ADMINISTRATIVE LAW SECTION

Newsletter

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ALJ Q&A

By Richard J. Shoop

A new chapter has begun at the Division of Administrative Hearings (DOAH). After 16 years as the Director and Chief Judge, the Honorable Robert S. Cohen has stepped down and John MacIver has assumed the task of leading DOAH going forward.

Prior to his appointment as Director and Chief Administrative Law Judge, Mr. MacIver served as Deputy General Counsel in the Executive Office of Governor (EOG) Ron DeSantis where he oversaw the legal offices of Florida's executive branch health, welfare, and business regulatory agencies. Mr. MacIver served in the same role throughout the second term of then-Governor now United States Senator Rick Scott. Mr. MacIver also served as the Director of Florida's Office of Fiscal Accountability and Regulatory Reform, a position housed within the Governor's Office of General Counsel. Prior to joining EOG, Mr. MacIver worked as the rules attorney for Florida's Department of Business and Professional Regulation. Prior to law school Mr. MacIver worked as a legislative assistant to state Senator and now Congressman Bill Posey. He is a graduate of Northwestern University School of Law and the University of Central Florida.

Chief Judge MacIver graciously allowed me to interview him on short notice, and I really appreciated the good, candid answers he gave to my questions. I was particularly impressed by his view on maintaining a good work/life balance, which

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From the Chair

By Brian Newman

They say the only constant thing in life is change. This column is devoted to new programs offered by the Administrative Law Section and other positive changes affecting the practice of administrative law that you should know about.

You would probably not be surprised to learn that the majority of our members reside in the Tallahassee area. That demographic makes it easy to plan events in Tallahassee but we are making an effort to better serve administrative law practitioners who reside elsewhere by establishing a South Florida chapter to host events and CLE programs. Please contact Sharlee Edwards at sedwards@amerijet.com or Paula Savenchenko at PaulaSavchenko@floridasalestax.com if you are interested in attending or planning an event to be held in South Florida. Also, keep a look out for the announcement of a Central Florida location for our long range planning retreat to be held in April 2020. And remember, all ALS members are welcome—you do not have to be an officer or executive council member to attend.

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FROM THE CHAIR
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The Section and DOAH jointly sponsored the first DOAH Trial Academy this year, a week-long intensive CLE program devoted to administrative litigation. Twenty students completed the program and earned 42 hours of CLE credit, all of which count toward board certification in State and Federal Government and Administrative Practice. Financial support was provided by Foley & Lardner, Parker Hudson, and the Pennington Law Firm which allowed us to offer the program at no charge to Section members. Students who attended the program were also eligible to participate in the very first Section mentor program designed by former chair Richard Shoop. Keep a look out for details on the second DOAH Trial Academy next fall and for an expanded mentor program on the ALS website.

The board certification examination for State and Federal Government and Administrative Practice has changed to place more emphasis on Florida law topics such as Florida administrative law, Florida constitutional law, Florida government litigation, and the Sunshine Law. Eighty percent of the examination is now devoted to these state law topics and twenty percent to federal law. Rumor has it that a name change and more revisions to the examination may come later—stay tuned for that.

Finally, join me in welcoming John MacIver as the new Director and Chief Administrative Law Judge of DOAH. I am happy to report that Chief Judge MacIver has already attended Section events and has pledged DOAH's continued support for our programs. You can learn more about Chief Judge MacIver in Richard Shoop's interview in this issue.

CALL FOR AUTHORS:
Administrative Law Articles

One of the strengths of the Administrative Law Section is access to scholarly articles on legal issues faced by administrative law practitioners. The Section is in need of articles for submission to *The Florida Bar Journal* and the Section's newsletter. If you are interested in submitting an article for *The Florida Bar Journal*, please email Lylli Van Whittle (Lyyli.VanWhittle@perc.myflorida.com) and if you are interested in submitting an article for the Section's newsletter, please email Jowanna N. Oates (oates.jowanna@leg.state.fl.us). Please help us continue our tradition of advancing the practice of administrative law by authoring an article for either *The Florida Bar Journal* or the Section's newsletter.

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

APPELLATE CASE NOTES

By Tara Price, Larry Sellers, and Gigi Rollini

Gaming—Live Jai Alai Games Maintains "Eligible Facility" Status

Fla. Thoroughbred Breeders' Ass'n v. Calder Race Course, Inc., 44 Fla. L. Weekly D2417 (Fla. 1st DCA Sept. 25, 2019).

The Florida Thoroughbred Breeders' Association challenged a final order granting a declaratory statement for Calder Race Course Inc. ("Calder"). The declaratory statement concluded that pursuant to section 551.102(4), Florida Statutes, Calder could discontinue the operation of thoroughbred races and instead present a full schedule of live jai alai performances, and still maintain its "eligible facility" status to conduct slot machine operations. The declaratory statement also determined that Calder was not required to conduct summer jai alai performances in the fiscal year proceeding its operation of slot machines.

The Association asserted that the declaratory statement misinterpreted the statutory definition of "eligible facility" by allowing Calder to continue its slot machine operation even if the thoroughbred racing ended and jai alai performances began. The Association interpreted "eligible facility" to mean that the "facility" is limited to *the portion* of the property upon which the racing activity was conducted when Calder was first licensed. Defining "facility" narrowly would not allow the slot machines to be located in connected buildings or anywhere on the premises not within the footprint of the actual racetrack or fronton.

The court rejected this interpretation as too narrow and determined that Calder's thoroughbred horse racing facility satisfied the elements of an "eligible facility" under the statute for purposes of obtaining its slot machine license. The court reasoned that Calder obtained its slot machine license as an "eligible facility" under section 551.102(4), and nothing in the language of section 551.102(4) requires a facility to continue in the same form of pari-mutuel wagering activity that it originally qualified for a slot machine license; nor does the statute tie an "eligible facility" to the same type of racing or gaming it had when the status was originally approved.

The court therefore found the agency's interpretation to allow Calder to present jai alai games to conduct slot machine operations as the most reasonable. The court affirmed the declaratory statement, commenting that when a statute is clear and unambiguous, "courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent," citing *Turbeville v. Dep't of Fin. Servs.*, 248 So. 3d 194, 196 (Fla. 1st DCA 2018) (quoting *Borden v. East–European Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006)).

Medicaid Reimbursement—Evidence Required to Reduce Settlement Proceeds

Gray v. Agency for Health Care Admin., 44 Fla. L. Weekly D2238 (Fla. 1st DCA Sept. 3, 2019).

John Gray was injured in an automobile accident and Florida Medicaid paid $65,615.05 in medical expenses related to his hospital stay. Mr. Gray sued the driver of the car to recover damages for injuries to his spinal cord and other permanent injuries and was awarded a verdict exceeding $2.8 million. After Mr. Gray received a $10,000 settlement from the driver's insurance company, an automatic lien of $3,750 was placed against the $10,000, pursuant to the Medicaid third-party liability statutes.

Mr. Gray filed an administrative petition to reduce the lien amount, arguing that the lien should be 0.349% of the amount Medicaid expended ($65,615.05), or a lien total of $229.49. The Agency for Health Care Administration ("AHCA") argued that it was entitled to $3,750 under the statutory formula. After Mr. Gray conceded that no statute or case law authorized the ALJ to apply a different formula, the ALJ ruled that Mr. Gray had failed to show by clear and convincing evidence that AHCA was entitled to less than $3,750.

On appeal, Mr. Gray argued that the ALJ erred by placing a lien on his future medical expenses, applying a clear and convincing evidence standard, and failing to use a pro rata formula to calculate the appropriate lien amount. The court affirmed. First, the evidence showed that the $10,000 settlement was a lump-sum payment that was not allocated to any particular category of damages. Thus, Mr. Gray had not shown that the lien was applied against his future medical expenses.

Second, although there was an open question as to the correct evidentiary standard, the court was not persuaded that the clear and convincing standard was incorrect. But even if it were, Mr. Gray also would have failed to have met the preponderance of the evidence standard found in section 120.57(1)(j), Florida Statutes. The evidence that Mr. Gray offered during the administrative hearing was insufficient to conclude that the $10,000 recovery was allocated between various damages categories, costs, or even attorney's fees. Thus, regardless of the evidentiary standard used, the ALJ was unable to use a different amount than the $10,000.

Third, the ALJ is required to apply the statutory formula when the petitioner fails to show via evidence or testimony that the lien amount

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should be reduced. Thus, the ALJ did not err, and the court affirmed the ALJ's Final Order.

Judge Makar wrote a concurring opinion noting that the ALJ did not err based on the statutory framework, but suggested that the Legislature may wish to adjust the statutory formula to prevent severely injured individuals from being forced to surrender such large portions of their total recovery when they obtain uncollectable judgments and can only receive smaller settlements from small-dollar insurance policies.

Medicaid Reimbursement—Reasonable Basis Must Exist to Reject Uncontested Expert Testimony Regarding Allocation of Settlement Proceeds

Eady v. Agency for Health Care Admin., 44 Fla. L. Weekly D2287 (Fla. 1st DCA Sept. 12, 2019).

Brandon Eady suffered catastrophic spinal cord injuries in an automobile accident that left him an incomplete quadriplegic. Florida Medicaid paid $177,747.91 for his medical care. Mr. Eady sued the driver of the car, the car's owner, and an insurance carrier. The Agency for Health Care Administration ("AHCA") notified Mr. Eady's attorney that it had filed a preliminary lien of $177,747.91 against any damages that Mr. Eady might recover. Mr. Eady ultimately agreed to separate confidential settlements with the parties totaling $1,000,000.

Mr. Eady filed a petition with DOAH to determine the amount payable to AHCA in satisfaction of the Medicaid lien. Mr. Eady and AHCA stipulated that the ALJ should use the preponderance of the evidence standard. During the administrative hearing, Mr. Eady called two expert witnesses, who both testified that the value of his future medical and life care plan damages exceeded $15 million, with tens of millions more for non-economic damages, and that the $1 million settlement was approximately 6.66% of the value of Mr. Eady's total estimated damages. Thus, the experts testified that the same 6.66% percentage should be allocated to the past medical expenses that AHCA could recover from Mr. Eady's $1 million settlement, which would reduce the $177,747.91 lien to $11,838.01.

AHCA did not engage in a vigorous cross examination, enter evidence as to the reasonableness of the experts' opinions, or enter contrary evidence into the record. The ALJ disregarded the experts' opinions as too general and speculative, ruled that Mr. Eady failed to prove that his $1 million settlement was 6.66% of his total past medical expenses, and concluded that AHCA was entitled to the full $177,747.91. Mr. Eady appealed.

The court noted that Medicaid recipients are entitled to demonstrate that Medicaid liens should be reduced because either a lesser amount of the total recovery should be allocated as reimbursement for medical expenses or that Florida Medicaid provided less funding for medical expenses than that alleged by AHCA. Furthermore, when a Medicaid recipient settles but does not itemize allocations of that settlement for various damages, the court noted it is more difficult for the recipient to prove that a certain portion of the settlement was allocated to past medical expenses. Confidential settlements can make the analysis even more complicated.

Nevertheless, the court distinguished much of the case law, including *Gray v. Agency for Health Care Admin.*, 44 Fla. L. Weekly D2238 (Fla. 1st DCA Sept. 3, 2019), that had rejected pro rata formulas. Notably, Mr. Eady had presented competent, substantial, and uncontested evidence that the portion of the $1 million settlement that was properly allocated to past medical expenses was $11,838.01. AHCA presented no evidence on the matter at all. Thus, the record contained no competent, substantial evidence to support the ALJ's findings of fact or conclusions of law.

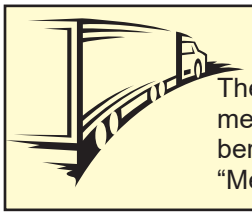
Citing *Giraldo v. Agency for Health Care Administration*, 248 So. 3d 53 (Fla. 2018), the court held that there must be a "reasonable basis in evidence" for an ALJ to reject a Medicaid recipient's uncontested expert testimony that established the portion of a total recovery that should be allocated for past medical expenses. Because there was no reasonable basis in the record here for the ALJ to reject Mr. Eady's uncontested evidence, the ALJ erred. Thus, the court reversed and remanded the ALJ's Final Order so the ALJ could reduce AHCA's lien to $11,838.01.

Procedural Due Process in State Tax Audits

A & S Entm't, LLC v. Dep't of Revenue, 44 Fla. L. Weekly D2341 (Fla. 3d DCA Sept. 18, 2019).

A Notice of Decision was issued by the Department of Revenue ("Department") after an audit of A&S Entertainment, LLC ("A&S"). A&S appealed the resulting decision, which concluded that A&S owed sales and use tax, penalties, and accrued interest totaling $1,925,953.17. A&S argued that the Department denied it procedural due process during the audit because the Department prepared its tax assessment without considering certain documents that A&S submitted. A&S further argued that the Department misapplied the law in categorizing certain fees as taxable rental income.

In analyzing A&S's due process argument, the court observed that procedural due process requires (1) notice of the case and (2) an opportunity to be heard, and that due process is satisfied when the notice and



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opportunity to be heard are "granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

Prior to the start of the audit, the Department provided notice to A&S of its intent to audit A&S's records and gave A&S multiple chances to provide the required/requested documents before the issuance of the Proposed Assessment and the Notice of Decision. The court noted that under Florida law, where a dealer "fails or refuses to make his or her records available for inspection . . . it shall be the duty of the department to make an assessment from an estimate based upon the best information then available to it for the taxable period." § 212.12(5)(b), Fla. Stat. (2018).

The court noted that the Department is entitled to collect the estimated taxes, interest, and penalty based on the auditor's assessment using the records it obtained. The court found that the responsive documents ultimately submitted by A&S were unverified and untimely, and the Department's lack of consideration of those documents therefore did not violate procedural due process.

A&S also argued that the Department's assessment misapplied law in assessing its taxable "rental income." Specifically, A&S argued that dancer fees and valet parking fees are not taxable as rental income, including because payment thereof did not afford anyone any property rights. However, the court found that the Department properly categorized the dancer fees as taxable income pursuant to Florida law and its own precedent.

As for the valet parking fees, the court held that A&S failed to provide the Department with documentation evidencing a third party's existence that A&S claimed was an outside vendor (valet company) who was responsible for payment of the sales and use tax connected with that income. Under section 212.03(6), Florida Statutes, the valet fees are taxable if patrons of an establishment are required to use and pay for valet services and parking.

Accordingly, the appeals court held that the Department did not violate A&S's due process rights and adhered to Florida law and its own precedent and procedures in categorizing the dancer fees and valet parking fees as taxable rental income.

Public Records—Abuse of Discretion to Order Access When Applicant No Longer Wants the Records

Dep't of Corr. v. Miami Herald Media Co., 278 So. 3d 786 (Fla. 1st DCA 2019).

In August 2015, the Miami Herald sent public records requests to the Department of Corrections ("DOC") for video footage of the area around an inmate's cell at the Suwannee Correctional Institution and the outside shower area of an inmate dorm at Sumter Correctional Institution. DOC denied both requests, stating that the requested video recordings were confidential and exempt from Florida's public records laws.

The Miami Herald filed a complaint seeking injunctive and mandamus relief, asking the trial court to compel DOC to produce the footage. The court issued an order finding that the videos fell within the security plan exemption and were exempt from public disclosure.

The Miami Herald moved for reconsideration and argued that its goal of gathering information regarding inmate treatment at state prisons and reporting it to the public constituted good cause. The trial court granted the Miami Herald's motion for reconsideration. However, at the hearing on the motion, Miami Herald advised the trial court that it no longer wanted the videos as they were no longer newsworthy.

Nevertheless, the trial court issued a final order recognizing that while the Miami Herald no longer wanted copies of the security footage, it had shown good cause to satisfy the exception to the public disclosure exemption laws and DOC was obligated to provide the videos.

Records related to the physical security of a state correctional facility are exempt from disclosure under Florida's public records and safety and security services laws. The applicable statutes provide exceptions to the exemption and, in 2016, the Legislature added a provision to the exceptions permitting disclosure "[u]pon a showing of good cause before a court of competent jurisdiction." Ch. 2016-178, §§ 1 and 2, Laws of Fla. (codified at § 119.071(3)(a)3.d.; § 281.301(2)(d), Fla. Stat.).

DOC appealed, arguing that the trial court's interpretation of "good cause" was overly broad and terminated the "security plan" exemption in Florida's public records law.

The appeals court ruled that Florida law allows for the public disclosure of materials that otherwise would be exempted for security purposes if good cause is shown, but that the Miami Herald extinguished any claim to good cause when it unambiguously renounced its need for the video footage. For that reason, the trial court abused its discretion by compelling DOC to disclose the video recordings.

Public Records—Defendant Need Not Acknowledge Obligation to Pay Copying Costs

Anthony v. State, 277 So. 3d 223 (Fla. 2d DCA July 19, 2019).

James Lee Anthony, Jr. entered into a plea agreement after he was charged with kidnapping. Following the entry of his plea, Mr. Anthony received a letter from the Public Defender regarding a Department of Justice report involving improper testimony on hair samples in his case. The letter stated that the Public Defender had concluded that the improper testimony did not likely impact the outcome of Mr. Anthony's case.

Mr. Anthony sought to file a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850, using the report as newly discovered evidence. After making numerous unsuccessful requests to the Public Defender for a copy of the report, Mr. Anthony petitioned the circuit court to compel the Public Defender to give him a copy of the report for use in his postconviction motion.

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The circuit court dismissed Mr. Anthony's petition because he had not included an acknowledgement that he would need to pay the copying costs for the report. In support, the circuit court cited *Farmer v. State*, 927 So. 2d 1075, 1076 (Fla. 2d DCA 2006), wherein the district court noted that a defendant who requested public records from a State Attorney's Office had acknowledged his statutory obligation to pay for copying costs. Mr. Anthony appealed.

The appellate court reversed, concluding that *Farmer* merely stated that the defendant had noted the statutory obligation to pay for copying costs. *Farmer* did not require that a defendant acknowledge these costs before a petition for writ of mandamus can be considered facially sufficient. Moreover, the court noted that in some cases, a defendant is entitled to certain records without paying costs, and thus, depending on the nature of the report, the circuit court may ultimately make a determination that Mr. Anthony need not pay copying costs. Thus, the court reversed the circuit court's denial of Mr. Anthony's petition for a writ of mandamus and ruled that a petitioner need not include an acknowledgement of copying costs to state a facially sufficient petition for writ of mandamus.

Shade Meetings—Mediation Communications Should be Redacted When Transcript Becomes Public Record

Everglades Law Ctr., Inc. v. S. Fla. Water Mgmt. Dist., 44 Fla. L. Weekly D2356 (Fla. 4th DCA Sept. 18, 2019).

Everglades Law Center, Inc. ("ELC") appealed several trial court orders, including one that denied ELC's petition for a writ of mandamus to compel the South Florida Water Management District ("District") to fully disclose a shade meeting transcript containing mediation communications disclosed by a government attorney.

This case originated after the District and Martin County entered into a partnership with Lake Point Phase I, LLC and Lake Point Phase II, LLC (collectively, "Lake Point") for an environmental project. Lake Point sued the District, Martin County, and others regarding certain contract disputes, and the parties were ordered to attend mediation. Lake Point and the District developed a settlement agreement during the mediation sessions. The District's Governing Board ("Board") held a public meeting, during which its Board members and two of the Lake Point litigation attorneys were present. The Board then held a shade meeting to discuss the litigation and returned to an open meeting format, where the Board approved the settlement agreement with Lake Point. The claims between Lake Point and the District were dismissed with prejudice.

After the Board approved the settlement agreement, ELC made a public records request for the shade meeting transcript. The District sued ELC and others seeking a declaratory judgment that it need not provide ELC with an unredacted copy of the shade meeting transcript. ELC counterclaimed with a petition for a writ of mandamus directing the District to provide a copy of the transcript. The trial court held a hearing, where the District argued that the mediation discussions during the shade meeting were exempt from disclosure under section 44.102(3), Florida Statutes, which exempts "[a]ll written communications in a mediation proceeding" from disclosure under chapter 119. In addition, section 44.405(1), Florida Statutes, states that "all mediation communications shall be confidential," and prohibits the disclosure of mediation communications to individuals not involved in the mediation. The trial court denied ELC's petition for writ of mandamus and ruled that the mediation communications were exempt from disclosure under the public records laws.

On appeal, ELC argued that section 286.011(8), Florida Statutes, does not exempt mediation communications from disclosure and that a permanent exemption of the information discussed during a shade meeting is not authorized under chapter 119. The District argued that mediation discussions should remain redacted when a shade meeting transcript is eventually released to the public.

The court noted that all exemptions to the Sunshine Law were to be narrowly construed because section 286.011 was enacted to protect the public and provide open access to government. A shade meeting occurs when an attorney for a government board discusses settlement and litigation strategy outside of the public eye pursuant to section 286.011(8). The statute requires a court reporter to record the shade meeting, and at the conclusion of the litigation, the transcript becomes part of the public record.

Nonetheless, the court held that the voters and the Legislature, in adopting article I, section 24(d) of the Florida Constitution, specifically authorized the continuation of exemptions to public meetings and public records that existed prior to 1993, such as the exemption for mediation communications. Proper harmonization of the mediation communication exemption with the shade meeting provisions of section 286.011(8) required the court to protect mediation communications during a shade meeting after the transcript is made available to the public.

Thus, the court affirmed the trial court's ruling that mediation communications should remain redacted once a shade meeting transcript is released to the public. The court, however, found that the trial court committed a fundamental error by not first requiring an in camera review of the shade meeting transcript to determine if the claimed exemption applied. The court then directed the trial court on remand to conduct an in camera review of the shade meeting transcript to determine the applicability of the mediation communication exemption.

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

DOAH CASE NOTES

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

Rule Challenges – Unadopted Rule

Maya v. Agency for Health Care Admin., Case No. 19-2881 (Recommended Order Sept. 24, 2019).

FACTS: Dr. Yaron Maya is an optometrist initially enrolled as a Medicaid provider in 1998. In 2008, the Agency for Health Care Administration ("AHCA") Medicaid Fraud Control Unit reviewed 18 months of Dr. Maya's Medicaid patient records and determined that he billed Medicaid for tinted lens, glasses, and additional office visits without adequate documentation. After pleading no contest to grand theft charges, Dr. Maya was placed on 12 months' probation and ordered to pay restitution of $25,000. Because the grand theft conviction disqualified him from being a Medicaid provider, Dr. Maya applied to AHCA in 2013 for an exemption. After denying his exemption request, AHCA notified Dr. Maya that he would not be considered disqualified if his criminal record was sealed. After having his criminal record sealed, Dr. Maya was re-enrolled as a Medicaid provider in April 2014. AHCA's policy regarding sealed criminal records changed in 2015 so that AHCA would consider sealed offenses when evaluating exemption applications. However, AHCA did not adopt a rule in order to memorialize this revised policy. When Dr. Maya applied in 2019 to renew his Medicaid provider status, AHCA denied his application and later denied his request for an exemption from disqualification.

OUTCOME: Following a formal administrative hearing, the ALJ found that Dr. Maya clearly and convincingly established that he was fully rehabilitated from his offense. While Dr. Maya did not assert that AHCA's denial was based on an unadopted rule, the ALJ noted that AHCA's revised policy of considering sealed criminal records when assessing exemption applications had the characteristics of an unadopted rule. However, because section 408.809, Florida Statutes, unambiguously requires AHCA to consider sealed criminal records, the revised policy is not an unadopted rule.

Substantial Interest Proceedings – Employment Exemptions

Gonzalez-Salcerio v. Agency for Health Care Admin., Case No. 19-0124EXE (Recommended Order August 5, 2019).

FACTS: Dr. Riquel Gonzalez-Salcerio received a medical degree from Central University in Las Villas, Cuba. Dr. Gonzalez defected to the United States in 1999 by using a fake Florida driver's license. In 2003, Dr. Gonzalez used that license in an attempt to cash a fraudulent check and ultimately pled guilty to possessing a counterfeit driver's license in violation of section 322.212(1)(a), Florida Statutes. In 2007, Dr. Gonzalez was interpreting radiological scans without being licensed as a physician by the State of Florida and ultimately entered a guilty plea to practicing medicine without a license in violation of section 456.065(2)(d)1, Florida Statutes. Dr. Gonzalez obtained a medical license from the State of Florida in 2014 and treated Medicaid patients from 2014 until April 2019. However, AHCA, the state agency responsible for administering Florida's Medicaid program, terminated Dr. Gonzalez's Medicaid provider agreement and denied his request for an exemption from disqualification as a Medicaid provider. In doing so, AHCA acted pursuant to section 435.04(4), Florida Statutes, which is intended to ensure that AHCA does not utilize a Medicaid provider who has violated "a federal law or a law in any state which creates a criminal offense relating" to the delivery of goods or services under a health insurance program; fraud, theft, or embezzlement; or moral turpitude.

OUTCOME: Dr. Gonzalez argued that his convictions under section 322.212(1)(a) pertaining to his use of a counterfeit driver's license and section 456.065(2)(d) pertaining to his unlicensed practice of medicine are not disqualifying offenses. The ALJ agreed by concluding that the plain language of the aforementioned statutes does "not create a criminal offense relating to the delivery of any goods or services under" any health insurance program. The plain language of those statutes also does not create a criminal offense relating to fraud, theft, embezzlement, or moral turpitude. Moreover, even if the statutes had created disqualifying offenses, the ALJ found that Dr. Gonzalez demonstrated by clear and convincing evidence that he is rehabilitated. Therefore, the ALJ recommended that AHCA grant Dr. Gonzalez's application to be renewed as a Medicaid provider.

Substantial Interest Proceedings – Collective Bargaining

Nassau Cty. Sch. Bd. v. Alderman, Case No. 19-2092 (Recommended Order Sept. 9, 2019).

FACTS: Phyllis Alderman was an educational support employee for the Nassau County School Board ("School Board"). A collective bargain-

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ing agreement covered Ms. Alderman's position and provided that an employee who has completed the probationary period shall not be terminated except for just cause. With the exception of disciplinary situations and a reduction in work force announced by the superintendent, the collective bargaining agreement did not address situations in which an employee's position is not renewed at the end of a school year. In April 2018, the principal of West Nassau High School met with Ms. Alderman and gave notice that her position would be phased out at the end of the 2017-18 school year. Ms. Alderman petitioned for a formal administrative hearing alleging she had a property interest in her employment and that she was not terminated for just cause. The School Board responded by arguing that Ms. Alderman was required to pursue a grievance through the collective bargaining agreement and could not proceed under the Administrative Procedure Act.

OUTCOME: In addressing the School Board's argument, the ALJ distinguished *Sickon v. School Board of Alachua County*, 719 So. 2d 360 (Fla. 1st DCA 1998), from the instant case. The *Sickon* Court held that "parties must pursue the procedures established by the collective bargaining agreement rather than turn to the Administrative Procedure[] Act, when only rights created by the collective bargaining agreement are at issue." The ALJ concluded that *Sickon* was not controlling because the School Board could not identify a provision within the collective bargaining agreement applying to situations in which an employee is not terminated for cause or through a reduction in work force. The ALJ also concluded that the School Board, given the circumstances of this case, had no authority to terminate Ms. Alderman's employment under section 1012.40, Florida Statutes, or the collective bargaining agreement. Accordingly, the ALJ ruled that the School Board had no lawful basis for terminating Ms. Alderman and recommended that she be reinstated to her prior status with back pay and all other benefits she would have received had she not been improperly terminated.

Substantial Interest Proceedings

DeSoto Cty. Sch. Bd. v. Looby, Case No. 19-1793TTS (Recommended Order August 13, 2019).

FACTS: Casey Looby was an exceptional student education teacher at DeSoto County High School who used small, Nerf-type footballs to get her students' attention. On February 11, 2019, there were several students in her classroom, including A.R., a senior with cerebral palsy. The students had just returned from an art class and would not settle down. When A.R. did not promptly obtain a pencil as she instructed, Ms. Looby threw one of her footballs at A.R., and it struck his torso or back. After an investigation by the Department of Children and Families determined that there was no abuse or maltreatment, the school principal issued a written reprimand to Ms. Looby. Nevertheless, the county superintendent notified Ms. Looby on March 6, 2019, that he intended to recommend that the school board terminate her. That action bypassed a progressive disciplinary system that must be followed unless there is a real or immediate danger.

OUTCOME: The ALJ found that Ms. Looby violated certain provisions within the Florida Administrative Code. However, the ALJ concluded that "the evidence did not demonstrate conduct sufficiently egregious to justify dismissal without resort to the lesser prescribed discipline in the [collective bargaining agreement.] Although [Ms. Looby]'s actions were inappropriate, it is unreasonable to infer that the foam footballs, which had been used playfully in the classroom, could have caused any physical harm. Moreover, there was no evidence that [Ms. Looby] intended to harm A.R., or that A.R. was placed in any danger."

Manatee Cty. Sch. Bd. v. Lincoln Memorial Academy, Inc., Case No. 19-4155 (Final Order Sept. 27, 2019).

FACTS: The School Board of Manatee County ("School Board") voted to terminate the charter school contract of Lincoln Memorial Academy ("LMA") at a regularly scheduled School Board meeting. The decision was partially based on the immediate danger posed to LMA's students by fiscal mismanagement. LMA requested a formal administrative hearing, and the matter was forwarded to DOAH. During depositions, LMA's chief executive officer and chief financial officer invoked the Fifth Amendment in response to all questions concerning the location of unaccounted for funds.

OUTCOME: LMA argued that the School Board erred by failing to issue an agenda indicating that LMA's immediate termination would be an item for discussion at the board meeting. The ALJ rejected this argument by concluding that "while Florida courts have recognized that notice of public meetings is mandatory pursuant to the Sunshine Law, an agenda which details every matter that will be addressed in such meeting is not a requirement." In addition, the ALJ concluded that "[e]ven if there had been a violation of due process . . . any such violation was remedied by the ability of LMA to petition for an administrative hearing over disputed material facts, conduct discovery, and participate in the four-day administrative hearing . . ." As for invocation of the Fifth Amendment by the chief executive officer and chief financial officer, the ALJ noted that one involved in a civil, and by extension most administrative cases, may choose to remain silent if it is realistically possible that his or her testimony could be incriminating. While any adverse inference resulting from that silence is of limited weight, it "may be used to bolster circumstantial evidence in a civil or administrative case." The ALJ thus concluded that their "refusal to answer any questions about the unaccounted for funds merely supported the evidence of record, thereby assisting the undersigned to further establish

the significant mismanagement or misappropriation of funds entrusted to LMA to provide a complete educational experience for its students." Ultimately, the ALJ affirmed the School Board's decision to terminate LMA's charter school contract.

Equitable Tolling

Dep't of Health, Bd. of Massage Therapy v. Kai Xin Spa, Inc., Case No. 19-1304 (Recommended Order Aug. 29, 2019).

FACTS: The sole issue before the ALJ was whether Respondent's untimely filed Election of Rights form ("EOR") should be excused under the doctrine of equitable tolling. The case arose from a complaint alleging Respondent ran an advertisement with content "to induce sexual misconduct." On August 5, 2016, the Department of Health ("Department") sent a letter to Respondent stating it was investigating the complaint. Respondent took action by removing the advertisement, and, through its attorney, sent a letter to the Department explaining that it was now in compliance with the agency's advertising regulations. Nearly 20 months later, on April 18, 2018, the Department sent a letter identical to the one sent on August 5, 2016. Attached to the letter was a "Health Care Provider Complaint Form," dated August 1, 2016. Respondent's attorney sent a second response stating they believed the issues had been resolved. Without any acknowledgment of Respondent's letters, the Department issued an administrative complaint based on the alleged advertising infractions. The cover letter and EOR explained that failure to return the EOR may result in the entry of a default final judgment. After Respondent's attorney conferred with another attorney (who was later retained as Respondent's counsel in the DOAH proceedings), Respondent filed the EOR requesting a formal hearing. The filing occurred 16 days after the deadline.

OUTCOME: Relying on *Machules v. Department of Administration*, 523 So. 2d 1132 (Fla. 1988), the ALJ concluded equitable tolling was applicable on the ground Respondent was lulled into inaction by the Department's failure to expeditiously investigate the matter, as required by statute. Other equitable factors the ALJ found to support tolling included: the Department's failure to respond to Respondent's letters; the inclusion of the predated Health Care Provider Complaint Form; the 23-month delay in filing the administrative complaint; allegations in the administrative complaint that were not in the investigation letter; and the Department's use of permissive language regarding the consequences for failing to timely return the EOR. In so holding, the ALJ rejected the Department's argument of attorney misconduct.

Bid Protests

Abacode, LLC v. Dep't of Educ., Case No. 19-2741BID (Recommended Order August 26, 2019).

FACTS: After the February 2018 tragedy at Marjory Stoneman Douglas High School, the Florida Legislature enacted a law that required the Department of Education ("Department") to provide a digital tool that would enable school districts to monitor social media for threats of violence, signs of bullying, thoughts of suicide, and other issues impacting students' well-being. The Department issued an invitation to negotiate ("ITN") and received six replies, including ones from Abacode, LLC ("Abacode") and NTT Date, Inc. ("NTT"). At the conclusion of the negotiation phase, Abacode submitted a best and final offer of $4,875,320, and NTT submitted a best and final offer of $3,587,859. The Department's three-person negotiating committee unanimously recommended that Abacode receive the contract. However, on April 15, 2019, the Commissioner of Education decided to award the contract to NTT, partially influenced by the fact that NTT's best and final price was $1,287,461 lower than Abacode's.

OUTCOME: Abacode raised several arguments during its protest of the Commissioner's decision. For example, Abacode asserted that its proposal would, despite the extra cost, provide a better value that NTT's proposal. The ALJ rejected this argument by finding that "[a]lthough reasonable persons may disagree whether, when it comes to the safety of the public school system, it is desirable to focus on cost-savings rather than maximum capabilities, the Department's decision to select a viable solution based on lesser cost is well within the discretion provided [by] law." With regard to Abacode's argument that the Commissioner improperly substituted his judgment for that of the negotiation committee, the ALJ found that "practice is not precluded by law or rule, and state agencies, state courts, and federal courts have regularly recognized agency heads' authority to substitute their will where cost is the deciding factor." Accordingly, the ALJ recommended that the Department enter a final order dismissing Abacode's protest.

Agency Snapshot: Agency for Persons with Disabilities

By Matthew E. W. Bryant

In October 2004, the Agency for Persons with Disabilities (APD) became an agency separate and distinct from the Department of Children and Families (DCF). It was specifically tasked with serving the needs of Floridians with developmental disabilities. Prior to that time, it existed as the Developmental Disabilities Program within DCF. APD serves Floridians with developmental disabilities as defined in chapter 393, Florida Statutes. This includes individuals with autism, cerebral palsy, spina bifida, intellectual disabilities, Down syndrome, Prader-Willi syndrome, Phelan McDermid syndrome, and children aged 3-5 who are at a high risk of a developmental disability.

APD works with local communities and private providers to support people who have developmental disabilities and their families in living, learning, and working in their communities; provides assistance in identifying the service needs of people with developmental disabilities; and educates the public on disability issues while focusing attention on employment for people with disabilities. Accordingly, its goals are threefold: 1) to increase access to community-based services, treatment, and residential options; 2) to increase the number of individuals with developmental disabilities in the workforce; and 3) to improve management of the agency and oversight of providers.

Along with providing support and oversight, APD operates two intermediate care facilities, also referred to as developmental disability centers, as well as a general revenue-funded forensic program. The developmental disability centers, Tacachale in Gainesville and Sunland in Marianna, provide support for people who need structured care 24 hours a day and offer residents opportunities to enhance their quality of life and maximize their individual potential. These full-service residential facilities provide medical care, therapy, and a variety of recreational opportunities to approximately 600 people.

Individuals with developmental disabilities charged with committing a felony may be court-ordered into APD's Developmental Disabilities Defendant Program (DDDP). DDDP is a 146-bed secure facility located on the grounds of Florida State Hospital in Chattahoochee for defendants with developmental disabilities who are deemed incompetent to participate in their own defense or stand trial. APD also operates a civil commitment program at DDDP along with two step-down programs (Pathways at Sunland Center and Seguin at Tacachale Center) for individuals whose competency cannot be restored but continue to require a secure setting.

Agency Director

Barbara Palmer
Agency for Persons with Disabilities
4030 Esplanade Way, Suite 380
Tallahassee, FL 32399-0950
Phone: (850) 488-4257
Toll-Free: 1-866-APD-CARES
(1-866-273-2273)
Fax: (850) 922-6456
Email: APD.info@apdcares.org

Barbara Palmer was appointed director of APD by Governor Rick Scott in August 2012. Prior to that she served as the agency's chief of staff. Before coming to APD, Palmer was the Assistant Secretary for Administration of DCF. Palmer also served more than 15 years as president and CEO of Palmer, Musick & Associates, where she represented interests on a variety of issues including athletics, education, mental health, health care, and regulation before state and local governments.

Agency Clerk:

Gypsy Bailey
4030 Esplanade Way, Suite 335
Tallahassee, FL 32399-0950
Email: apd.agencyclerk@apdcares.org
Phone: (850) 921-3779

Mailing Address/Location:

Agency for Persons with Disabilities
4030 Esplanade Way, Suite 380
Tallahassee, FL 32399-0950

Hours for Filings:

8 a.m. to 5 p.m., Monday – Friday. Any document received by the Agency Clerk after 5:00 p.m. shall be filed as of 8:00 a.m. on the next regular business day.

General Counsel:

Richard Teitschler

Number of Lawyers on Staff:

The General Counsel's Office has 17 senior attorneys, one attorney, and four administrative staff positions.

Kinds of Cases:

APD handles all types of civil and forensic litigation in state and federal courts, the Division of Administrative Hearings (DOAH), and other administrative bodies including the Public Employees Relations Commission (PERC) and the Florida Commission on Human Relations (FCHR). Primarily, the type of APD cases resolved at DOAH involve licensure determinations. APD has authority to govern the activities of its licensees as authorized in chapter 393, Florida Statutes, as well as APD's rules promulgated thereunder and located in rule division 65G of the Florida Administrative Code. APD has the authority to impose a wide variety of punishments for non-compliant licensees ranging from small monetary fines to revocation of a license.

Practice Tips:

Prior to filing matters with APD, practitioners should ensure that filings conform, both in content and in timeliness, with the Uniform Rules of Procedure contained within chapters 28-101 through 28-110 and 28-112, Florida Administrative Code.

Law School Liaison

Fall Update from the Florida State University College of Law

by David Markell, Steven M. Goldstein Professor

This column highlights recent accomplishments of the Florida State University College of Law students and faculty. It also lists the rich set of programs the College of Law is hosting this year.

Recent Student Achievements

- Congratulations to the 2019-20 Executive Board of the Florida State University College of Law's Environmental Law Society:
  - President – Kelly Ann Kennedy
  - Vice President – Amelia Ulmer
  - Treasurer – Steven Kahn
  - Secretary – Payton Williams
  - Mentor Chair – Anastacia Pirrello
- In addition, the following students are leading the Florida State University College of Law's Journal of Land Use and Environmental Law:
  - Gabriel Lopez – Editor-in-Chief
  - Erica Gloyd and Allison Barkett – Executive Editor
  - Young Kang – Senior Articles Editor
  - Jordan Botsch – Associate Editor
  - Ryan Soscia – Administrative Editor
- The Sustainable Law Society provides resources and educational opportunities to make FSU Law a leader in sustainability, including providing reusable coffee mugs in the student lounge, organizing an annual student clothing swap, and hosting regular trash cleanups near campus. Congratulations to the 2019-20 Executive Board:
  - Holly Parker Curry – President
  - Corie Posey – Vice President
  - Abby Boyd – Secretary
  - Brooke Boinis – Treasurer
  - Mikayla Melnik – Activities Coordinator
- The following students are participating in administrative law or environmental law externships this fall:
  - Eric Saccomanno – City of Tallahassee Attorney's Office, Land Use
  - Erin Carroll – Division of Administrative Hearings, Environmental
  - Sordum Ndam – NextEra Energy
  - Young Kang – U.S. Department of Justice, Environment and Natural Resources Division
- Ashley Englund and Alexander Purpuro will be competing in the Jeffrey G. Miller National Environmental Law Moot Court Competition at Pace University in February 2020.
- FSU Law's annual Moot Court Team Final Four Competition took place at the Florida Supreme Court on October 16, 2019, where students Holly Parker Curry, Alex Clise, Erin Tuck and Gabriela De Almeida presented oral arguments before justices of the Florida Supreme Court and judges of the First District Court of Appeal. Congratulations to all who competed and Holly Parker Curry on being awarded Best Advocate.
- The Florida State University College of Law Trial Team has won first place in the 2019 Mockingbird Challenge National Trial Competition! Congratulations to team members R. McLane Edwards, Genevieve Lemley, Corie Posey, and Luke Waldron.

Faculty Achievements

- Professor Shi-Ling Hsu has published, with Professor Josh Eagle of the University of South Carolina, the casebook *Ocean and Coastal Resources Law*.

2019-2020 Events

The College of Law will host a full slate of impressive administrative law and environmental law event and activities this upcoming year. Below is a sampling of the events that we have planned with more to be announced.

Guest Lectures

The College of Law has been fortunate to welcome several terrific guest lecturers this fall, including: John Truitt, Deputy Secretary for Regulatory Programs, Florida Department of Environmental Protection; Justin Wolfe, General Counsel, Florida Department of Environmental Protection; David Childs, Partner, Hopping Green and Sams; Whitney Gray, Administrator, Florida Resilient Coastlines, Florida Department of Environmental Protection Office of Resilience and Coastal Protection; Jeffrey Wood, Partner, Baker Botts L.L.P., and former Acting Assistant Attorney General for the U.S. Department of Justice Environment and Natural Resources Division; Janet Bowman, Senior Policy Advisor, The Nature Conservancy; Julie Dennis, Owner, OVID Solutions; Former Director, Division of Community Development, Department of Economic Opportunity; and Alisa Coe, Staff Attorney, Earthjustice.

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LAW SCHOOL LIAISON
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Externship Luncheon

Every year the Externships office hosts an Externship Luncheon for students interested in externship and volunteer opportunities in administrative, environmental and land use law. This year's luncheon was held on September 16, 2019. Individuals who participated, and their organizations, include: Janet Bowman, The Nature Conservancy; Peter Cocotos, NextEra Energy/Florida Power & Light; Administrative Law Judges Robert Cohen and Francine Ffolkes, DOAH; Jessica Icerman and Emily Pepin, Leon County Attorney's Office; Louis Norvell, City of Tallahassee Attorney's Office; and Gregory West, Florida Department of Environmental Protection.

Environmental Law Enrichment Lectures

Silvia Alderman, Chair of the Water Task Force at Akerman LLP, presented "Environmental Law: One Lawyer's Path" to law students on September 17, 2019. A recording of Ms. Alderman's lecture is available to view here.

William Butler, Associate Professor and Master's Program Director of FSU's Department of Urban and Regional Planning, joined us on October 2, 2019, to present recent research on Florida local governments' implementation of state-mandated sea level rise planning into comprehensive plans. His guest lecture entitled, "Vague Law, Absent Rules, and Ambiguous Language: Responding to a Mandate to Plan for Sea Level Rise in Florida," can be viewed on our webpage.

On November 13, 2019, the law school co-hosted a special guest lecture with FSU's Sustainable Law Society by Sarah Lester, Assistant Professor at Florida State University's Department of Geography. Professor Lester presented her guest lecture entitled, "Offshore Aquaculture: Spatial Planning for a 'Blue Revolution.'"

Fall 2019 Environmental Distinguished Lecture

David Spence, Baker Botts Chair in Law, The University of Texas at Austin School of Law, presented the College of Law's Fall 2019 Environmental Distinguished Lecture on October 30, 2019.

Spring 2020 Environmental Distinguished Lecture

Cary Coglianese, Edward B. Shils Professor and Professor of Political Science, University of Pennsylvania Law School, will present the College of Law's Spring 2020 Environmental Distinguished Lecture on Wednesday, March 11, 2020, at 3:30 p.m. in Room 310. A reception will follow in the Rotunda.

Information on upcoming events is available 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.

UPDATE on Recommended Changes to the Uniform Rules of Procedure

An ad hoc committee of the Administrative Law Section has been tasked with reviewing the Uniform Rules of Procedure and recommending appropriate changes. Beginning in January 2019, the committee solicited suggestions and developed a draft that was distributed for comment. The committee received a number of comments. The committee reviewed the comments and prepared an updated draft dated November 4.

The latest draft and other information about the committee's work is available on the Section website.

Any recommended changes to the Uniform Rules of Procedure will be reviewed by the Section's executive council. If the executive council approves any recommended changes, then these will be submitted to the Administration Commission, which has the exclusive authority to propose and adopt changes to the Uniform Rules of Procedure.

The Uniform Rules of Procedure were last updated in 2013 based on recommendations from the Section. For a summary of these changes, see the April 2013 issue of the ALS newsletter. As in 2013, any amendments to the Uniform Rules of Procedure will become effective only if formally proposed and adopted by the Administration Commission in accordance with the rulemaking process in the APA.

Comments or questions may be directed to Larry Sellers or any of the other members of the committee: Paul Drake, Seann Frazier, Shaw Stiller, Judge Yolonda Green, Judge Elizabeth McArthur, Judge Li Nelson, or Judge Dave Watkins. Larry's e-mail address is: larry.sellers@hklaw.com.

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.

To join, make your check payable to "**THE FLORIDA BAR**" and return your check in the amount of $25 and this completed application to:

ADMINISTRATIVE LAW SECTION
THE FLORIDA BAR
651 E. JEFFERSON STREET
TALLAHASSEE, FL 32399-2300

NAME _____ ATTORNEY NO. _____

MAILING ADDRESS _____

CITY _____ STATE _____ ZIP _____

EMAIL ADDRESS _____

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/

ALJ Q&A
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is an area of concern for all attorneys these days. I hope you will find the interview to be informative and enlightening.

RS: Why did you become a lawyer?

JM: I worked for several years in the Florida Senate, and had a love for the legal process and the law itself. There were a number of things that made me want to become more active in the practice of law. One of them was the *Bush v. Holmes* case, which occurred at the start of my time in the Legislature. I was intrigued by the disparity between the majority and dissenting opinions. For me, that case highlighted the idea in jurisprudence of following the law as it was written. I wanted to explore that idea, and I focused on it while going through law school, as well as in my career. I wanted to learn what the boundaries [between the branches of government] are and what was the role of the court. Additionally, I wanted to learn how the courts' role not only affects people's rights, but also the political power courts possess.

RS: What positions did you hold prior to becoming chief judge?

JM: I've spent the last four-and-a-half years working in the EOG, first as an assistant general counsel and then as a deputy general counsel. There, I was tasked with the oversight and direction of the legal offices of several state agencies. My duties included driving the litigation and rulemaking for agencies, making personnel decisions, and managing outside counsel. Pretty much everything you can think of that goes with managing what is essentially a government law firm. Additionally, 30-40% of my time at the EOG was spent assisting with the vetting of judicial candidates the judicial nominating commissions sent to the Governor for consideration. In addition to interviewing the candidates, I reviewed the applications, checked the candidates' references, and looked into their backgrounds in order to ensure the chosen candidate was a good, solid judge. The most important qualification the Governor looked for was respect for separation of powers and the rule of law. Prior to my time at the EOG, I worked for two months as the executive director for a couple of licensing boards at the Department of Business and Professional Regulation and prior to that I was the Department's rules attorney. The rules section was a two-person shop, and we reviewed all the Department's rules, as well as did all the bill analyses for the Department.

RS: Why did you decide to apply for the chief judge position?

JM: I saw it as a really good opportunity to focus on the things that really interested me in terms of the law. What I had been doing at the EOG for the last few years is trying to find really good judges to staff our Article V judiciary, and here's an opportunity for me to be the point person on doing that for our administrative courts. One of the primary roles of the Chief ALJ is to hire really qualified ALJs and find folks who are really dedicated to respecting the rule of law, applying the law in a way that respects the text in the way the Legislature wrote it, and following the common understanding of the words and not coming to any strained interpretation to arrive at an outcome-based determination. Let me clarify that it's not something that I currently see happening at DOAH, but, to the greater extent that you have people who are focused on not letting it happen, the better the reputation of DOAH will become. We all know courts that have a reputation for being a really great court to go in front of and know that the law is going to be applied the way it's written. You can approach that court with predictability. You can advise your client according to what the law says. We all know courts that have a reputation for being a little wild west as it were, where the whim and caprice of any particular judge might decide the case instead of what the law says. Making sure that DOAH has the reputation of the former, rather than the latter, is really what attracted me to the job.

RS: You haven't been chief judge for long, but what do you most enjoy about your new position so far?

JM: It's really been a whirlwind, and I have enjoyed the pace of trying to identify things that can be done slightly differently or a little bit better. I've enjoyed the people that I've encountered here. Being new to an agency and knowing that I have an incredible team to work with makes the tasks in front of me a whole lot easier. We have an incredibly talented pool of ALJs. Our OJCC [Office of the Judges of Compensation Claims] staff is incredibly competent. My Director of Administration pretty much knows how every single function of this agency works and is a godsend to me to be able to get my own feet underneath me. Being able to work with an incredible team right out of the gate is the best part so far. That, coupled with the excitement of "what can we do?"

RS: Describe your duties as chief judge.

JM: First and foremost, I am statutorily the agency head for all purposes. My responsibility is to carry out the mission of DOAH, which is to provide an impartial place for the adjudication of quasi-judicial disputes. Attentive to that is the primary duty of hiring ALJs. I am also responsible for all the administrative decisions of the agency, everything from approving employee travel to making decisions about how certain cases will be reviewed. Let me clarify that a little bit. Chapter 120, Florida Statutes, places the determination about how a case is going to come out with the individual ALJ. They have control over their cases. Now, I will review draft orders, consult with them about it, and give them some advice or edits here and there, but it's up to the ALJ to take what they like, and leave what they dislike on the table. An example of that would be me looking at an order and saying "hey, what do you think about this approach?", or "do you really think you gave this idea a fair shake?" I also consult with ALJs on how their cases are going. I control the docket from the 50,000 foot level, deciding how cases are going to go

where. That process is pretty much in place already, so I do not have to do much tweaking about how that works.

RS: How do you use technology in your work?

JM: We're a computerized society now, right? Prior to me getting here, both the Director of Administration, Lisa Mustain, and former Director Cohen have done an amazing job of modernizing this agency, getting our website to a point where it is very user-friendly and making sure agency final orders are all indexed at DOAH and searchable. The behind-the-scenes work our IT department does to make sure all that happens, and make sure our judges can use the case management system for the efficient flow back and forth of orders and drafts, as well as scheduling is incredible. For my part at this early stage, it's a matter of me wanting to offer input on how orders are going. I use the "track changes" feature in Microsoft Word for my reviews and use Microsoft Outlook to communicate back and forth with the ALJs. My technology lift is not nearly as high as the rest of the agency.

RS: What is the current state of DOAH and what are the most significant issues facing DOAH today?

JM: In terms of the state right now, we have an incredible team. I think that there may be opportunities for us to improve how we outwardly face the public by helping the public understand how ALJs come to their decisions. The unfortunate problem with any quasi-judicial process is there is always going to be someone who doesn't prevail, so there is always going to be someone who, at least to a certain degree, thinks you are doing it wrong. Comparing it to a county court where you have a lot of pro se people, an incredibly high docket and a limited amount of time where you can talk to parties who are in front of you, the judges who do it the best there are the ones who are able to navigate the case in a way that the parties understand how you fairly arrived at your decision. I think one of the things that we can do better is make sure people understand how we arrived at our decision, and how it was a fair process going through it. That way we can mitigate any chance for folks to say "I didn't get a fair shake." To any extent people aren't getting a fair shake (which I don't think is prevalent), that's a threshold issue that must be addressed. We must be the agency that is always fair and always impartial and will always follow the law.

RS: What qualities will you be looking for in an ALJ?

JM: First and foremost, as a threshold issue, there has to be respect for the rule of law. There's an interplay between that and humility and the understanding of the role of an ALJ, but ultimately our ability to be impartial is founded on our idea that we respect the text of the law the way that it is written. I need to know that a person applying for a position as an ALJ has thought about these things and has struggled a little bit with the tension between the different branches and how the APA [Administrative Procedure Act] affects that. Beyond that, administrative law experience and litigation experience are both obviously very, very helpful. Not crucial or the litmus test, but certainly a fact that is going to weigh strongly in someone's favor because they can hit the ground running and know how the process works. The second most important factor [when considering ALJ candidates], and this is a really subjective factor, is the ability to exercise good, sound judgment. That's really hard to define in an applicant. Luckily, I have been doing this for a number of years in the Governor's Office when considering people who are applying to become Article V judges, so I am looking for the same thing when it comes to administrative law judges. They must have respect for the law and sound judgment. Good demeanor is also important, especially from the aspect of making sure people know where your decision is coming from. Now, I can tell you that the difficult part of the process is the people who apply for a position as a judge and as an ALJ are lawyers, and lawyers are trained and skilled in presenting a case. So, if you are not the person who has that diehard perspective of "this is what the text says, and I'm going to follow the text," then you are probably at least going to be somewhat persuasive in presenting the idea that you are that kind of person. So, being able to talk to people and have a really good conversation and really know where they are coming from in terms of their approach to the law is how it works.

RS: What is the most important piece of advice you could give a young lawyer that you had wished someone had given you when you were first starting out?

JM: I don't have a good answer to that question. I think that everybody's experience as a lawyer and their experience navigating their way through their career and life is so varied and so driven by individual values and tastes that it's hard for me to think of a universal thing everyone should keep in mind. Of course, there are obvious truths like guard your integrity, or once you lose your credibility you never get it back. These are important things everyone tells young lawyers, so it should not be lost on them. And, when you are young, advice that you are not actively soliciting often goes in one ear and out the other, so giving advice when someone is not ready for it is not always all that helpful either.

RS: What do you like to do for fun?

JM: I have a little two-year-old girl named Scout, and she is pretty much my whole world wrapped up in a package. So, me and her and her mom Abbie will spend time going to the park, or going to the trampoline place, or grabbing dinner. Just doing whatever. Hanging out with family is pretty much what I have time for right now. That's what I do for fun.

RS: How do you manage to balance your work and your personal life?

JM: I've been really, really lucky throughout my career that I've had

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ALJ Q&A
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positions which have allowed me a decent work/life balance. For one thing, family will always come first, so if I didn't have a position that allowed me the time I needed with my family then I wouldn't keep that position. Family will always come first. But, like I said, I've been extremely lucky in that aspect. The jobs I've had have been important ones to be sure. They have required some late nights or long hours. But, by and large, it's a fairly manageable time requirement, punctuated here and there with discrete instances where you have to do a lot of hours at one time.

RS: Do you plan to become involved with the Section? If so, what role do you envision for yourself?

JM: Yes, I do plan to be involved with the Section. I've had a good opportunity, especially since taking this position, to become a little more familiar with the Section. I've talked with some of its leadership about the good people that make up the Section. As far as what I envision as my role with the Section, I need to get my feet underneath me and see what my time commitments are and what my other commitments are going to be before I know what sort of an obligation I could take on. In the immediate future, I will be what economists call a freerider in terms of my relationship with the Section. I am going to benefit as much as I can from the knowledge of the people I call friends, and hopefully, at some point in time, I will find a way to return that back to the Section.

RS: When it's all said and done, how would you like to be remembered as chief judge?

JM: I would like to be remembered as a connection to how the agency is viewed. Not so much remembering me, but I would like the reputation of this agency to be the best quasi-judicial or adjudicative body in Florida. And, if the agency is thought of that way, then I would want to be remembered as someone who contributed to that reputation.

Richard J. Shoop *is the Agency Clerk for the Agency for Health Care Administration. He attended the University of Miami for both undergraduate studies and law school, obtaining a Bachelor of Arts in History with General Honors in 1996 and a Juris Doctor in 1999. He began his legal career at the Quincy office of Legal Services of North Florida, Inc. In 2001, Mr. Shoop went to work for the State of Florida, first with the Agency for Health Care Administration and then with the Department of Health as a prosecuting attorney for the Boards of Medicine, Osteopathic Medicine and Psychology. He accepted the position of Agency Clerk for the Agency for Health Care Administration in 2004. Mr. Shoop has served as a member of the Administrative Law Section's Executive Council since 2009 and is a past chair of the section.*