the Joint Administrative Procedures Committee. I am not sure where she got all this time or energy; I am tired just typing her list of contributions.

To all future Section award winners, the chairs of all Section committees are now posted on the Section's website: http://flaadminlaw.org. Please contact them if you an interest in serving on any committee.

I'll close by recognizing the now immediate past chair, the Honorable Garnett Chisenhall. First, under his leadership, all traditional Section events have run smoothly despite unusual challenges (like Hurricane Michael) and he has helped ensure that Section committees worked together to get Section business completed on time and on budget. This takes a lot of time and energy as I am just now starting to learn.

More importantly, Judge Chisenhall has ushered in significant changes to the Section aimed at increasing its appeal to new Florida Bar members and members located outside of Tallahassee. For example, the Section now sponsors a monthly speaker series at Florida State University's College of Law and schedules several fall and spring mixer events that have been well attended and benefitted local charities. At his urging, the Section created a South Florida Chapter that has already held several successful events and increased our visibility to those who practice outside of Tallahassee. Frustrated by the dwindling interest in the Section's Board Certification program, Judge Chisenhall has advocated material changes to the Board Certification examination to concentrate more on state administrative law and is taking steps to improve the CLE offerings for those interested in sitting for the exam and maintaining their certification.

Of course, Judge Chisenhall did not accomplish these tasks alone and I will not attempt to name all who worked hard to make the Section better under his leadership. But inspiring others to work together to make an organization better takes talent, tenacity and hard work. In short, I have big shoes to fill. Fortunately, I have his telephone number.

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

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DOAH CASE NOTES

By Gar Chisenhall, Matthew Knoll, Dustin Metz, Virginia Ponder, Christina Shideler, Paul Rendleman, and Tiffany Roddenberry

Substantial Interest Hearings

Fayulu v. Fla. Real Estate Comm'n, DOAH Case No. 19-0509 (Recommended Order June 5, 2019).

FACTS: The Florida Real Estate Commission ("the Commission") is responsible for ensuring that every applicant for a real estate license is qualified to practice as a broker or sales associate. On November 29, 2018, the Commission notified Milain David Fayulu that it intended to deny his application for licensure as a real estate sales associate. The denial was based on Mr. Fayulu's misdemeanor conviction for simple assault in the District of Columbia in January 2016. Under section 475.25, Florida Statutes, the Commission is authorized to deny a licensure application if the applicant has been convicted of "a crime in any jurisdiction which directly relates to the activities of a licensed broker or sales associate."

OUTCOME: The ALJ recommended that the Commission approve Mr. Fayulu's application because simple assault under the law of the District of Columbia "is not directly related to the activities of a licensed real estate sales associate." In doing so, the ALJ concluded that there was no connection between injuring another person and the practice of real estate sales, "where the only nexus is that both involve transactions between human beings." According to the ALJ, "[s]uch a nexus is a universal common denominator as far as the activities of human beings are concerned. If this were a sufficient connection to establish that a crime directly relates to the activities of a sales associate, then practically every crime, if not all crimes, would fit the bill." The ALJ also addressed whether the arrest report from Mr. Fayulu's simple assault was admissible into evidence under the public records or business records exceptions to the hearsay rule. The ALJ determined that the public records exception was inapplicable because the arrest report relied upon information supplied by outside sources. The ALJ determined that the business records exception did not apply because the sources of information were not employed by the police department and not acting within the regular course of the police department's business.

Fewless v. Dep't of Mgmt. Servs., Div. of Retirement, DOAH Case No. 18-5787 (Recommended Order July 18, 2019).

FACTS: The Department of Management Services, Division of Retirement ("DMS") manages the Florida Retirement System ("FRS") and the Deferred Retirement Option Program ("DROP"). DROP enables a FRS member to defer receipt of retirement benefits while continuing employment with his or her FRS employer. The deferred benefits accrue on the member's behalf, along with monthly compounded interest, for the specified period of the DROP duration. After completing the specified period of the DROP duration, section 121.021(39)(a), Florida Statutes, requires the employee to terminate all employment with FRS employers. If an employee is employed by any FRS employer within six months of completing DROP, then the statute deems the termination to have not occurred, and the employee and the re-employing FRS employer are jointly and severally liable for reimbursing any retirement benefits paid to the employee.

Michael Fewless spent approximately 30 years working for the Orange County Sheriff's Office ("OCSO") and ended his tenure with OCSO as a captain. Mr. Fewless entered DROP on June 1, 2011, and was scheduled to retire on May 31, 2016. By 2015, Mr. Fewless realized that he was not ready to retire from law enforcement and received an offer in June 2015 to become the City of Fruitland Park's police chief. Fruitland Park was an FRS employer, but Fruitland Park's city manager erroneously assured Mr. Fewless that he could be enrolled into a city pension plan without violating the FRS termination requirement. According to Mr. Fewless, a DMS employee working the FRS hotline corroborated the city manager's erroneous assurances. As a result, Mr. Fewless concluded that he could retire from OCSO and then work for Fruitland Park without jeopardizing his retirement benefits. After conducting an audit of Fruitland Park in November 2017, DMS discovered that Mr. Fewless had not satisfied the termination requirement and notified Mr. Fewless that he was required to repay $541,780.03 in retirement benefits.

OUTCOME: The ALJ found Mr. Fewless's description of what he was told by the FRS hotline employee to be more credible than the hotline employee's description of the conversation, and thus determined it was entirely reasonable for Mr. Fewless to rely on those statements in taking the Fruitland Park job. Finding Mr. Fewless's reliance on those statements reasonable and detrimental, the ALJ said that the exceptional circumstances of the case justified applying the doctrine of equitable estoppel against DMS. Accordingly, the ALJ recommended that DMS issue a final order rescinding its determination that Mr. Fewless was required to repay retirement benefits.

continued...

DOAH CASE NOTES
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Fla. Horsemen's Benevolent & Protective Ass'n v. Calder Race Course, Inc., DOAH Case No. 18-4997 (Recommended Order May 24, 2019)

FACTS: Under section 551.114(4), Florida Statutes, a slot machine licensee must place its slot machine gaming area within its "current live gaming facility" or in a building that is "contiguous and connected to the live gaming facility." Slot machine licensee Calder Race Course ("Calder") tore down its live gaming facility—its grandstand—and did not replace it. Yet the Division of Pari-mutuel Wagering ("Division") renewed Calder's slot machine license, taking the view that a live gaming facility did not have to be a building but instead could be Calder's outdoor, trackside viewing area where patrons place bets on thoroughbred races. Because a concrete path connected Calder's slot machine gaming area and trackside viewing area, the Division deemed Calder compliant with the "contiguous and connected" requirement and approved the application for license renewal. The Florida Horsemen's Benevolent & Protective Association ("FHBPA") filed a petition for formal hearing challenging the Division's decision and interpretation of section 551.114(4).

OUTCOME: The ALJ rejected arguments that FHBPA lacked standing, finding that FHBPA was a party within the meaning of the APA. A "party" includes one who, as a matter of statute, is entitled to participate in a proceeding. By law, FHBPA and Calder must contract to share slot machine revenues to supplement the purses paid on thoroughbred races conducted at Calder's track. The ALJ found that this "statutory contract" necessarily incorporated relevant provisions of the pari-mutuel wagering law, including the "contiguous and connected" requirement. Because of this, the ALJ reasoned that FHBPA was a "party" under the APA, entitled to challenge the Division's interpretation of a part of this "statutory contract"—section 551.114(4).

Turning to the merits, the ALJ concluded that section 551.114(4) unambiguously requires that a live gaming facility be within a building. Further, section 551.114(4)'s use of the phrase "contiguous and connected" did not mean "merely proximate, abutting, adjoining, or adjacent, but conjoined, integrated, and united for a common purpose." To achieve the "contiguous and connected" requirement then, the live gaming facility and slot machine gaming area must be within the same building or in two separate buildings connected by a party wall. Thus, Calder's live viewing area was not a compliant live gaming facility, and its slot machine gaming area was not contiguous and connected to a valid live gaming facility, in violation of the statute. The ALJ acknowledged that this interpretation of section 551.114(4) is contrary to that reached by another ALJ in a related rule challenge. *See Fla. Horsemen's Benevolent & Protective Ass'n v. Dep't of Bus. & Prof'l Reg.*, Case No. 17-5872RU (Final Order Sept. 4, 2018).

As Calder did not comply with section 551.114(4), the ALJ recommended that the Division deny Calder's renewal application.

Licensing – Collateral Estoppel

Loving Touch "A Brighter Future" Home v. Agency for Pers. with Disab., DOAH Case Nos. 18-6496FL & 18-6497FL (Recommended Order May 28, 2019).

FACTS: The Agency for Persons with Disabilities ("APD") is the state agency that licenses group home facilities. Section 393.0673(2), Florida Statutes, provides that APD may deny an initial licensure application if the Department of Children and Families ("DCF") has verified that the applicant is responsible for the abuse, neglect, or abandonment of a child or the abuse, neglect, or exploitation of a vulnerable adult. Loving Touch Dynamic Group Home and Loving Touch A Brighter Future Group Home ("Petitioners") are owned and operated by Loving Touch Adult Family Care, Inc. ("LTAFC"), and Zulia Brenovil is LTAFC's sole shareholder. While the Petitioners' initial applications for group home licensure satisfied all the requirements, APD denied the applications because it found four reports from DCF containing verified findings of abuse, neglect, or exploitation against Ms. Brenovil. LTAFC owns three existing group homes licensed by APD, and those group homes had their licenses renewed and/or issued after the aforementioned findings.

OUTCOME: The primary question posed was whether DCF's verified findings against Ms. Brenovil could serve as a basis for denying licensure to corporate entities that she owns or operates. The ALJ concluded that it would be an "illogical result" if Ms. Brenovil "could figuratively hide behind the veil of the corporations." Accordingly, "her actions, conduct, and the verified findings against her should be imputed or attributed by APD to the corporate applicants as a basis to deny their applications." In addition, the ALJ rejected Petitioners' argument that APD should be estopped from denying their applications because it had renewed licenses for other LTAFC entities when it knew, or should have known, that DCF had made verified findings against Ms. Brenovil. The ALJ concluded that collateral estoppel was inapplicable because the parties were not re-litigating the same issues and there was no previous ruling or judgment binding them.

Standing – Requirements for Associational Standing

Asian Am. Hotel Owners Ass'n v. Dep't of Revenue, DOAH Case No. 19-1034RU (Final Order April 25, 2019).

FACTS: The Department of Revenue ("Department") collects Florida's transient rentals tax ("TRT"), a tax imposed on short-term accommodation rentals. On December 1, 2015, the Department entered into an agreement with Airbnb requiring

Airbnb, rather than the parties offering accommodations on Airbnb's web-based platform, to collect and remit TRT for all Florida-based rental transactions completed on Airbnb's platform. The Asian American Hotel Owners Association ("AAHOA") is a nationwide trade association representing the hotel industry. AAHOA members own approximately 60 percent of all hotels in the United States, and AAHOA's Florida members constitute its third largest membership, by volume, of all its members per state. In contrast to the parties offering accommodations via Airbnb, the AAHOA's Florida members must collect and remit TRT. The AAHOA filed a petition alleging that the Department's agreement with Airbnb amounted to an unadopted rule.

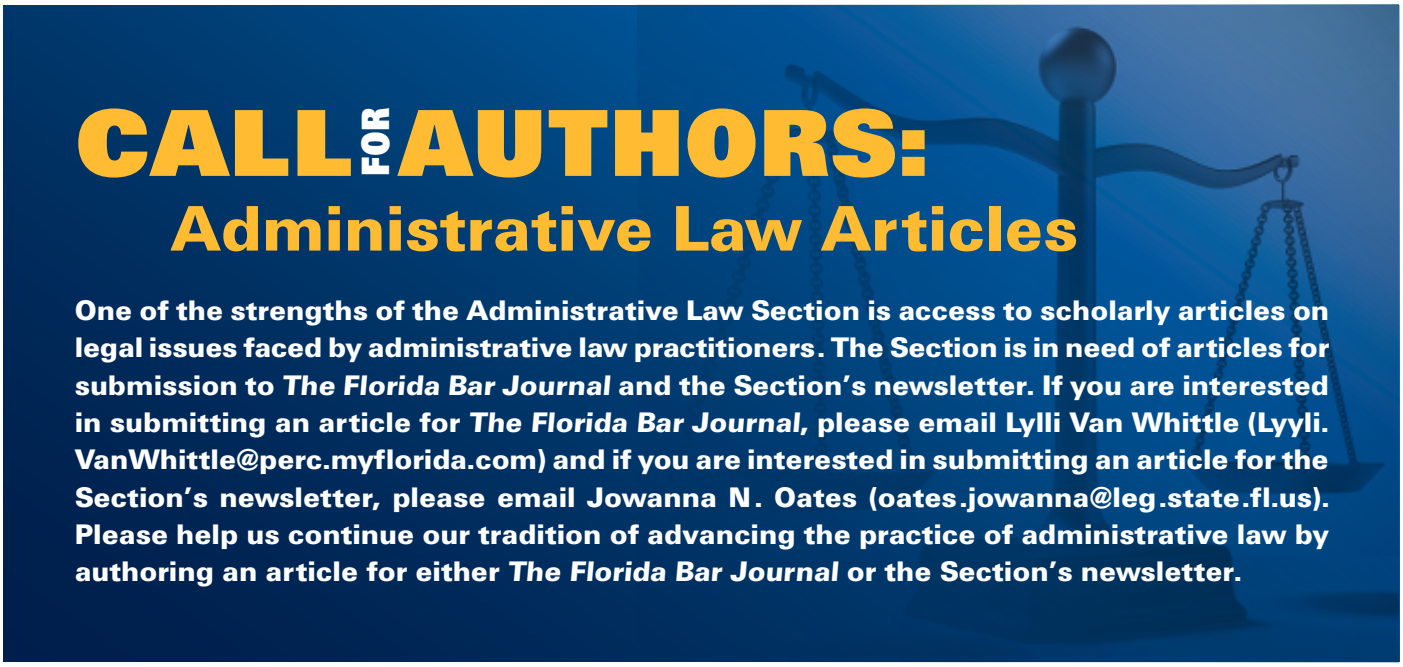
OUTCOME: The ALJ concluded that the AAHOA failed to establish that it had associational standing. While AAHOA argued that its members did not have a level playing field as a result of Airbnb hosts being exempt from collecting and remitting TRT, the ALJ noted that AAHOA's members would be collecting and remitting TRT regardless of whether the agreement between the Department and Airbnb existed. In short, the ALJ found that there was no evidence indicating that the agreement between the Department and Airbnb has negatively impacted the economic performance of AAHOA's Florida-based members.

Rule Challenges

James v. Dep't of Children & Families, DOAH Case Nos. 19-2946RU, 19-2947RU, & 19-2948RU (Summary Final Order of Dismissal June 27, 2019).

FACTS: Chapter 394, part V, entitled "Involuntary Civil Commitment of Sexually Violent Predators," finds that "a small but extremely dangerous number of sexually violent predators exist who do not have a mental disease . . . that renders them appropriate for involuntary treatment under the Baker Act." Accordingly, the Legislature created a separate civil commitment procedure for the long-term care and treatment of sexually violent predators. The Department of Children and Families ("Department") contracts with a private entity, Wellpath, LLC ("Wellpath"), to use and operate the Florida Civil Commitment Center ("the FCCC") in compliance with chapter 394, part V. Petitioners are sexually violent predators subject to chapter 394, part V, who are confined in the FCC. They alleged that the FCCC Resident Handbook utilized for the internal operation of the FCCC is an unadopted rule.

OUTCOME: The ALJ dismissed Petitioners' rule challenge with prejudice. In doing so, he noted that Wellpath, an independent contractor, is not an "agency" as defined in section 120.52(1), Florida Statutes. The ALJ concluded that a state agency contracting with a private entity "does not make the services the private entity employs to implement the provisions of that contract equivalent to agency action."



APPELLATE CASE NOTES

by Tara Price, Gigi Rollini, and Larry Sellers

Administrative Finality—Not Applicable to Value Adjustment Board Decisions

Crapo v. Academy for Five Element Acupuncture, Inc., 44 Fla. L. Weekly D1728 (Fla. 1st DCA July 8, 2019).

The Academy for Five Element Acupuncture, Inc. (Academy), operates a post-secondary school that teaches and trains students in acupuncture, health sciences, and herbal studies. After the school moved to Alachua County in 2008, Alachua County Property Appraiser Edward Crapo denied the Academy's request for an educational property tax exemption because he concluded that the Academy was not an educational institution under the tax code. The Academy petitioned the Alachua County Value Adjustment Board (VAB), and a special magistrate ruled that the Academy qualified for the tax exemption under section 196.012(5), Florida Statutes. Crapo did not seek a hearing in the circuit court to obtain a de novo review of the VAB's decision, and granted the Academy a tax exemption from 2008 until 2013.

In 2014, Crapo issued a notice to the Academy that it failed to meet the definition of an educational institution and would not receive the educational property tax exemption. The Academy petitioned the VAB, which again concluded that the Academy qualified for the tax exemption. Crapo filed suit in circuit court for a de novo hearing, and in addition to its argument on the merits, the Academy argued that the doctrine of administrative finality precluded the circuit court's review because Crapo failed to challenge the VAB decision in 2008. The circuit court ruled that Crapo was not precluded from bringing suit because every tax year starts the process anew, but agreed that the Academy qualified for the tax exemption.

Crapo appealed the circuit court's ruling and the Academy cross-appealed, arguing that administrative finality precluded Crapo's arguments on the merits. The court did not rule on the merits and instead held that Crapo could not challenge the Academy's educational property tax exemption because he failed to challenge the VAB's decision in 2008. Crapo then sought rehearing en banc, which the court granted.

The en banc court reviewed section 196.012(5) and concluded that the Academy did not meet the definition of an educational institution, and thus did not qualify for an educational property tax exemption. Although the Academy argued that it offered classes and courses that satisfied the licensing requirements of the Florida Commission for Independent Schools, the Academy did not satisfy the statutory requirement that educational institutions be credentialed by, or offer classes or courses as required for credentialing by, the Florida Department of Education, the Southern Association of Colleges and Schools, or the Florida Council of Independent Schools.

Next, the en banc court held that the doctrine of administrative finality did not apply to VAB decisions not litigated in circuit court. Numerous reasons justified the court's conclusion, including the independence of Florida's property appraisers, the circuit court's original jurisdiction in property tax issues, the fact that VAB decisions have no deferential weight on review and that, generally, "each year stands on its own" with regard to annual taxation decisions. Thus, the en banc court concluded that only a decision by the circuit court would result in preclusive effect over a taxation dispute, and reversed the circuit court's judgment.

Judge Osterhaus wrote a concurring opinion, declining to join the majority's opinion with regard to administrative finality. Because the Academy lost on the merits, he said, it was unnecessary for the en banc court to rule on whether the doctrine of administrative finality applied to VAB decisions.

Judge Makar wrote a dissenting opinion, reasoning that the doctrine of administrative finality applied to VAB rulings because they are "quasi-judicial tribunals to which principles of finality and preclusion apply." Judge Makar detailed the formal adjudication process and the standards applicable to Florida's 67 VABs and noted that the courts have applied the principles of res judicata to quasi-judicial decisions by administrative entities.

Emergency License Restrictions—Sufficiency of Allegations in Emergency Order

Kruse v. Dep't of Health, 270 So. 3d 475 (Fla. 1st DCA 2019).

Psychotherapist Gerard Kruse sought relief from an emergency order issued by the Department of Health (DOH) which prohibited him from treating any female patients after he engaged in sexual misconduct involving one patient, arguing there were insufficient allegations that the conduct would recur.

On review, the First District looked to *Field v. Department of Health*, 902 So. 2d 893 (Fla. 1st DCA 2005), in which the court approved an emergency order suspending a doctor's medical license based on a single allegation of sexual misconduct, on the basis that such allegations sufficiently demonstrated the doctor's continued medical practice would pose an immediate and serious danger to public health, safety, and welfare. The court likened the case to *Field* and rejected Kruse's attempt to downplay the seriousness of the misconduct. The court found that

the order's detailed facts based on the victim's testimony were clearly sufficient to support the emergency order. The court also noted that to the extent credibility determinations were to be made, they were to be left for the full expedited evidentiary administrative proceeding and were not properly raised in the context of the emergency suspension order. The court also found that DOH's gender-specific restriction was narrowly tailored, restricting only Kruse's ability to see female patients, and consistent with prior case law. The court therefore denied the petition to review.

License Application—Applicant Not Entitled to Default License Where Applicant Fails to Meet Minimum Licensure Requirements

MILA ALF, LLC v. Agency for Health Care Admin., 273 So. 3d 272 (Fla. 1st DCA 2019).

MILA ALF, LLC (MILA) applied for a change of ownership license relating to one of its assisted living facilities (ALFs), and the Agency for Health Care Administration (AHCA) issued a provisional license while considering the application. A couple of months later, AHCA issued a notice of intent to deny MILA's application, citing MILA's failure to meet minimum licensure requirements based on multiple Class II and III deficiencies identified during the ownership inspection. MILA petitioned for a formal administrative hearing, and the ALJ issued a recommended order concluding that clear and convincing evidence supported many of the alleged deficiencies. Although the ALJ concluded that AHCA had the authority to deny MILA's application, the ALJ did not recommend denial. AHCA issued a final order 63 days later, concluding that MILA failed to meet the minimum licensure requirements and denying the application.

On appeal, MILA argued that its application was approved pursuant to section 120.60(1), Florida Statutes, because AHCA failed to issue its final order within 45 days. The court noted that section 120.60(1) requires the issuance of a license that is not approved or denied within 45 days after a recommended order is sent to the agency "[s]ubject to the satisfactory completion of an examination if required as a prerequisite to licensure." The court concluded that MILA was not entitled to a default license because AHCA's pre-licensure survey inspection uncovered more than 20 deficiencies, and the court ruled that the pre-licensure survey inspection served as MILA's "examination" which was a "prerequisite to licensure." Because MILA failed its pre-licensure examination, AHCA was not required to issue MILA a license under section 120.60(1).

MILA also argued that AHCA lacked the authority to deny its application pursuant to section 120.57(1)(*l*), Florida Statutes, which requires agencies to state with particularity the reasons for rejecting or modifying conclusions of law and to issue a finding that the agency's conclusions of law are as or more reasonable than the rejected ones. The court, however, held that the facts and conclusions in the recommended and final orders were in agreement. Although the recommended order did not recommend denial of MILA's application, it provided the legal basis upon which AHCA could deny the application. Because AHCA explained the reasons it denied MILA's application in the final order and both orders were in agreement as to the facts and legal conclusions, the final order did not violate section 120.57(1)(*l*).

Thus, the court affirmed AHCA's final order.

License Revocation—Board Properly Applied Aggravating Factors

Hall v. Dep't of Health, 274 So. 3d 1241 (Fla. 1st DCA 2019).

Shemaka Hall appealed the permanent revocation of her license as a practical nurse by the Department of Health (DOH). The revocation arose from an incident in which a patient threw water into Hall's face and Hall reacted by chasing the patient from the room and dragging the patient by her hair across the floor.

DOH filed an administrative complaint that alleged "unprofessional conduct" as grounds for disciplinary action pursuant to section 464.018(1)(h), Florida Statutes. Hall did not dispute the facts, and the matter proceeded to an informal hearing before the Board of Nursing (Board). The Board unanimously adopted the conclusions of law set out in the administrative complaint. The Board also found that the facts were sufficient to meet two aggravating factors, pursuant to rule 64B9-8.006(5)(b)1. and 5., Florida Administrative Code—that Hall was a "danger to the public" and a "deterrent effect" was necessary. The Board voted unanimously to permanently revoke Hall's license.

On appeal, Hall argued that: (1) the revocation of her license was improper because section 456.072(3)(b), Florida Statutes, limits the penalty for a single violation of section 464.018(1)(h) to a non-disciplinary citation; (2) the Board considered matters outside the administrative complaint in finding Hall presented a danger to the public; and (3) there was no competent, substantial evidence to find that she was a danger to the public.

With regard to the first argument, the court determined that section 456.072(3)(b) provides for the penalty of "a citation . . . and . . . a penalty as determined by rule," so the Board did not err where the rule permitted revocation. The court disagreed that the Board considered matters outside the complaint, where the complaint stated that Hall "us[ed] force against and/or struck" a patient and clearly stated that DOH was seeking permanent revocation. The court concluded that DOH is not required to restate the law in its complaint; rather, DOH must notice the factual allegations against the licensee. Additionally, the court disagreed that no competent, substantial evidence supported the finding that Hall was a danger to the public where the video of the incident clearly showed Hall violently attacking a patient under her care and having to be restrained.

The court therefore affirmed the Board's final administrative order revoking Hall's nursing license.

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APPELLATE CASE NOTES
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License Suspension—Impact of Choosing Informal vs. Formal Hearing

King v. Dep't of Health, 272 So. 3d 803 (Fla. 1st DCA 2019)

Loren King, a registered nurse, challenged the Board of Nursing's (Board) final order suspending his license after he tested positive for marijuana on a pre-employment drug screen without having a lawful prescription or legitimate medical reason for using it. King opted for an informal hearing on the administrative complaint filed against him, after he stated that he did not dispute the allegations in the complaint. At the hearing before the Board, King stated that he was awaiting a marijuana card, even though at the time of the screening marijuana was not available in Florida. King admitted fault. After the hearing, the Board issued a final order adopting the findings of fact set forth in the administrative complaint and directed that King's license would be suspended until he completed an evaluation and complied with any conditions or terms imposed thereby.

On appeal, the court observed that section 456.072(1)(aa), Florida Statutes, provides that "[t]esting positive for any drug . . . on any confirmed pre-employment or employer-ordered drug screening when the practitioner does not have a lawful prescription and legitimate medical reason for using the drug" is grounds for discipline for a healthcare professional. Moreover, subsection (2) states that if the Board finds that a person has violated subsection (1), it may enter an order suspending the person's license. According to the court, because King did not dispute the facts alleged in the administrative complaint, this statute squarely applied and permitted the Board to suspend his license. Thus, competent, substantial evidence in the form of the undisputed allegations in the administrative complaint supported the finding that a violation occurred.

Petition for Certiorari—Appropriate Vehicle for Review of Denial of Motion to Dismiss for Failure to Exhaust Administrative Remedies

Sch. Bd. of Hillsborough Cty. v. Woodford, 270 So. 3d 481 (Fla. 2d DCA 2019).

After being terminated by the Hillsborough County School Board (School Board), Stephanie Woodford filed a complaint under the Whistleblower's Act, alleging that her termination was in retaliation for her comments about and refusal to participate in alleged unlawful and unethical practices. Her complaint did not allege that she exhausted all administrative remedies prior to filing suit or that such administrative remedies did not exist.

The School Board moved to dismiss Woodford's complaint for lack of subject matter jurisdiction for failure to exhaust administrative remedies. In support, the School Board attached a copy of its contract with DOAH, under which the School Board could send a letter to DOAH requesting the services of an ALJ to resolve administrative disputes. The trial court, however, denied the School Board's motion, ruling that the School Board lacked a policy or practice for dealing with whistleblower complaints and had not put Woodford on notice that any policy or practice needed to have been followed. The School Board then filed a petition for a writ of certiorari.

The court first examined whether it could grant the School Board relief, as a petitioner seeking a writ of certiorari must show that the trial court

departed from the essential requirements of the law which resulted in material injury that cannot be corrected on appeal. The courts have held that, generally, certiorari is not an appropriate vehicle for review of a trial court's denial of a motion to dismiss. But the court noted that an exception exists where the motion to dismiss would have terminated the litigation based on the plaintiff's failure to meet statutory presuit requirements. Thus, the court had jurisdiction to review the School Board's petition.

Next, the court noted that section 112.3187(8)(b), Florida Statutes, requires local government employees to file complaints with the local government authority if the authority has established an administrative procedure by ordinance or through a contract with DOAH to conduct administrative hearings. The statute permits an employee to file a civil suit after entry of a final decision by the local government authority, unless the authority has not established an administrative procedure by ordinance or contract. Contrary to Woodford's arguments, the court concluded that the School Board's contract with DOAH was not required to specify that it was enacted for the purposes of conducting administrative hearings on Whistleblower's Act claims. In addition, the court ruled that the Whistleblower's Act did not require the School Board to put employees on notice about the administrative process they should follow prior to filing suit. Because the trial court's order denying the motion to dismiss ruled that the School Board did not have an administrative remedy and that the Whistleblower's Act had a notice requirement, the order departed from the essential requirements of the law.

Thus, the court granted the School Board's petition for writ of certiorari and quashed the trial court's order that denied the motion to dismiss Woodford's complaint.

PSC Orders—Administrative Finality & Relaxed Hearsay Rule

Fla. Indus. Power Users Grp. v. Brown, 273 So. 3d 926 (Fla. 2019).

The Florida Industrial Power Users Group (FIPUG) appealed a final order from the Florida Public Service Commission (PSC) that approved a request by Florida Power and Light (FPL) to recover costs through base rates for eight solar energy centers.

In 2016, FPL filed a petition with the PSC to increase base rates. Numerous parties, including FIPUG, intervened in the case. FPL reached a settlement with some of the parties that, among other things, allowed FPL to recover the costs for eight solar energy centers if certain benchmarks were met and procedures were followed. The settling parties filed a motion to approve the settlement agreement. FIPUG elected to take no position on the settlement agreement, even though it had the opportunity to participate in an evidentiary hearing.

The PSC approved the settlement agreement, and although other parties appealed the PSC's settlement order, FIPUG did not. The Florida Supreme Court affirmed the PSC's settlement order. Pursuant to the terms of the settlement order, FPL filed a petition for an increase in the base rates to recover costs for the solar energy centers. The PSC held an evidentiary hearing and issued a final order, which concluded that FPL had complied with the settlement order and approved FPL's request to recover the costs. FIPUG appealed the PSC's final order.

First, FIPUG argued that the PSC was required to conduct a prudence review pursuant to section 366.06(1), Florida Statutes, prior to approving FPL's petition. But the Court held that FIPUG had waived the right to challenge the solar energy centers when it failed to object to the settlement agreement before the PSC or to appeal the PSC's final order approving the settlement agreement. The settlement agreement made it unnecessary for the PSC to apply the prudence review standard to the solar energy centers, because a settlement agreement requires the PSC instead to review the solar energy centers according to the public interest standard, which the PSC had done.

Moreover, if the Court were to require the PSC to apply the prudence review standard now, the PSC would first have to vacate the settlement order, which the Court noted was contrary to the doctrine of administrative finality. The Court also rejected FIPUG's other arguments challenging procedures established within the settlement agreement. "Once the [PSC] entered the settlement order and that order was affirmed by this Court on appeal, the parties and the public were entitled to rely on that order and the settlement agreement as being final and dispositive of the rights and issues involved therein." Thus, FIPUG could not now try to undo what it failed to challenge before.

Second, FIPUG argued that the PSC erroneously relied upon uncorroborated hearsay testimony and the testimony of unqualified expert witnesses. The Court rejected FIPUG's argument about expert witnesses, holding that FIPUG had failed to follow the PSC's order establishing the procedure for objecting to witness testimony. Prior to the PSC's hearing, FIPUG was required to have identified the witnesses it wished to voir dire as well as the specific portions of the testimony to which FIPUG objected. The PSC's order noted that failure to follow the procedure without good cause would result in a waiver of the right to challenge the witnesses' expertise. FIPUG instead lodged a general objection to every witness FPL presented as an expert, and the prehearing officer ruled that FIPUG had waived its right to challenge the witnesses.

The Court also rejected FIPUG's argument that the PSC erred in relying on a report introduced by an expert because it was uncorroborated hearsay testimony. The report was one part of the expert witness's testimony, and the relaxed hearsay rule under section 120.57(1)(c), Florida Statutes, permitted the PSC to consider it because the report was not the sole basis for the PSC's findings.

Thus, the Court affirmed the PSC's final order.

Rule Challenges—AHCA's Medicaid Reimbursement Rates Are Invalid

S. Baptist Hosp. of Fla. v. Agency for Health Care Admin., 270 So. 3d 488 (Fla. 1st DCA 2019).

continued...

APPELLATE CASE NOTES
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In consolidated appeals, numerous Florida hospitals that provide inpatient and outpatient hospital care to Medicaid patients appealed a final order declaring valid the Agency for Health Care Administration's (AHCA) existing and proposed rules that implemented legislative mandates to reduce reimbursement rates for Medicaid outpatient hospital services.

Historically, AHCA reimbursed hospitals on a fee-for-service basis. AHCA set reimbursement rates based on the most complete and accurate cost reports submitted by each hospital and other established means adopted in rule 59G-6.030. However, beginning in 2005, the Florida Legislature periodically included provisions in its General Appropriations Acts (GAA) directing AHCA to reduce hospital outpatient reimbursement rates to comply with specific budget reductions for that year (called Medicaid Trend Adjustments, or MTAs). Other caps were also set by the Legislature, with additional GAA-required reductions in rates. Starting in 2011, the required reductions became known as the "unit cost cap," a ceiling on Medicaid outpatient rates.

Existing rule 59G-6.030 did not set out the methodology that AHCA used to calculate the unit cost base or the subsequent years' unit costs. Instead, AHCA used a methodology that continued to evolve over the years, but which was never adopted into the rules on which rates were supposed to be based. The hospitals challenged that methodology, contending that the MTA methodologies constitutes invalid exercised of delegated legislative authority. In response, AHCA published proposed rule 59G-6.030. The hospitals then filed a subsequent petition challenging both the existing and proposed rules. The ALJ found that neither the existing nor proposed rules exceeded the grant of legislative authority.

On appeal, the court disagreed, noting that a rule is an invalid exercise of delegated legislative authority when "[t]he rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the Agency." Despite amendment, proposed rule 59G-6.030 failed to establish adequate standards. Although the proposed rule ostensibly indicated the basis on which specific cuts would be made, questions remained as to whether these were set methodologies which AHCA must use in administering the MTAs. Additionally, the lack of verification via audit or otherwise to determine if the rate reductions were GAA-compliant further supported that the rule vested unbridled discretion in the agency. While AHCA tried to argue it was doing nothing but simple math and that the GAAs merely require the agency to "implement" reductions and not adopt a process, the court reasoned that nothing exempts "math" or methodologies from rulemaking. Thus, the court held that the ALJ erred in concluding that the existing and proposed rule 59G-6.030 were valid exercises of delegated legislative authority.

The court also noted that the order had been based on deference to the agency, but that under the new constitutional amendment (Article V, section 21), appellate courts no longer defer to agency interpretation; rather, a de novo standard of review applies.

School Expulsion—School Board Lacked Competent, Substantial Evidence to Expel Student Based on Policy

Mott v. Sch. Dist. of DeSoto Cty., 268 So. 3d 956 (Fla. 2d DCA 2019).

Shasta Mott's daughter allegedly ate a pot brownie on the way to school and was expelled as a consequence. Mott argued that expulsion was not appropriate. The Desoto County School Board (School Board), however, stated that its zero tolerance policy for being under the influence of drugs while at school required that the School Board expel Mott's daughter. Mott appealed the School Board's final order.

The court reviewed the School Board's zero tolerance policy, which identified the "[s]ale, distribution, possession, receipt, or delivery of illegal drugs" as zero tolerance offenses. The court noted that simply being under the influence of drugs at school was not an enumerated offense in the zero tolerance policy. The court refused to rule that the policy included additional offenses that were not expressly prohibited, noting that school boards have an obligation to be clear about conduct that would result in such serious punishment. Because the zero tolerance policy did not include being under the influence of drugs at school, the court held that the School Board's final order was not supported by competent, substantial evidence. Thus, because the School Board had failed to establish a violation of the zero tolerance policy, the court reversed the School Board's final order.

Tara Price and Larry Sellers *practice in the Tallahassee office of Holland & Knight LLP.*

Gigi Rollini *is a shareholder with Stearns Weaver Miller P.A. in Tallahassee, and leads its Government & Administrative Group.*

Congratulations to Chair Brian A. Newman on his appointment to the Second Circuit Judicial Nominating Commission. Chair Newman has been appointed for a term ending July 1, 2023.

Law School Liaison

Summer 2019 Update from the Florida State University College of Law

by David Markell, Steven M. Goldstein Professor

This column highlights recent accomplishments of our College of Law alumni and students.

Recent Alumni Accomplishments

- Erika Barger was recognized as one of the Volusia/Flagler Business Report's "40 Under 40" by the Daytona Beach News-Journal and was honored at a banquet in March. She was also recently named the Florida State Chair of the Elks National Foundation Certificates Committee for the Florida State Elks Association.
- Chief Judge Robert S. Cohen was awarded the 2019 Claude Pepper Outstanding Government Lawyer Award by the Government Lawyer Section of The Florida Bar. This award is presented each year to an individual who has exemplified the highest ideals of dedication, professionalism, and ethics in service to the public.
- Terry Lewis of Lewis, Longman & Walker, P.A. was included in the 2019 Florida *Super Lawyers* magazine in the area of Environmental Law.
- Brian O'Neill of Van Ness Feldman was honored as Lawyer of the Year in Washington, D.C., in the area of Energy Regulatory Law by Best Lawyer.
- Joshua Pratt has accepted a position as an assistant general counsel with the Florida Governor's Office.
- Tara Price of Holland & Knight LLP was recently recognized as a Rising Star in the 2019 Florida *Super Lawyers* magazine. Tara practices administrative law and appellate litigation and serves on the Executive Council of the Administrative Law Section of The Florida Bar.
- Robert Volpe of Hopping Green and Sams was presented with the Stephens/Register Memorial Award from the Environmental and Land Use Law Section at the 2019 Florida Bar Conference for his work with the ELULS executive council and as chair of the continuing education committee.
- Travis Voyles was recently appointed Deputy Associate Administrator of the Office of Congressional and Intergovernmental Affairs at the U.S. Environmental Protection Agency. In this new position he manages the agency's response to congressional, state, and local governmental interactions and oversight investigations, including coordination with agency personnel and congressional committee staff in preparation for hearings, briefings, and the production of documents and information relevant to oversight investigations.

Recent Student Achievements

- Congratulations to our Spring 2019 Environmental Law Certificate graduates: Jill Bowen, Lindsay Card, Darrell Garvey, Amber Jackson, Annalise Kapusta, Caleb Keller, Jennifer Mosquera, Matthew Pritchett, and Laurel Tallent.
- Deborah Huveldt was selected as a recipient of a Rocky Mountain Mineral Law Foundation Scholarship for 2019-2020.

Information on upcoming events is available at https://law.fsu.edu/academics/academic-programs/juris-doctor-program/environmental-energy-land-use-law/environmental-program-recent-upcoming-events. We hope Section members will join us for one or more of these events.

2019 Legislative Update: All Quiet on the Administrative Front—Except for CON

By Larry Sellers

For a time, it looked like 2019 might be a banner year for major changes to the Administrative Procedure Act (APA). The Joint Administrative Procedures Committee (JAPC) recommended a number of significant amendments to the APA, but the Legislature soon turned its attention to other matters. In the end, the Legislature enacted a few bills of interest to administrative lawyers—including one that eliminates certificate of need (CON) review for certain hospitals—but none of these measures made any major changes to the APA. Here's a brief summary of what passed and what died, including what you might see again in 2020.

Bills That Passed

Certificates of Need

For years, legislative efforts to eliminate CON review for hospitals never quite became law. However, this year was different, largely because CON repeal was a priority for House Speaker Jose Oliva.

CS/HB 21 amends various provisions related to the requirement that a hospital must obtain a CON. Among other things, the bill eliminates the requirement to obtain a CON prior to establishing a general acute care or long-term acute care hospital.

The bill also eliminates the requirement that a hospital must obtain a CON prior to offering a new tertiary service. Tertiary services include: pediatric cardiac catheterization; pediatric open-heart surgery; organ transplantation; neonatal intensive care units; comprehensive rehabilitation; medical or surgical services which are experimental or developmental in nature to the extent that the provision of such services is not yet contemplated within the commonly accepted course of diagnosis or treatment for the condition addressed by a given service; heart, kidney, liver, bone marrow, lung transplantation, pancreas and islet cells, and heart/lung transplantation; adult open heart surgery; and neonatal and pediatric cardiac and vascular surgery. The Agency for Health Care Administration (AHCA) may continue to use the CON rules for the regulation of tertiary services until such time as AHCA adopts licensure rules for such services.

The Office of Program Policy Analysis and Government Accountability (OPPAGA) is required to study federal requirements and other state requirements for tertiary services and report to the Legislature by November 1, 2019. The report must include best practices for licensure requirements for tertiary services, including volume requirements.

Effective July 1, 2021, the bill also eliminates the requirement to obtain a CON prior to establishing a new Class II, III, or IV hospital.

The bill became effective on July 1, 2019. Chapter 2019-136, Laws of Florida.

State Hemp Program

Quite a few administrative lawyers have been and continue to be involved in the substantial litigation related to the implementation of state laws authorizing the cultivation and sale of one form of cannabis, medical marijuana. Could a new law relating to hemp provide the next similar opportunity?

CS/CS/SB 1020 authorizes the Department of Agriculture and Consumer Services (DACS) to create a state industrial hemp program to administer and oversee the cultivation and sale of hemp. Among other things, the bill authorizes the distribution and retail sale of hemp extract, which is defined as a substance or compound intended for ingestion that is derived from hemp and does not have a THC concentration exceeding 0.3 percent on a dry weight basis. The bill also provides labeling requirements. DACS is required to adopt implementing rules by October 1, 2019, and DACS currently is actively engaged in that rulemaking.

The bill became effective on July 1, 2019. Chapter 2019-132, Laws of Florida.

Bid Protest Settlements

CS/SB 7068, a comprehensive transportation bill creating the Multi-use Corridors of Regional Significance Program, was a priority for Senate President Bill Galvano. An amendment late in the process creates a new section 337.1101, Florida Statutes, to establish requirements relating to payments by the Department of Transportation (DOT) of $1 million or more to a non-selected responsive bidder through a settlement agreement. The new section requires DOT, when it determines that it is in the best interest of the public to resolve a bid protest of the award of certain contracts through a settlement agreement requiring such payment, to: (1) document in the DOT secretary's written memorandum the specific reasons that such settlement and payment is in the best interest of the state; (2) provide a written notice that settlement discussions have begun in earnest; and (3) provide a written notice at least five business days, or as soon thereafter as practicable, before DOT makes the agreement final. The bill also prohibits its DOT from pledging any current

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or future action by another branch of state government as a condition of any procurement action.

The act became effective on July 1, 2019. Chapter 2019-43, Laws of Florida.

Prohibiting Use of Graduate Medical Education Funds by Certain Hospitals

It is often said that the only bill that the Legislature is required to pass is the General Appropriations Act. Appropriation bills frequently include so-called proviso language governing how the funds are to be expended. Sometimes these provisos address substantive matters.

The 2019 appropriations bill includes a proviso that contains the following language:

> Hospitals owned or operated by a controlling interest that has had any license issued under Ch. 400, F.S., revoked pursuant to s. 408.815(1)(b), F.S., between January 1, 2017 and July 1, 2020, are not eligible for funds in specific appropriation 202 [relating to graduate medical education].

A complaint filed challenging this proviso alleges that this language appears to target entities related to Rehabilitation Center at Hollywood Hills, LLC, which operates a skilled nursing facility that is the subject of license revocation proceedings after the deaths of nursing home residents that occurred in the wake of Hurricane Irma.[1] In its complaint, the plaintiffs—hospitals that are under the controlling interest of an individual who also has a controlling interest in Rehabilitation Center at Hollywood Hills, LLC—seek a determination that the proviso is invalid because it: (1) violates the single subject requirement contained in Article III, Section 12 of the Florida Constitution; (2) constitutes an invalid special act prohibited by Article III, Section 10 of the Florida Constitution; and (3) constitutes an improper bill of attainder in violation of Article I, Section 9 of the U. S. Constitution and Article I, Section 10 of the Florida Constitution. The complaint also seeks an alternative declaration that the proviso is not applicable to the plaintiffs.[2]

The act became effective on July 1, 2019. Chapter 2019-115, Laws of Florida.

Patient Brokering Act

The primary focus of—and indeed the title of—**CS/CS/HB 369** is substance abuse services. For example, the bill requires community housing components of day or night treatment facilities to obtain certification and have a certified administrator to manage them. The bill also adds requirements for clinical supervisors.

But one provision of the bill makes what may be a significant change to the Florida Patient Brokering Act, which generally penalizes certain compensated patient referrals. The Act contains a number of exceptions, including a provision that allowed discounts, payments, and other arrangements "not prohibited" by the federal Medicare/Medicaid Anti-Kickback Statute and regulations. CS/CS/HB 369 changes the statute so that this exception applies only to arrangements "expressly authorized" by a subsection of the Anti-Kickback Statute and its related regulations. It has been suggested that this change to "payment practices" that are "expressly authorized" renders the exception less clear, in that the referenced statute and regulations do not expressly authorize but instead prohibit certain business and payment practices. Some other possible issues have been identified by counsel. As such, clarifying legislation may be needed.

The act became effective on July 1, 2019. Chapter No. 2019-159, Laws of Florida.

Ratification of DFS Rule 69L-3.009

HB 983 ratifies the Department of Financial Services rule that, as required by law, specifies the types of third-party injuries qualifying as grievous bodily harm of a nature that shocks the conscience for the purposes of allowing wage replacement benefits for first responder post-traumatic stress disorder.

The statement of estimated regulatory costs prepared by the agency shows that the regulatory costs of the proposed rule likely exceed $1 million in the aggregate within five years after implementation. Accordingly, the rule was required to be submitted to the Legislature and could not take effect until ratified by the Legislature.

The act became effective on July 25, 2019. Chapter No. 2019-139, Laws of Florida.

Bills That Failed

JAPC Recommendations for Changes to the APA

JAPC developed a number of recommendations for changes to the APA to increase transparency in rulemaking, provide a mechanism to ensure that agencies reduce unnecessary rules, and ensure that rulemaking costs are considered for every rule. Legislation incorporating these recommendations was filed in the House (**HB 7063**) and in the Senate (**SB 1670**). Here are a few of the key provisions:

Review and Repromulgation of Agency Rules: The bills require each agency to review its rules for consistency with the powers and duties granted by the agency's enabling statutes. If, after reviewing a rule, the agency determines substantive changes to update a rule are not required, the agency must repromulgate (or re-adopt) the rule using a process that does not require the full republication of the rule in the *Florida Administrative Register* or subject the rule to an administrative challenge.

Regulatory Costs: The bills require an agency to prepare a statement of estimated regulatory costs (SERC) for the adoption or amendment of any rule, other than an emergency rule, and specifies the economic impacts and compliance costs an agency must consider in creating a SERC. Each

agency is required to have a website where all of its SERCs may be viewed in their entirety.

The bills authorize agencies to hold workshops for the purposes of gathering information to aid in the preparation of the SERC. In addition the bills describe what constitutes an adverse impact on small business. And they provide that a lower cost regulatory alternative (LCRA) may be submitted after a notice of proposed rule *or* a notice of change.

JAPC Objection: The bills require JAPC to review all existing rules. Notably, the bills also provide that if JAPC objects to a proposed rule, it may not take effect until ratified by the Legislature.

Rulemaking Procedure: The bills seek to define what constitutes a "technical change" and require technical changes to be documented in the history of the rule. The bills also require publication of a notice of correction and they distinguish between a notice of correction and a notice of change. The bills also streamline the petition to initiate rulemaking procedure.

Mandatory Rulemaking: The bills also require any legislatively-required rulemaking to be completed within 180 days. A similar provision was removed from the APA in 2015.

Emergency Rules: The bills also revise the provisions governing emergency rules. The bills require an agency to publish notice of the renewal of an emergency rule in the *Florida Administrative Register* prior to the expiration of the emergency rule. The bills also require the text of emergency rules to be published in the Florida Administrative Code. In addition, the bills allow technical changes to be made within the first seven days after the adoption of the emergency rule, but expressly prohibit an agency from making changes to an emergency rule by superseding the previous emergency rule.

HB 7063 was approved by the House Oversight, Transparency & Public Management Subcommittee. SB 1670 was never heard in committee.

Look for some of these JAPC recommendations to be considered again in 2020.

Larry Sellers *is a Partner in the Tallahassee office of Holland & Knight LLP.*

Endnotes

1 In January 2019, the Agency for Health Care Administration issued a final order revoking the nursing home's license; that final order is the subject of a pending appeal. *AHCA v. Rehab. Ctr. at Hollywood Hills, LLC*, DOAH Case No. 17-5769 (Final Order entered January 4, 2019), *on appeal*, Case No. 4D19-293.

2 *See Larkin Cmty. Hosp., Inc. v. Mayhew*, No. 2019-CA-001481 (2d Cir.) (Complaint filed June 24, 2019).

Agency Snapshot: Florida Department of Children and Families

By Stephen Emmanuel

The Florida Department of Children and Families (DCF) was created in 1996 when the Legislature divided the former Department of Health and Rehabilitative Services into two new departments: DCF and the Florida Department of Health. The mission of DCF is to protect the vulnerable, promote strong and economically self-sufficient families, and advance personal and family recovery and resiliency. DCF provides services through a number of different programs and offices such as the Adult Protective Services Program (charged with protecting vulnerable adults from abuse, neglect, or exploitation), the Office of Child Care Regulation (which licenses child care facilities and day care homes), the Office of Child Welfare (charged with protecting children from abuse or neglect), Children's Legal Services (which handles dependency proceedings under chapter 39, Florida Statutes, when it is determined that a child has been abused, abandoned, or neglected), the Domestic Violence Program (which operates as a clearinghouse for state and federal funding initiatives for the prevention and intervention of domestic violence), the Economic Self-Sufficiency Program (which assists in determining eligibility for food and medical assistance), the Refugee Service Program (a federally funded program that assists in resettling refugees), the Substance Abuse and Mental Health Program (which provides oversight of a statewide system of care for the prevention and treatment of children and adults suffering from mental illness or substance abuse), and the Office on Homelessness (which works with state and local agencies to help individuals or families facing homelessness).

Agency Secretary: Chad Poppell

Mr. Poppell came to Tallahassee from Jacksonville in 2013. He previously served as the chief of staff for the Department of Economic Opportunity and then as the Secretary of the Department of Management Services. Following a brief time in the private sector, Governor DeSantis charged him to lead DCF.

Agency Clerk: Lacey Kantor

Agency Clerk's Mailing Address/ Location:

Office of the General Counsel
Department of Children and Families
1317 Winewood Boulevard,
Building 2, Room 204
Tallahassee, FL 32399-0700

Hours for Filings:

8:00 a.m. – 5:00 p.m.

General Counsel:

Javier Enriquez

Prior to becoming the general counsel for DCF, Mr. Enriquez worked in the private sector, representing clients in family, guardianship, civil and employment litigation matters. For nearly a decade, he has been a non-profit leader in South Florida, dedicating much of his free time to serving his community.

A native of Miami, he is fluent in both English and Spanish. Mr. Enriquez earned his Bachelor's, Master's in Public Administration, and Juris Doctor degrees from the University of Miami.

Number of Lawyers on Staff:

There are approximately 308 lawyers on staff at DCF with approximately 205 support staff. DCF's attorneys provide legal advice and representation to its programs and staff in 16 locations.

Kinds of Cases: Administrative and Dependency

Administrative: The Office of General Counsel is the statewide legal office for DCF. It provides legal advice and representation to all of DCF's programs, institutions and administrative staff throughout Florida. The lawyers of the Office of General Counsel provide legal counsel to the Secretary, management and all DCF employees. The Office also gives advice regarding DCF to the Legislature, Governor, cabinet members, the court system, and other state and local governmental agencies. DCF lawyers have expertise in the following areas, among others: health and human services; contracts; litigation; constitutional and statutory law; public records and the Sunshine Law; ethics; government procurement; administrative law; appeals; and human resources.

Dependency: Children's Legal Services (CLS) represents the State of Florida through DCF to ensure the health and safety of children and the integrity of families. Working with other department programs and community stakeholders, CLS advocates for the safety, well-being, and permanency of Florida's abused, abandoned, and neglected children.

Practice Tips

For legal questions regarding the responsibilities of DCF, contact the Office of the General Counsel, Florida Department of Children and Families, 1317 Winewood Blvd. Building 2, Rm. 204, Tallahassee, FL 32399, 850-488-2381 (Work), 850-922-3947 (Fax).

THE END OF AN ERA
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Sandi Gunter, JAPC's legislative analyst, recalls her time working with Judge Boyd: "I had worked with Scott at JAPC for more than a decade when he transitioned into the role of Executive Director, and it was immediately obvious that he was a natural leader. He just instinctively knew how to inspire and motivate staff to give their best effort, in no small part because we always knew we would get nothing less than that from him. Scott is incredibly intelligent and his enthusiasm for and knowledge of Florida's APA is unsurpassed, but what I most admire about him was how he always led our staff by example, and with great kindness. To simply say that Scott has served Florida with dedication and honor is quite an understatement, and I am fortunate to have had the opportunity to work with him."

During Judge Boyd's time as Executive Director and General Counsel, JAPC reviewed over 21,000 agency rules. Additionally, Judge Boyd guided JAPC into the information age by overseeing the development of its website FALCON (Florida Administrative Law Central Online Network). FALCON is a wonderful tool for administrative law practitioners because it allows one to track the progress of JAPC's review of a proposed rule. The website also contains links to publications and has an annotated chapter 120 database which includes law review and journal articles, case law, DOAH decisions, and Attorney General Opinions.

Anyone who has had the pleasure of speaking to Judge Boyd knows that he has a deep interest in the APA. He is a past chair of The Florida Bar Administrative Law Section, a member of the Administrative Law Section Executive Council, and a past chair and member of the State and Federal Government Administrative Practice Certification Committee. Judge Boyd has published numerous law review articles on administrative law and has made presentations at organizations such as the National Association of Secretaries of State, the National Association of Administrative Law Judges, and the National Conference of State Legislatures. Additionally, he has presented at and chaired the Pat Dore Administrative Law Conference. He is board certified in State and Federal Government Administrative Practice.

In 2011, Judge Boyd was appointed as an Administrative Law Judge at DOAH, where he has served with great distinction for eight years. Chief Judge Robert Cohen recalled his excitement at learning that Scott was going to apply for one of the open ALJ positions that year. "I had known and greatly respected Scott for years. Scott was a legend in administrative law who was not only a true expert in all aspects of rulemaking, but also had brought JAPC's website into the 21st century, making it one of the most useful and comprehensive resources in administrative law research. So when he decided to apply for an ALJ position, we were very happy at the prospect of someone with his wealth of administrative law knowledge and intellect becoming part of DOAH. Scott has used not only these qualities, but also his personable demeanor and calm temperament, to serve with great distinction, including as a senior judge supervising other ALJs, at DOAH."

Judge Li Nelson says of Judge Boyd, "Scott has never tried to be part of the story, but has always used the APA to facilitate telling the story. His work at DOAH has never been about him; it has always been about the litigants in the cases he has heard, and he's used his knowledge of the APA to tell their story, not his."

Judge Boyd has served as a senior judge for the Southern District of DOAH since 2014. Judge Sellers, who is assigned to the Southern District, recalls her reaction at learning that Judge Boyd also would be part of the group of ALJs hired in 2011. "I knew Scott had applied for one of the ALJ positions, and I wanted him to get it about as much as I wanted to be chosen. So when I found out that Scott also had accepted a position, as far as I was concerned, it was perfect. I literally could not have been happier." She also recalls going to him numerous times, in his capacity as a senior judge, to discuss various legal and procedural issues over the years they have worked together. "Scott not only has tremendous institutional knowledge of the APA, but such great judgment about how to approach and resolve the whole range of issues that can arise in our cases. He is so thoughtful, so generous with his time, and offers such sage advice every single time. I honestly can't imagine being at DOAH without him being here. I am going to miss him greatly."

The Administrative Law Section of The Florida Bar and the people of the State of Florida owe Judge Boyd a debt of great gratitude for his many years of service. Judge Boyd has served as a mentor and role model to countless numbers of administrative lawyers and who will miss seeing him on a daily basis.

Jowanna Nicole Oates *is a Chief Attorney with the Joint Administrative Procedures Committee. She is a past chair of the Administrative Law Section and serves as a co-editor of the Administrative Law Section Newsletter. She earned her J.D. from the University of Florida Frederic G. Levin College of Law. She had the privilege of working with Judge Boyd for five years at the Joint Administrative Procedures Committee and is proud to call him a mentor and friend.*

Cathy M. Sellers *is an Administrative Law Judge with the State of Florida Division of Administrative Hearings. She is a past chair of the Administrative Law Section, is board certified by The Florida Bar in State and Federal Governmental and Administrative Practice (SFGAP), and served on the SFGAP board certification inaugural committee. She is an adjunct professor at the University of Florida Frederic G. Levin College of Law, where she has taught Florida Administrative Law since 1999. She has had the privilege of working with Judge Boyd for eight years at DOAH, and is proud to call him a colleague and friend.*

Administrative Law Section

ADMINISTRATIVE LAW SECTION
MEMBERSHIP APPLICATION (ATTORNEY)
(Item # 8011001)

This is a special invitation for you to become a member of the Administrative Law Section of The Florida Bar. Membership in this Section will provide you with interesting and informative ideas. It will help keep you informed on new developments in the field of administrative law. As a Section member you will meet with lawyers sharing similar interests and problems and work with them in forwarding the public and professional needs of the Bar.

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Note: The Florida Bar dues structure does not provide for prorated dues. Your Section dues cover the period from July 1 to June 30.

For additional information about the Administrative Law Section, please visit our website:
http://www.flaadminlaw.org/

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