Administrative Law Section Newsletter

Vol. XXVII, No. 2 **Elizabeth W. McArthur, Editor** **December 2005**

From the Chair

by Deborah K. Kearney

I have discovered that the Administrative Law Section chair I have occupied for the past five months is certainly not an easy chair—it has been more like a hot seat recently.

Your Executive Council has struggled over the issue of supporting or not supporting a proposal for certification in state and federal government and administrative law. While we are still midway in the process, at this juncture it seems safe to report that the Government Lawyers Section has proposed the certification program. With the addition of modest changes, the Administrative Law Section has withdrawn its earlier objection to the proposal. The Florida Bar's Board of Legal Specialization and Education has approved the proposal and it will next go to the Program Evaluation Committee of the Board of Governors, then to the Board of Governors, and finally to the Florida Supreme Court. Presuming no further delays, it is expected to be presented to the Court this January.

In my last column I expressed the hope that we could get more of our membership involved in Section activities. I am renewing this aspiration by inviting you to contact me or the committee chair in any area in which you would be interested in volunteering. The following is a list of the committees for which we are seeking members ready to roll up their sleeves:

CLE Committee:
Andy Bertron, Chair
andy@hueylaw.com

Publications:
Li Nelson, Chair
lnelson@heqlaw.com

Continued, page 2

Proposed Recommended and Final Orders Before DOAH

by Charles A. Stampelos

Introduction

You have spent days conducting discovery, interviewing witnesses, combing through documents, and preparing your case for hearing. Prehearing motions have been considered and resolved. You presented your case, as did the opposition.

The Administrative Law Judge (ALJ) will instruct you on the right to file post-hearing submissions. Pay attention! Even though the evidentiary portion of the hearing is over, your work is not over.

The complexity of administrative cases at the Division of Administrative Hearings (DOAH) varies considerably. Not unexpectedly, the quality and thoroughness of proposed recommended orders (PRO) also varies.

The discussion herein reflects what is generally required by statute and rule. Practice tips and some aspirational goals are mentioned, but because of time, financial, and other constraints, may not be attainable. See, e.g., infra, regarding parties adhering to a PRO outline or post-hearing refinement of the disputed issues of fact and law.

Continued, page 14

INSIDE:

FROM THE CHAIR
from page 1

Bar Journal:
Li Nelson, Chair
lnelson@heqlaw.com

Newsletter:
Elizabeth McArthur, Chair
emcarthur@radeylaw.com

Agency Reports:
Mary Ellen Clark, Chair
mary_ellen_clark@oag.state.fl.us

Law School Liaison:
Cathy Sellers
csellers@broadandcassel.com

Website:
Cathy Lannon
cathy_lannon@oag.state.fl.us

Public Utilities Law:
Cindy Miller
cmiller@psc.state.fl.us

The planning for a CLE program that will be jointly sponsored with the Appellate Practice Section is well underway, but Andy Bertron is also planning a Pat Dore Conference for the Fall of 2006 and would welcome some committee members to assist him with planning the program, obtaining speakers, and otherwise pitching in for all that it takes to smoothly execute the conference. In addition, Cindy Miller is planning a terrific CLE to be held January. Section members practicing public utilities law should consider contacting Cindy to volunteer to serve on this committee.

The Publications chairs are in need of a steady diet of writers for the Bar Journal and the ALS Newsletter and its constituent parts. Please contact me or Li Nelson, Elizabeth McArthur, Mary Ellen Clark, or Mary Smallwood if you have always wanted to be a published writer. Our Website Committee seeks a computer geek wishing to dedicate all to the cause—or at least *something* to keep us squarely in the 21st century. Cathy Lannon would appreciate some committee members with IT expertise.

Cathy Sellers has come up with a number of great ideas for us to communicate with law students who may be interested in practicing in the area of administrative law. Our law school writing competition was not working well to connect us with law students interested in our practice area. Instead, we are moving the resources to projects that we hope will provide better opportunities for building relationships between students and the Section.

I hope you will want to become more involved in Administrative Law Section activities and I encourage you to let us know how you can volunteer your talents.

Deborah K. Kearney *is the Chair of the Administrative Law Section. She graduated from the Florida State University College of Law and currently serves as the General Counsel of the Florida House of Representatives. Debby can be contacted at* debby.kearney@ myfloridahouse.gov.

APPELLATE CASE NOTES

by Mary F. Smallwood

Adjudicatory Proceedings

Menorah Manor, Inc. v. Agency for Health Care Administration, 30 Fla. L. Weekly 1717 (Fla. 1st DCA, July 20, 2005)

The Agency for Health Care Administration (AHCA) conducted a survey at Menorah Manor to determine whether the facility was in compliance with federal requirements related to Medicare and Medicaid programs. Subsequently, AHCA issued a deficiency report on Form 2567 finding that the facility was not in compliance with certain food preparation requirements. Issuance of this report resulted in Menorah Manor being required to post the listed deficiencies in a prominent location at the facility and in AHCA providing the information to other entities. Menorah Manor filed a petition for a formal proceeding alleging that its substantial interests had been affected as the issuance of the report would result in diminished respect for the facility among members of the public, reduced resident admissions, and greater difficulty in retaining qualified staff.

AHCA dismissed the petition on the grounds that it did not affect Menorah Manor's substantial interests, did not result in the imposition of any penalties and did not constitute a charging document. AHCA concluded that a Form 2567 could not, under any circumstances, give rise to the right to an administrative hearing.

On appeal, the court rejected AHCA's blanket position that a hearing would never be justified. It held that issuance of the form was a final action of the agency, and the facility should not be required to refuse to comply with the form (resulting in the issuance of a formal administrative complaint) before being given the opportunity to challenge the factual findings of the agency. In addition, the court concluded that AHCA's interpretation of Section 120.57, Fla. Stat., to require Menorah Manor to establish a legal right to prepare food in a specific manner was too restrictive.

However, the court agreed that an injury to an entity's reputation alone is not sufficient to satisfy the injury in fact prong of the standing test set forth in *Ybor II, Ltd. v. Florida Housing Finance Corp.*, 843 So. 2d 344 (Fla. 1st DCA 2003).

Gopman v. Department of Education, 30 Fla. L. Weekly 1777 (Fla. 1st DCA, July 25, 2005)

Daniel Gopman, a student, was denied a Bright Futures Scholarship by the Department of Education (DOE) on the grounds that he did not have two credit hours in the same foreign language. Pursuant to Section 1009.42, Fla. Stat., DOE had established an appeals committee (consisting of one DOE employee, two practicing financial aid administrators, and one student) to hear appeals of such actions. Gopman appealed to the committee, and it issued a final order of denial.

Gopman then filed a petition for a formal administrative hearing under Section 120.57 and a request for a declaratory statement under Section 120.565. The petition for hearing alleged that DOE had failed to properly apply its non-rule policy regarding the eligibility requirements for a Bright Futures Scholarship. The declaratory statement requested that DOE identify any rules or policies that specified foreign language credits as a prerequisite for scholarship funds.

DOE dismissed the petition for hearing on the grounds that Gopman was not entitled to a Section 120.57 hearing. It based its decision on Section 1009.42(1) which stated *inter alia* that "[t]he decision rendered by the [appeals] committee constitutes final agency action." DOE also denied the request for a declaratory statement on the grounds that it was mooted by the appeals committee's denial of eligibility.

The appellate court reversed and remanded for a formal administrative hearing. The court held that DOE had misunderstood the meaning of the term final agency action under the Administrative Procedure Act. Judge Benton noted that the preliminary procedures utilized by DOE, similar to "free form" procedures utilized by many agencies without a specific statutory basis, do not extinguish the right to an administrative hearing. Characterization of an agency action as final prior to the expiration of the time for requesting an administrative hearing does not eliminate the right to a hearing. On appeal, DOE admitted that there was no specific applicable exemption from the APA under Section 120.81, Fla. Stat. Without a specific exemption in Chapter 120 or another statute, provisions such as Section 1009.42 are to be read *in pari materia* with Chapter 120.

The court also held that the denial of a Section 120.57 hearing did not moot the request for a declaratory statement. However, because the court remanded the matter to DOE with directions to hold a formal evidentiary hearing, the court concluded that a declaratory statement was not appropriate as the issues would be litigated in the administrative proceeding.

Menke v. Broward County School Board, 30 Fla. L. Weekly 2311 (Fla. 4th DCA 2005)

Menke, a licensed teacher, was suspended from his teaching position on the grounds that he had engaged in misconduct. Certain of the allegations pertained to alleged electronic mail communications between Menke and students. The complaint was forwarded to the Division of Administrative Hearings, and the School Board served a request on Menke for inspection of all of his household computer hard drives.

The administrative law judge issued an order granting the School

continued...

CASE NOTES
from page 3

Board's expert access to the hard drives to determine whether they contained the categories of information sought to be discovered. The order provided that Menke could have his own expert there during the inspection, that Menke's expert could identify documents he or she believed to be privileged, and that the School Board's expert could not retain, provide, or discuss any communications which were deemed to be privileged. Any communications of information determined by Menke's expert to be privileged would be so marked and provided to the administrative law judge for *in camera* review.

Menke appealed the non-final order allowing discovery. He argued that discovery of the entire contents of his computer hard drives could violate his Fifth Amendment right against self-incrimination and his right to privacy.

The court reversed and remanded. It agreed with Menke that the wholesale disclosure of information on his computer hard drive to a representative of the School Board violated his right to privacy and protection against self-incrimination. The court cited Fla. R. Civ. P. 1.280(b)(1) which provides for discovery of any matter that is "not privileged, that is relevant to the subject matter of the pending proceeding…."

The court found only one other Florida appellate decision addressing the discovery of electronic information, *Strasser v. Yalamanchi*, 669 So. 2d 1142 (Fla. 4th DCA 1996), in which the court held discovery of electronic information was appropriate but only in limited and strictly controlled circumstances. That case, and all of the other cases across the country found by the court, involved a situation where it was alleged that information had been deleted or purged from the computer. Noting that the School Board did not appear to have sought discovery of relevant information in a more limited way (including, but not limited to, allowing Menke's expert to search the computer or requesting hard copies of relevant documents), the court held that the order allowing access to Menke's computer violated his right under Fla. R. Civ. P. 1.280(b)(5) to assert a privilege.

Appeals

Ames v. District Board of Trustees, Lake City Community College, 30 Fla. L. Weekly 1922 (Fla. 1st DCA, August 11, 2005)

Ames appealed an order of the Board of Trustees holding, alternatively, that he had resigned his position as an instructor or that he was terminated by the Board for physical inability to perform his duties. Initially, the college president advised Ames that he was to be terminated in May 2002. Ames filed a petition for hearing asserting that the college had failed to follow the procedures of Rule 6A-14.0411, F.A.C., which required seven days notice to an employee before written notice is given to the Board of a recommendation of dismissal. In a prior final order, the college rejected the petition for hearing, and Ames appealed. On appeal, the court remanded with a mandate that Ames be provided a hearing in which the Board must provide evidence that Ames either resigned or was properly terminated. Subsequent to the administrative hearing, the Board entered the final order appealed in this case.

On appeal, Ames argued that there was no competent substantial evidence to support the Board's finding that he had resigned. He further argued that the holding that his termination was appropriate should be rejected solely because the Board failed to follow the procedural requirements of Rule 6A-14.0411. However, he did not argue that the finding regarding his physical inability to fulfill the duties of position was incorrect.

The court affirmed. It agreed with Ames that there was no competent substantial evidence to support the finding that he had resigned. The court held, however, that the failure to comply with the notice requirements of Rule 6A-14.0411 was essentially harmless error as Ames had been afforded an evidentiary hearing. Accordingly, it was not deemed to be a "material error in procedure or a failure to follow prescribed procedure" under Section 120.68(7)(c), Fla. Stat. In addition, the court noted that the Board had complied with its mandate in the prior appeal by holding a hearing to determine whether Ames' termination was appropriate.

Licensing

Trevisani v. Department of Health, 30 Fla. L. Weekly 1719 (Fla. 1st DCA, July 20, 2005)

The Department of Health issued an administrative complaint alleging that Trevisani, a physician, failed to practice medicine with the requisite level of skill and care and failed to document or create certain medical records as required by Section 458.331 (l), Fla. Stat. The administrative law judge concluded that there were inadequate facts to establish either count of the complaint, accept-

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

ing Trevisani's testimony that he had created the disputed documents, and dismissed the charges. Upon filing exceptions with respect to the second count, the Board of Medicine entered a final order finding Trevisani to be in violation of Section 458.331(1)(m). The Board concluded that the administrative complaint had not only charged Trevisani with failure to create records, but also with failure to retain such records.

The court reversed. It held that the complaint had not contained sufficient facts alleging a failure to retain necessary documents. Instead, it simply referenced the statutory provision. The court noted, in addition, that Trevisani was no longer employed at the medical center and, therefore, didn't have possession of any documents.

Judge Ervin dissented. He opined that the administrative law judge had simply interpreted the complaint to involve a situation where the respondent had failed to create certain documents and thus, had none to retain. Judge Ervin concluded that the Board was free to interpret the complaint in a different manner.

Tuten v. Department of Environmental Protection, 30 Fla. L. Weekly 1730 (Fla. 4th DCA, July 20, 2005)

Tuten appealed the issuance of a default permit by the Department of Environmental Protection containing general and special conditions. In 2002, the court had mandated the issuance of the default permit in *Tuten v. Department of Environmental Protection*, 819 So. 2d 187 (Fla. 4th DCA 2002). When the Department had not issued a permit within the subsequent two years, Tuten filed a Motion to Show Cause with the appellate court. The Department issued the default permit 11 days later without action by the court. The default permit contained a notice of rights stating that Tuten could file a request for an administrative hearing if he was not satisfied with the permit conditions.

Tuten did not file a petition for hearing, but, instead, appealed the permit to the District Court. The court reversed and remanded. It noted that its order in the 2002 opinion had directed the Department to hold an evidentiary hearing on permit conditions before issuing the default permit. No such hearing was ever held. Accordingly, the court directed the Department, on remand, to hold an evidentiary hearing.

Attorney's Fees

Shimkus v. Department of Business and Professional Regulation, 30 Fla. L. Weekly 1740 (Fla. 4th DCA, July 20, 2005)

Shimkus, a contractor, requested an administrative hearing on a complaint filed by the agency alleging he violated certain provisions of Chapter 489, Fla. Stat. The administrative law judge issued a final order concluding that Shimkus was not in violation, but finding that there were special circumstances that would make an award of attorney's fees to Shimkus under Section 57.111, Fla. Stat., unjust. The recommended order stated that the denial of attorney's fees was "a final order."

Shimkus appealed the denial of attorney's fees, and the court accepted jurisdiction. Subsequently, the Construction Industry Licensing Board entered a final order rejecting the recommended order and imposing sanctions on Shimkus. Shimkus appealed that final order.

The court, although it had initially accepted jurisdiction of the appeal of the recommended order, determined in this situation that the appeal should be dismissed as an appeal from a non-final order. It noted that Shimkus would not be the prevailing party if the Board's final order was upheld on appeal and that Shimkus could challenge the administrative law judge's conclusion with regard to special circumstances in the appeal of the Board's final order.

Board of Regents v. Winters, 30 Fla. L. Weekly 2134 (Fla. 2d DCA 2005)

Winters, a former women's basketball coach for the University of South Florida, had challenged her dismissal by the University. Initially, the grounds cited for dismissal were dishonesty on her part and retaliatory conduct. The appellate court reversed on the retaliatory conduct grounds, holding that the University had inappropriately rejected findings of fact in the recommended order. The case was remanded for a determination of whether the charges of dishonesty alone justified dismissal. The University subsequently issued a final order concluding that the dismissal was justified on the basis of Winters' dishonesty.

Winters, despite being ultimately unsuccessful in retaining her position, sought attorney's fees pursuant to Section 120.595(5), Fla. Stat. That provision provides for an award of attorney's fees for both the administrative proceeding and the appeal where the agency improperly rejects or modifies a finding of fact. The administrative law judge awarded full attorney's fees to Winters under that provision.

On appeal, the Board argued that Winters was not entitled to attorney's fees, or alternatively, that she was only entitled to fees to the extent her appeal was successful. Winters argued that Section 120.595(5) should be construed to operate in a punitive manner against the agency.

The court found that the award of fees should be governed by *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985), in that the award of fees should consider the result obtained. Since Winters was successful only in having one aspect of the final order reversed, the court remanded the case with directions to the administrative law judge to try to determine what amount of attorney's fees related to the successful claim by Winters or, at least, to reduce the fee award by a proportionate amount.

Statutory Construction

Mack v. Department of Financial Services, 30 Fla. L. Weekly 2366 (Fla. 1st DCA, October 6, 2005)

Mack appealed an order of the Department of Financial Services suspending her license to sell insurance for 12 months. She had been licensed by the Department to sell only automobile insurance. She had taken the licensing exam for a general lines license but failed the exam. The charges against her arose from her sale of a mobile home owner's insurance policy. Mack argued that her activities in that respect were permitted pursuant to Section 627.732(1)(c), Fla. Stat., which requires that any person applying for a general lines license complete at least one year "in responsible insur-

continued...

CASE NOTES
from page 5

ance duties" before receiving a license. No agency rule defines what responsible insurance duties entail. She further alleged that she was acting under the supervision of another licensed salesperson. The Department relied on Section 627.041(2), Fla. Stat., which prohibits unlicensed persons, without exception, from performing certain acts, including taking an insured's money or procuring an application for insurance. The Department construed the two provisions in *pari materia* in reaching its conclusion.

The court affirmed. It recognized the broad discretion that an agency has in interpreting its own statutes and rules. In addition, it noted that the two provisions were adopted simultaneously as part of the original insurance code and should be read together and harmonized.

Circuit Court Jurisdiction
Agency for Persons with Disabilities v. J.M., 30 Fla. L. Weekly 2161 (Fla. 3rd DCA 2005)

J.M., an autistic retarded juvenile, sought services under the Developmental Disabilities Medicaid Waiver Program. The Agency for Persons with Disabilities ("APD") found that J.M. was not in a crisis situation and put him on a waiting list for services. APD's rules provided that a qualified person applying for services after 1999 would receive services only after other persons higher on the list have received services. J.M. sought an administrative hearing to challenge that decision. The administrative law judge concluded that J.M. was not in crisis, and APD entered a final order to that effect. The final order was not appealed.

Subsequently, J.M. became a party to dependency proceedings in circuit court in Miami-Dade County. The judge found J.M. to be in need of emergency expedited services and ordered that he be moved to the crisis status for services. APD filed an emergency petition for a writ of prohibition to prevent the circuit court from directing it to provide crisis services.

On appeal, the court held that the statute had designated APD as the entity to determine the appropriateness of emergency services. It further held that the circuit court's order was essentially overruling the final order in the administrative proceeding where only an appellate court had such authority.

Dismissal
Knight v. Winn, 30 Fla. L. Weekly 2056 (Fla. 4th DCA 2005)

Knight appealed a final order terminating her employment as a teacher and suspending her teaching license. *Inter alia,* she argued that the administrative law judge erred in hearing her case. The Department of Education had voluntarily dismissed the initial complaint filed against Knight because the statutory provisions upon which it relied had been renumbered by the Legislature. At the time the complaint was dismissed, Knight had argued that the dismissal should be with prejudice. The complaint was subsequently refiled to correct the statutory citations.

On appeal, Knight argued that the judge had erred in hearing the second complaint. The court affirmed. Citing Rule 28-106.201(4), Fla. Admin. Code, it noted that dismissal of a petition shall "at least once" be without prejudice unless the petition, on its face, indicates that it has a defect that cannot be cured. In this case, the court found no such defect.

Disqualification of Judge
Lee Memorial Health System v. Agency for Health Care Administration, 30 Fla. L. Weekly 2093 (Fla. 1st DCA 2005)

Select Specialty Hospital challenged the denial of its application for a Certificate of Need ("CON"). Lee Memorial Health System intervened on behalf of the Agency for Health Care Administration supporting the denial. A final hearing was held; however, prior to the entry of a final order the administrative law judge ("ALJ") holding the hearing submitted his resignation to the Division of Administrative Hearings. As part of his resignation, he agreed to enter the recommended order in that case. The recommended order recommended issuance of the CON. Lee Memorial learned that the ALJ had been retained by another health care provider (not a party to the CON case) to provide lobbying services. It filed a motion for disqualification questioning the ALJ's impartiality. It alleged that the ALJ's client was the subject of a RICO suit filed by the Attorney General's Office in which Lee Memorial was a party aligned with the Attorney General. The former ALJ entered an order denying the motion for disqualification. In that order he made a number of statements disputing the factual basis alleged for disqualification and rejecting such allegations.

Lee Memorial filed an appeal of the order entered by the administrative law judge denying its motion for disqualification. Lee Memorial further requested that the court vacate the recommended order in the CON case and remand for entry of a new recommended order.

On appeal, the court reversed and remanded. It held that the ALJ should not have passed on the truth of the facts asserted in the motion or looked beyond the legal sufficiency of the pleading. Without discussion, the court also vacated the recommended order.

Mary F. Smallwood *is a partner with the firm of Ruden, McClosky, Smith, Schuster & Russell, P.A. in its Tallahassee office. She is Past Chair of the Administrative Law Section and a Past Chair of the Environmental and Land Use Law Section of The Florida Bar. She practices in the areas of environmental, land use, and administrative law. Comments and questions may be submitted to* Mary.Smallwood@Ruden.com.

Agency Snapshots

Department of Juvenile Justice

The Department of Juvenile Justice was created by the Legislature in 1994 when its responsibilities were transferred from the Department of Health and Rehabilitative Services. The Department is headed by the Secretary, a gubernatorial appointment subject to confirmation by the Senate.

Head of the Agency:
Anthony J. Schembri
Knight Building
2737 Centerview Drive
Tallahassee, FL 32399-3100
(850) 488-1850

Agency Clerk:
Maritza Donate
Knight Building
2737 Centerview Drive
Tallahassee, FL 32399-3100
(850) 488-1850

Hours of Operation:
8:00 a.m. to 5:00 p.m.

General Counsel:
Jennifer A. Parker
Knight Building
2737 Centerview Drive, Suite 312
Tallahassee, FL 32399-0999
(850) 921-4129
(850) 921-4159 (fax)
jennifer.parker@djj.state.fl.us

The Department was created to provide prevention and early intervention services for at-risk youth and minor offenders. The Department also works toward rehabilitation of more serious juvenile offenders. The Department offers services ranging from diversion programs for at-risk youths, all the way to residential programs for serious juvenile offenders.

The Department's General Counsel is Jennifer Parker, a 1988 graduate in business from the University of Florida, and a 1991 graduate of the University of Florida College of Law. Jennifer has been with the Department since it was a part of HRS.

Number of Lawyers on Staff: 18

Kinds of Cases:
The Department's administrative cases are usually bid protests. More generally, the Department's lawyers appear in circuit court cases whenever the Department of Juvenile Justice is summoned, and serve as counsel of record in children-in-need-of-services cases pursuant to Chapter 984, Florida Statutes. In this last category of cases, courts are called upon to determine whether juveniles are habitually truant or persistent runaways and whether they may benefit from court-ordered counseling or shelters.

APA Interaction:
The Department's Chapter 120 interaction primarily involves bid protests. The Department is 87% privatized, requiring it to procure and administer a large number of contracts. The Department, which has a complement of more than 5,000 employees, also becomes involved in employment disputes with PERC.

Practice Tips:
As most administrative interaction will involve bid protests, the Department advises that practitioners play close attention to the deadlines and bond requirements found in Chapters 120 and 287, Florida Statutes.

Florida Public Service Commission

The Florida Public Service Commission was created by the Legislature, and is headed by five Commissioners, nominated by the Joint Committee on Public Service Commission Oversight, appointed by the Governor, and confirmed by the Senate.

Head of the Agency:[1]
Commissioner J. Terry Deason
Commissioner Lisa Polak Edgar
Commissioner Isilio Arriaga – Effective November 1, 2005
Commissioner Matthew M. Carter, II – Effective January 3, 2006
Commissioner Katrina J. Tew – Effective January 3, 2006
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Mary Andrews Bane
Executive Director
(850) 413-6066

Agency Clerk:
Blanca Bayo, Director
Division of Commission Clerk and Administrative Services
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
(850) 413-6726

General Counsel:
Richard D. Melson
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
(850) 413-7286

Richard D. Melson is General Counsel to the Florida Public Service Commission. Prior to joining the Commission in October 2003, he was a shareholder at Hopping Green & Sams. While in private practice, he represented telecommunications, electric, gas, water, and wastewater clients before the Commission for over 20 years. Mr. Melson graduated from the University of Florida, 1968; and received his J.D. with high honors from the University of Michigan Law School, 1975. Mr. Melson is a member of The Florida Bar and is

continued...

AGENCY SNAPSHOTS
from page 7

admitted to practice before the Northern District of Florida.

The Office of the General Counsel provides legal counsel to the Commission on all matters under the Commission's jurisdiction. The Office also supervises the procedural and legal aspects of all cases before the Commission.

The Office of General Counsel's Appeals, Rules and Mediation Section is responsible for defending Commission orders on appeal, for defending the Commission rules challenged before the Division of Administrative Hearings, and for representing the Commission before state and federal courts. The Section supports technical divisions in making filings with, or presentations to, other federal, state, or local agencies. The Section advises in the promulgation of rules, and attends or conducts rulemaking hearings at the direction of the Commission. This Section also reviews procurement contracts and provides counsel to the Commission on personnel, contractual, public records, and other administrative legal matters. It also offers mediation services to parties to Commission proceedings.

In cases involving evidentiary hearings before the Commission or an Administrative Law Judge, the Economic Regulation Section (for the electric, natural gas, water, and wastewater industries) and the Competitive Markets and Enforcement Section (for the telecommunications industry) are responsible for conducting discovery, presenting staff positions, presenting any staff testimony, and cross-examining other parties' witnesses. In conjunction with the appropriate technical staff, this Office prepares recommendations to the Commission and prepares written orders memorializing Commission decisions.

Number of Lawyers on Staff: 23

Kinds of Cases:
Utility Regulation, Telecommunications Arbitration

APA Interaction:
FPSC is subject to the Administrative Procedure Act and is generally subject to the Uniform Rules of Procedure. However, the FPSC has a number of specific exemptions from the Uniform Rules, so a practitioner must be sure to consult Chapters 25-22 and 25-40, Florida Administrative Code. In addition, the FPSC has several agency-specific procedural provisions in Section 120.80(12), Florida Statutes. While the FPSC has the authority to send cases to the Division of Administrative Hearings for hearings before an Administrative Law Judge, the vast majority of Chapter 120 proceedings are heard by the five-member Commission or by a panel of two or more Commissioners.

Practice Tips:
The FPSC accepts electronic filings for most (but not all) documents as described on the "e-filings" link on the Commission's web site, www.psc.state.fl.us. Copies of all docketed filings are available on that site, whether they were originally filed electronically or in paper form.

Some unique procedural practices include: (1) the use of pre-filed written testimony in cases heard by the Commission or a Commission panel; (2) rules for the classification and handling of confidential materials; and (3) the availability of motions for reconsideration of final Commission orders. Questions about these or any other procedural matters can be directed to any member of the General Counsel's office.

The FPSC is also unique in that appeals from final orders in cases involving the rates or service of electric, gas, or telephone companies are heard in the Florida Supreme Court. In addition, under the Federal Telecommunications Act of 1996, review of some FPSC decisions implementing federal law are reviewable by complaint in the U.S. District Court for the Northern District of Florida.

Footnotes:
[1] Terms of current Chairman Braulio Baez and Commissioner Rudolph "Rudy" Bradley will expire January 2, 2006. On Tuesday, November 29, 2005, Commissioner Rudy Bradley was elected to serve as chairman for the remainder of 2005, completing the chairmanship of Commissioner Baez who is stepping down as chairman effective December 2, 2005. Commissioner Lisa Polak Edgar was elected to serve as chairman for a two-year term beginning January 3, 2006.

Minutes
Administrative Law Section Executive Council Meeting
September 7, 2005

Approved by Executive Council, 10-14-05.

I. CALL TO ORDER: Executive Council Chair Debby Kearney called the meeting to order at approximately 12:00 p.m.

Present: Seann Frazier, Rick Ellis, Debby Kearney, Andy Bertron, Dave Watkins, Li Nelson, Bill Williams, Donna Blanton, Elizabeth McArthur, Charlie Stampelos, Mary Ellen Clark, Linda Rigot, Bobby Downie, Chris Moore, Clark Jennings, Allen Grossman, Booter Imhof, Cathy Sellers, Cathy Lannon and Jackie Werndli.

Absent: Cindy Miller (excused).

II. NEW BUSINESS

Certification: Elizabeth McArthur stated as a preface to making a motion, to explain her reasons for the motion, that the current certification proposal doesn't fairly measure expertise in state and federal administrative practice, and that there is something wrong with a certification proposal in state and federal government and administrative practice where lawyers can qualify with no experience or expertise in administrative practice. Elizabeth McArthur moved that the Administrative Law Section Executive Council oppose the joint certification program proposal in "State and Federal Government and Administrative Practice," that the name of the certification program be changed to "State and Federal Governmental Practice," and if the name change is made, that the Administrative Law Section Executive Council support the Government Lawyers Section in that section's effort to pursue its own certification program in State and Federal Governmental Practice. Allen Grossman asked for an explanation of how the Council got here with regard to addressing certification at this time. Bobby Downie summarized the process followed by the Council in editing the Government Lawyers Section's draft certification proposal and expressed concern that revisiting certification at this point would set a bad precedent. He suggested that the Council compare the April 18 and June 7 draft proposals. Mary Ellen Clark sought and obtained clarification that the Council was being asked to oppose the current draft (whether the June 7 or a later draft) rather than the concept of certification. After further discussion, the previous question was moved by Donna Blanton and the motion passed by a vote of 10 to 8.

Long Range Planning Retreat: Allen Grossman requested that the retreat be rescheduled to avoid conflict with the Jewish high holy days. All agreed and Booter Imhof was given direction to look for alternative dates and a location closer to Tallahassee.

ADJOURNED at approximately 1:40 p.m.

Minutes
Administrative Law Section Executive Council Meeting
October 14, 2005
Tallahassee, Florida

Draft: not yet reviewed or approved by Executive Council.

I. CALL TO ORDER: Executive Council Chair Debby Kearney called the meeting to order at approximately 3:30 p.m.

Present: Seann Frazier, Rick Ellis, Debby Kearney, Andy Bertron, Dave Watkins, Bill Williams, Donna Blanton, Elizabeth McArthur, Charlie Stampelos, Mary Ellen Clark, Linda Rigot, Chris Moore, Clark Jennings, Allen Grossman, Cindy Miller, Larry Sellers and Jackie Werndli.

Absent: Cathy Lannon, Li Nelson, Cathy Sellers (all excused), and Booter Imhof (not excused).

II. PRELIMINARY MATTERS

A. Minutes - June 24, 2005

The minutes to the June 24, 2005 Executive Council Meeting were approved.

B. Minutes - September 7, 2005

Mary Ellen Clark and Elizabeth McArthur requested corrections to the minutes for the September 7, 2005, Executive Council Meeting. Seann Frazier moved to correct the September 7 minutes as proposed by Mary Ellen and Elizabeth, and to approve the minutes as corrected. The motion was seconded and approved.

C. Treasurer's Report

Chris Moore reported on the

continued...

MINUTES
from page 9

Section's finances.

D. Chair's Report

Debby Kearney reported on a meeting hosted by the President of The Florida Bar to discuss section issues. Debby noted that most of the Administrative Law Section's committees have Chairs but no members. Discussion ensued in which it was agreed that certain committees, such as the CLE and Webpage committees, could use additional members, and that council members should try to identify section members who might be interested in joining committees and participating in these section activities. Seann Frazier and Larry Sellers volunteered to assist with CLEs.

III. COMMITTEE/LIASON REPORTS

A. Continuing Legal Education

Charlie Stampelos reported that the Appellate Practice Section is planning a CLE on April 7, 2006, on appeals from administrative proceedings. It was agreed that the Administrative Law Section will cosponsor the CLE. Cindy Miller reported that the Public Utility Law Seminar is tentatively scheduled for January 27, 2006, at the Public Service Commission in Tallahassee. Jackie Werndli advised that she will not be available on January 27, and agreed to work with Cindy Miller on alternative dates.

B. Publications

Elizabeth McArthur requested contributions for newsletter articles. Elizabeth stated that Charlie Stampelos has written an article on proposed recommended orders that will be published in the December issue of the newsletter. Mary Ellen Clark asked for volunteers to compile new agency snapshots. Several members volunteered, including Cindy Miller (Public Service Commission), Seann Frazier (Department of Juvenile Justice), and Andy Bertron (Department of Revenue).

C. Legislative

Bill Williams reported that Senator Bennett has filed Senate Bill 262 for the 2006 session as a placeholder bill for amending the Administrative Procedure Act. The text of the bill is the same as the 2005 bill vetoed by Governor Bush. The House of Representatives appears to be headed in the direction of an APA committee bill. Bill Williams also reported that some members of the House are considering potential legislation that would provide the Legislature with more oversight of agency rulemaking. Linda Rigot reported that the Senate is considering creation of a land use appeals board and a mediation process for administrative matters.

E. Membership

Charlie Stampelos reported that the section currently has 1,171 members.

F. Webpage

Jackie Werndli reported that she often sends items to the webmaster that do not get published on the webpage. Elizabeth McArthur noted several website pages were out of date, and others were incomplete, such as a page for Agency Snapshots that only had the first two snapshots published several years ago. The rest of the already published snapshots need to be added to this page so that they can be accessed directly rather than having to search through past issues of the newsletter.

G. Uniform Rules of Procedure

Chris Moore reported that the Governor's Office is still interested in comments from the Administrative Law Section regarding proposed amendments to the Uniform Rules of Procedure. After discussion it was agreed that Chris would re-convene the Uniform Rules of Procedure Committee.

H. Long Range Planning Retreat

The long range planning retreat is scheduled for January 5 and 6, 2006, at Wakulla Springs Lodge. Dave Watkins volunteered to assist Booter Imhof with the retreat.

I. Board of Governors Liaison

Larry Sellers reported that the Board of Governors is seeking input and recommendations for openings on Judicial Nominating Commissions.

J. Law School Liaison

Charlie Stampelos proposed that the section do away with the writing contest due to low participation by

DOAH Announcement

The Division of Administrative Hearings is pleased to announce that, effective Monday, October 17, 2005, in addition to electronic filing, registered Florida attorneys are able to view their active caseload as well as request and receive subpoenas on line. They may also view their dockets, edit and modify their official profile information, view current case statuses, verify status due dates, and transfer to the DOAH Internet Homepage.

Soon DOAH will be accepting electronic filing registrations of pro se litigants and, in the near future, Orders and Notices issued by the Judges will be electronically served upon its registered users, if all parties to a case are registered.

If you are not already registered for Electronic Filing at the Division of Administrative Hearings, now is a good time to do so. Just visit our website at *www.doah.state.fl.us* for instructions. If you have any questions, contact Susan Brown at (850) 488-9675.

students. Charlie proposed a new effort by Executive Council members to meet with and make presentations to law school administrative law classes. Cathy Sellers has already prepared a program for presentations at law schools. Cathy Sellers, Donna Blanton, Charlie Stampelos and Rick Ellis will meet to discuss implementation of the program. Jackie Werndli is currently working on the Section budget. It was agreed to reallocate money from the writing contest to the law school liaison program.

L. Council of Sections

Clark Jennings reported that the Council of Sections has discussed a proposal for a new section of The Florida Bar called the "Certified Lawyers Section." Membership would be open to any member of the Bar who has been certified in a practice area. A motion was made to oppose the creation of the Certified Lawyers Section, seconded and passed unanimously.

IV. OLD BUSINESS

A. State and Federal Governmental and Administrative Practice Certification

Debby Kearney reported that upon request, she appeared before the BLSE and she gave her personal observations regarding the Administrative Law Section Executive Council's position on the Government Lawyers Section's proposed certification program in State and Federal Governmental and Administrative Practice. The BLSE voted to approve the Governmental Law Section's proposal. The Chair also wrote a memorandum to the Board of Governors' Program Evaluation Committee regarding what she understood to be the reasons why members voted against the certification proposal. Allen Grossman asked Debby to clarify that her memorandum was not submitted on behalf of the full Executive Council by a statement of disclaimer to the Program Evaluation Committee. The certification proposal is scheduled for consideration by the Program Evaluation Committee on October 20, 2005. Larry Sellers stated that if the Program Evaluation Committee approves the proposal, it could go to the Board of Governors in December. If the Board of Governors approves, the proposal goes next to the Florida Supreme Court for final consideration. Both the Board of Governors and the Florida Supreme Court will solicit comments on the proposal.

V. NEW BUSINESS:

Linda Rigot reported that DOAH's e-filing system is up and running with 830 registered attorneys to date. Starting October 17, parties can request subpoenas and check due dates electronically.

ADJOURNED at approximately 5:00 p.m.

Respectfully submitted,

Andy Bertron, Secretary

Public Utilities Law Committee Report

by Cindy Miller, Chair

The PULC is sponsoring a seminar titled "Practice Before the Florida Public Service Commission." The seminar will be held January 27, 2006, from 9:00 am to 1:00 pm, in Room l66 of the Easley Building at 2540 Shumard Oak Blvd., near Southwood. The seminar promises an all-star list of officials. Commissioner Lisa Edgar will welcome the participants. There will be a timely topic on Settlements in Rate Cases, with Harold McLean, the Public Counsel, and Chris Kise, the Solicitor General. Then, a dazzling panel will discuss the Energy Policy Act and what practitioners need to know. Finally, attorneys can hear something special when the PSC General Counsel gives his personal insights on a "View from Inside and Outside the Public Service Commission."

Registration information is available at *www.flaadminlaw.org*.

***Cindy Miller** is the new chair of the Public Utilities Law Committee. She has practiced public utility law for 18 years, and is a senior attorney at the Florida Public Service Commission.*

Moving?
Need to update your address?

The Florida Bar's website (www.FLORIDABAR.org) now offers members the ability to update their address by using a form that goes directly to Membership Records. This process is not yet interactive (the information is not updated automatically), but addresses are processed timely. The address form can be found on the website under "Member Services," then "Member Profile."

The Florida Bar Administrative Law Section Public Utilities Law Committee presents

Practice Before the Florida Public Service Commission

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

One Location: January 27, 2006
Florida Public Service Commission
Room #166 • 2540 Shumard Oak Blvd., Tallahassee, FL 32399

Course No. 8803 5

8:40 a.m. – 9:00 a.m.
Late Registration

9:00 a.m. – 9:10 a.m.
Welcome and Opening Remarks
Cindy Miller, Chair, Public Utilities Law Committee
Lisa Polak Edgar, Commissioner, Florida Public Service Commission

9:10 a.m. – 10:05 a.m.
Settlements in Rate Cases
Christopher M. Kise, Solicitor General, Office of the Attorney General
Harold A. McLean, Public Counsel
Bill Walker, Florida Power & Light

10:05 a.m. – 11:00 a.m.
Energy Policy Act of 2005 – What it Means to Practitioners in Florida
Barry Moline, Florida Municipal Electric Association
Kelly A. Daly, Stinson Morrison Hecker LLP

11:00 a.m. – 11:10 a.m.
Break

11:10 a.m. – 11:55 a.m.
A Perspective from Inside and Outside the FPSC
Richard D. Melson, General Counsel, Florida Public Service Commission

11:55 a.m. – 12:05 p.m.
Questions & Answers

ADMINISTRATIVE LAW SECTION

Deborah K. Kearney, Tallahassee — Chair
Patrick L. "Booter" Imhof, Tallahassee — Chair-elect
J. Andrew Bertron, Jr., Tallahassee — CLE Chair

FACULTY & STEERING COMMITTEE

Cindy Miller, Tallahassee — Program Chair
Kelly A. Daly, Washington, DC
Lisa Polak Edgar, Tallahassee
Christopher M. Kise, Tallahassee
Harold A. McLean, Tallahassee
Richard D. Melson, Tallahassee
Barry Moline, Tallahassee
Bill Walker, Tallahassee

CLE CREDITS

CLER PROGRAM
(Max. Credit: 9.0 hours)

General: 9.0 hours
Ethics: 1.0 hour

CERTIFICATION PROGRAM
(Max. Credit: 2.0 hours)

City, County & Local Goverrnment: 2.0 hours

Seminar credit may be applied to satisfy both CLER and Board Certification requirements in the amounts specified above, not to exceed the maximum credit. Refer to Chapter 6, Rules Regulating The Florida Bar, for more information about the CLER and Certification Requirements.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar News) you will be sent a Reporting Affidavit or a Notice of Compliance. The Reporting Affidavit must be returned by your CLER reporting date. The Notice of Compliance confirms your completion of the requirement according to Bar records and therefore does not need to be returned. You are encouraged to maintain records of your CLE hours.

How to register:	MAIL: Completed form w/check.	FAX: 850/561-5825 Form with credit card information.

REFUND POLICY: Requests for refund or credit toward the purchase of the course book **must be in writing and postmarked** no later than two business days following the course presentation. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid. A $25 service fee applies to refund requests.

Register me for the "Practice Before the Florida Public Service Commission" Seminar

ONE LOCATION: FLORIDA PUBLIC SERVICE COMMISSION, TALLAHASSEE (JANUARY 27, 2006)

TO REGISTER OR ORDER COURSE BOOK, BY MAIL, SEND THIS FORM TO: The Florida Bar, Jackie Werndli, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5623.

Name _____ Florida Bar # _____

Address _____

City/State/Zip _____ Phone # _____

JMW: Course No. 8803 5
(AL005)

REGISTRATION FEE (CHECK ONE):

- ❑ Member of the Administrative Law Section: $35
- ❑ Non-section member: $60 (includes section membership/AL)

METHOD OF PAYMENT (CHECK ONE):

- ❑ Check enclosed made payable to The Florida Bar
- ❑ Credit Card (Advance registration only. Fax to 850/561-5825.) ☐ MASTERCARD ☐ VISA

Signature: _____ Exp. Date: _____/_____ (MO./YR.)

Name on Card: _____ Card No. _____

❑ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

COURSE BOOK — PUBLICATIONS

TO ORDER COURSE BOOKS, fill out the order form above, including a street address for delivery. **Please add sales tax to the price of books.**

_____ COURSE BOOK ONLY: Cost $35 plus tax (AL002) TOTAL $ _____

Related Florida Bar Publications can be found at http://bookstore.lexis.com/bookstore/catalog. Click on "Jurisdictions," then "Florida" for titles.

Certification/CLER credit is not awarded for the purchase of the course book only.

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

Recyclable

PROPOSED
from page 1

The preparation of a PRO or proposed final order (PFO) is an art form; not a science.[1] It requires advocacy within the bounds of ethical constraints; imagination; faithful adherence to the "record," see endnote 3, infra; and hard work. Now to the details.

Procedural Requirements for a PRO

By statute and rule, each party has the opportunity to submit proposed recommended (or final) orders, which contain findings of fact, conclusions of law, and a recommendation.[2] Unless otherwise authorized by the presiding officer, proposed orders shall be limited to 40 pages. Memoranda on the issues may also be submitted, if requested by the parties or the ALJ.

The PROs should contain appearances; a statement of the issues; a brief preliminary statement, which sets forth the procedural history of the case; findings of fact referring only to evidence adduced during the hearing, including matters officially recognized, with citations to the record (transcript if available);[3] conclusions of law with citations to applicable statutes, rules, and administrative and appellate cases and legal discussion; and an ultimate recommendation.

The ALJ is required to file a recommended order[4] with the agency, which sets forth appearances, a statement of the issues, findings of fact, conclusions of law, and a recommendation for final agency action, within 30 days, unless otherwise provided by law,[5] after the final hearing or receipt of the hearing transcript, whichever is later. This means that the PROs must be filed within ten days after the final hearing or receipt of the transcript, whichever is later. If the parties agree to extend the time for submission of the PROs to more than ten days, the parties waive the 30-day requirement for the submission of the recommended order, although the ALJ will normally file the recommended order within 30 days after receiving the PROs.[6]

Practice Tips

The order of pre-hearing instructions usually requires the parties to consider narrowing the disputed issues of fact and law. Facts and legal issues are often stipulated. During the hearing, the parties further refine, through the evidence that is admitted, the disputed issues of fact and law.

Before, during, or after the hearing, consider discussing with your adversary the notion of agreeing to an outline in which to present the PROs. You may agree that certain facts (and legal issues) are no longer in dispute. This may lead to an agreement as to specific findings of fact (and perhaps conclusions of law) that may appear in the PROs, leaving any remaining specific factual and legal disputes for resolution by the ALJ. Allied parties should consider using this approach and filing joint PROs.

These approaches will focus the party's (and the ALJ's) attention on the key issues that must be resolved by the ALJ and in some logical and coherent order.

The Division of Administrative Hearings posts all of the pleadings filed in a case on its web site: www.doah.state.fl.us. This includes proposed recommended orders and all recommended and final orders (FOs) issued by DOAH ALJs. (You can do a subject matter search of the DOAH website and locate similar cases (most of the time).) While requested, some agencies do not send their FOs to DOAH.

All DOAH recommended and final orders use the Courier New 12-point font. Check the web site for the formatting of orders. For example, you will find that the text of these orders is double-spaced, except for endnotes and quoted material that are single-spaced. You may provide the ALJ with a virus-free disc containing the PRO. File a hard copy also.

Pages are numbered consecutively as are the paragraphs in the "findings of fact" and "conclusions of law" sections. Underline cases and explanatory notes, such as see, but see. See The Harvard Law Review Association, The Bluebook: Uniform System of Citation (17th ed.)(The Bluebook); Fla. R. App. P. 9.800(n). Also, you may underline a word or phrase for emphasis only. Do not use too much emphasis or it loses its significance and distracts the reader. Do not use boldface or italics, except when the text of a quote is in bold or italics, and if so, state (emphasis in original) at the end of the quote.

Reviewing prior ALJ orders should be helpful in that it should give you some insight into how, and the manner in which, ALJs, in general, and perhaps the ALJ in your case, may have resolved other cases.

Each PRO will contain a "statement of the issue(s)" which follows the "appearances" section.

The "preliminary statement" follows. This should include a brief chronological statement of the procedural history of the case, beginning with the date on which the petition was filed and where. Depending on the complexity of the case, it may include the nature of any significant pre-hearing motions and dispositions; the nature and scope of any pre-hearing stipulation which was filed; the names and titles or expertise of witnesses of each party; identification, by number or letter as the case may be, of each party's exhibits admitted into evidence; the number of final hearing transcript volumes filed and when; and the date when any PROs were filed.

The "findings of fact" follow, beginning with paragraph numbered 1, followed by consecutively numbered paragraphs that continue until the "conclusions of law" are completed.

The "findings of fact" section should be supported by reference(s) only to the record, see endnote 3, developed during the final hearing, i.e., refer to a party's exhibit by number or letter and a transcript page, if the transcript is filed with DOAH.

Each numbered paragraph should contain proposed findings of fact consisting of a single thought. Use active voice; not passive voice.

Subheadings should be used where appropriate, such as: Parties; Standing; The Application.

Make findings, including ultimate findings of fact, not argument. Frequently, PROs present a one-sided view of the case. This is not helpful. A balanced PRO is preferred, especially in complex cases. Tell the ALJ (through findings of fact) why your

case is more credible than the opposition.

Extensive quoting from witness testimony or documents are not findings and not helpful unless you are comparing testimony in order to expose strengths or weaknesses in order to reach an appropriate finding of fact or ultimate finding of fact. Likewise, reciting a summary of the testimony of your witnesses as your findings of fact is also not helpful.

In a he said she said case, it may be appropriate to state what each person said followed by appropriate findings of fact, e.g., what actually happened and which story is credible and accepted. The same process may be appropriate when discussing the testimony of experts.

Sometimes, the story can be told using a chronological format. This may be helpful, particularly in disciplinary cases.

In criteria-intensive (statutes and rules) cases, such as certificate of need and environmental permitting cases, make findings regarding each criterion and point out where findings may overlap.

In summary, tell your story in a logical, persuasive fashion, with meticulous adherence to the record, and in a manner that produces findings, not a summary of the evidence.

The next section is "conclusions of law." Subheadings may be useful such as: Jurisdiction; Parties; Burden of proof; Standard of proof; Relevant statutes and rules.

Explain the relevant case law (appellate and administrative cases).[7] Cite favorable authorities and distinguish others. If you are requesting a certain remedy, cite to a statute, rule, or case that provides for such a remedy. Do not leave it to the ALJ's imagination.

Consider providing the ALJ with a copy of cited statutes and rules, particularly if an older version of the statutes and rules are applicable. It may also be appropriate to ask the ALJ to take official recognition (made a part of the record) of these statutes and rules.

Make sure you have the correct cites. The ALJs now use the method of citation set forth in Florida Rule of Appellate Procedure 9.800. Please use this method of citation.

ALJs use Westlaw. The DOAH library is sparse and does not contain Florida Administrative Law Reports (FALR). If possible, cite to Westlaw, referring to the DOAH case number followed by the Westlaw cite (2004 WL 00000), as cited in The Bluebook. Not infrequently, agency final orders are not sent to DOAH and, accordingly, are not posted on the DOAH website. If you cite to a final order, consider filing a copy of the final order if it is not available on the DOAH website or in Westlaw.

Some agencies, such as the Department of Environmental Protection, post their final orders on their website. Also, the Administrative Law Section of The Florida Bar has a link to some agency final orders. See www.flaadminlaw.org/resources/orders.asp.

The ALJ expects you to recite the applicable case law, statutes, and rules. You are an advocate for your client. No one expects otherwise. You have an ethical duty to be candid toward the tribunal. See generally R. Regulating Fla. Bar 4-3. This includes disclosing "legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." R. Regulating Fla. Bar 4-3.3(a)(3).

There is a fine line between the presentation of argument and stating "conclusions of law" in this section of the PRO.

Conclusions of law apply the law to the facts set forth in the findings of fact. They are not findings of fact, although sometimes findings of fact and ultimate findings of fact are mislabeled as conclusions of law.[8]

The conclusions of law should be a straightforward recitation of existing and applicable law as applied to the findings of fact of your case, with appropriate commentary. What is appropriate is often in the eye of the beholder. But, commentary unsupported by the law and the facts is not helpful.

The next section is the "recommendation." This section should be succinctly stated, for example: Based upon the foregoing Findings of Fact and Conclusions of Law, it is recommended that the agency enter a final order concluding that the Petitioner, John Doe's, application to be licensed to practice medicine in the State of Florida be approved. More specificity may be needed given the facts of a particular case. In other words, tell the ALJ the specific relief you want.

The PRO should provide the usual signature block information for the ALJ and a "copies furnished" section.

The PRO should also set forth a "notice of right to submit exceptions." (The PFO will have a "notice of right to judicial review.")

The PRO should have a "certificate of service." In the alternative, you can file the PRO as described above and also file a notice of filing referencing the PRO.

Conclusion

The ALJs appreciate time and financial constraints. The time that can be expended in the preparation of a case is a function of available resources. This includes the preparation of the PRO.

The PRO is an important document in the case. It allows you to put your client's best foot forward within the bounds of legal ethics. So, do the best you can. It will help your client, the ALJ, and your professional standing.

Endnotes:

[1] The PRO and PFO are similar in form and are referred to herein collectively as PRO.

[2] § 120.57(1)(b), Fla. Stat.; Fla. Admin. Code R. 28-106.215.

[3] During the final hearing, all parties have the opportunity to respond, present evidence and argument on all issues involved, to conduct cross-examination and, under limited circumstances, submit rebuttal evidence. § 120.57(1)(b), Fla. Stat. The agency is required to "accurately and completely preserve all testimony in the proceeding, and, on the request of any party, it shall make a full or partial transcript available at no more than actual cost." § 120.57(1)(g), Fla. Stat. (emphasis added). Fla. Admin. Code R. 28-106.213-214. See § 120.57(1)(f)1.-9., Fla. Stat., for the scope of the record in the proceeding.

The parties, including the agency, are not required to have the testimony transcribed. This may be problematic if exceptions are filed regarding an ALJ's findings of fact, or recommendation of a penalty in a disciplinary or penal case, because, without a transcript, it is not possible to determine, for example, if there is competent substantial evidence to support the findings of fact, as required by Section 120.57(1)(l). For example, "[t]he agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the

continued...

findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." § 120.57(1)(l), Fla. Stat. The "official transcript" is part of the "entire record." § 120.57(1)(f)9., Fla. Stat. See Roberts v. Department of Corrections, 690 So. 2d 1383 (Fla. 1st DCA 1997); National Industries, Inc. v. Commission on Human Relations, 527 So. 2d 894 (Fla. 5th DCA 1988).

[4] § 120.57(1)(k), Fla. Stat.; Fla. Admin. Code R. 28-106.216(1).

[5] See, e.g., § 403.527(3)(a), Fla. Stat. (providing that the recommended order will be issued no later than 60 days after the transcripts of the transmission line site certification hearing and public hearings are filed).

[6] Fla. Admin. Code R. 28-106.216(2).

[7] See generally Nordheim v. Department of Environmental Protection, 719 So. 2d 1212, 1214 (Fla. 3d DCA 1998), rev. denied, 729 So. 2d 392 (Fla. 1999)(agency refusal to consider its prior decision is abuse of discretion); Gessler v. Department of Business and Professional Regulation, 627 So. 2d 501, 503-504 (Fla. 4th DCA 1993)(agency bound by its administrative orders pursuant to the doctrine of stare decisis), rev. dismissed, 634 So. 2d 624 (Fla. 1994). But see Mercedes Lighting and Electrical Supply, Inc. v. State, Department of General Services, 560 So. 2d 272, 278 (Fla. 1st DCA 1990)("The doctrine of stare decisis is primarily applicable only to judicial decisions and is not generally applicable to decisions of administrative bodies. See 13 Fla. Jur.2d, Courts and Judges, § 138 (1979). To permit a prior decision by another hearing officer in a bid dispute to be binding in a subsequent totally unrelated, and factually distinguishable, bid dispute would be contrary to both the spirit and purpose of chapter 120 proceedings.") In Mercedes, the main issue was whether a bid protest was filed for an improper purpose.

[8] See Pillsbury v. State, Department of Health and Rehabilitative Services, 744 So. 2d 1040, 1041-1042 (Fla. 2d DCA 1999) for a discussion of differences between findings of fact and conclusions of law.

Charles A. Stampelos *is an administrative law judge with the Division of Administrative Hearings in Tallahassee. He is a member of The Florida Bar and is also admitted to practice in the District of Columbia and Virginia. He received his J.D. in 1976 from the College of William and Mary. The comments reflected herein do not necessarily reflect the position of DOAH.*

THE FLORIDA BAR

The Florida Bar
651 E. Jefferson St.
Tallahassee, FL 32399-2300

PRSRT-STD
U.S. POSTAGE
PAID
TALLAHASSEE, FL
Permit No. 43