# Administrative Law Section Newsletter

**Vol. XXIX, No. 2** **Donna E. Blanton, Editor** **December 2007**


# "What's Up With *Rupp*?" -- A Discussion of Some of the Issues Raised by *Rupp v. Department of Health*[1]

**by Kathryn L. Kasprzak and Jon M. Pellett**

Those of us who regularly represent clients before the Department of Health professional licensing boards were surprised recently by an opinion from the Third District Court of Appeal. In what appears to be a departure from settled principles of professional licensure, long-established case law, and statutory interpretation, the court reversed and remanded a Final Order of the Board of Medicine with instructions "that judgment be entered in Dr. Rupp's favor."[2]

This article explores three ways that the *Rupp* opinion appears to depart from settled licensing law and the facts of the case as found by the Administrative Law Judge ("ALJ"). First, the court accepted Dr. Rupp's defense of "impossibility," seemingly without regard for the facts found by the ALJ and the longstanding principle that compliance with the licensee's legal obligations under his or her license is a personal responsibility that cannot be delegated to third parties. Second, the court's opinion addresses only the "impossibility" of Dr. Rupp's ability to timely report Virginia disciplinary action to the Florida Board of Medicine and does not address the statutory violation based on the Virginia action, yet it reverses and remands the entire Final Order (and thus, all of its findings and conclusions) for a judgment in Dr. Rupp's favor. The third way the decision appears to depart from settled administrative licensing law is the court's declaration that the Board failed to provide Dr. Rupp her

*See "What's Up With Rupp?," page 15*

# From the Chair

**by Andy Bertron**

In December, when the weather finally cools and the holidays draw near, most people begin to think seriously about administrative law. Well, maybe not most people. Okay, only a few seriously geeky administrative law practitioners. But, speaking of administrative law practitioners (geeky or not), here's what members of the Administrative Law Section have been up to lately:

Daniel Nordby is leading the Section's renewed efforts to improve the quality of its website (http://www.flaadminlaw.org) and keep the content current. As Webpage Committee Chair, Daniel is making changes to the website to speed the uploading of information, including more timely meeting minutes, newsletters and CLE notices. More improvements are on the way.

Bruce Lamb, the Section's Law School Liaison, is working with DOAH and Florida's law schools to

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bring administrative law to students in a meaningful way. As a pilot project, Bruce is working with DOAH and Stetson Law School to schedule an administrative hearing at the law school so that students can observe the process up close and personal. If the first hearing goes well, the Section will seek to bring more hearings to other law schools. If you would like to volunteer to help schedule a hearing at your alma mater, contact Bruce (bruce.lamb@ruden.com) to find out how you can help.

In August, the Executive Council launched a listserv to more timely inform the members of Section activities. All Section members for whom The Florida Bar has an email address should have received an initial welcome message. If you have not received any communications from the Section listserv and would like to be added, you may update your information on The Florida Bar's website or send an email to Jackie Werndli (jwerndli@flabar.org) and she will put you on the list.

At the October meeting of the Administrative Law Section Executive Council, Shaw Stiller was elected to fill a mid-term vacancy on the Council. Shaw brings a wealth of administrative law experience to the Council. He has been an Assistant General Counsel at the Department of Community Affairs for over ten years and in January of this year became the agency General Counsel.

At the October meeting, members of the Executive Council established an ad-hoc committee to study ways to improve citation form for recommended and final orders. Florida Rule of Appellate Procedure 9.800(d) provides citation forms for orders reported in the FALR, FPER and FPSCR. The Florida Style Manual published by the Florida State University Law Review also provides citation forms. However, these citation forms have not been updated in many years and do not account for the availability of orders from online sources such Westlaw, LexisNexis or the Division of Administrative Hearings. The Rule and the Style Manual also do not address how to cite to orders that are not published in the FALR, FPER, or FPSCR, and therefore require citation to another source. As a result, practitioners have adopted a variety of methods for citing to recommended and final orders. The ad hoc committee will study the issue and make recommendations to the Executive Council on how to improve the current citation forms. The committee's work could lead to a recommendation to The Florida Bar Appellate Rules Committee for a proposed amendment to Rule 9.800(d). If you have ideas or suggestions for the ad hoc committee, send me an email (andy.bertron@sablaw.com).

By the time this newsletter reaches you, the Section, in conjunction with the Environmental and Land Use Law Section, will have completed another "Practice Before DOAH" CLE. As in previous editions, this CLE features a live mock hearing at DOAH before an Administrative Law Judge. I am sure that the program chairs, Wellington Meffert and Luna Phillips, have put on a great program. And many thanks to Chief Judge Bob Cohen and all the folks at DOAH for their help and hospitality.

Finally, a pro bono opportunity for administrative law practitioners – Florida's Children First and Florida Legal Services are looking for attorneys to represent persons with developmental disabilities in section 120.57 hearings before DOAH. Last year, hearings to resolve denials or changes in level of service by the Agency for Persons with Disabilities (APD) were moved from the Department of Children and Families to DOAH. Many petitioners cannot afford an attorney and need representation when they challenge a denial or change in service level by APD. If you would like to help out, contact Sheila Meehan, Pro Bono Developer at Florida Legal Services (sheila@floridalegal.org or 850-385-7900).

The Public Utilities Law Committee will get the Section off to a quick start next year by hosting a CLE on January 15, 2008, entitled: "Things You Should Know About Public Service Commission Ethics Requirements." The program will be held at the Public Service Commission in Tallahassee and costs $50. This CLE will be a good opportunity to get your ethics hours. You can register online at *http://www.floridabar.org*.

As the year draws to a close, try not to spend your holidays thinking about administrative law (it's hard, but you can do it) and enjoy the season. Happy Holidays and all the best to you and your family in the New Year.

# FWC Met Due Process Standards In Shark Feeding Case[1]

**by James V. Antista**

In 2001, a prominent marine biologist gave testimony at a public hearing on the proposed rule of the Florida Fish and Wildlife Conservation Commission ("FWC") to prohibit fish feeding in Florida waters. He was an opponent of this rule, which was designed to prohibit divers from using fish feed to attract fish, such as sharks, and to prohibit divers from feeding them.[2]

Some time later, this same biologist, while engaged in interaction with sharks in the water on a research project, was attacked by a bull shark and suffered serious injuries to his leg.[3] While there was no feeding in this incident, it illustrates that human interaction with predators such as bears, alligators, and sharks can be unpredictable and dangerous, even for professionals. From many years of experience, FWC knew that feeding alligators and bears by the general public will condition them to being fed, lessen their natural fear of humans, and increase the likelihood of an attack; that is why FWC prohibits feeding bears and alligators. Clearly, dive operators who attract sharks by feeding have affected the behavior of the sharks. If these sharks associate divers with food, then unsuspecting divers in the same general area might become subject to attack by these sharks. To prevent these behavior changes in sharks and other marine fish, FWC adopted a rule that prohibits this practice.[4]

The Diving Equipment and Marketing Association ("DEMA") and a consortium of dive operators filed a challenge to the rule at the Division of Administrative Hearings ("DOAH"). Following longstanding precedent, the Administrative Law Judge ("ALJ") dismissed the rule challenge for lack of jurisdiction. DOAH does not have jurisdiction to adjudicate FWC rules that are based upon constitutional rulemaking authority.[5]

The Petitioners then filed an action in Circuit Court in the Second Judicial Circuit, Leon County. By summary judgment, the Court upheld the rule.[6] The First District Court of Appeal upheld the Circuit Court in a per curiam opinion.[7]

The Circuit Court applied the proper judicial standard – the rational basis test. In its successful motion for summary judgment, FWC introduced an affidavit from a well respected marine biologist, who also testified at the Commission meeting. This marine biologist rendered his opinion based upon years of experience with sharks and upon an extensive review of research on the problems associated with people feeding vertebrate wildlife. The plaintiffs introduced affidavits from three dive operators who were directly affected by the rule.

The plaintiffs' claims about lack of procedural or substantive due process were rejected by the courts. One might wonder: If the plaintiffs' had prevailed in their case, would due process have been adequate for them?

Due process of law is vital to the public. In general terms as to state agencies, due process is defined as the procedural requirements to provide adequate notice before making rules or other decisions affecting substantial interests, to provide meaningful opportunity to be heard before a fair and impartial decision-maker, and to provide the opportunity to challenge an agency decision before the appropriate court or tribunal.[8]

Article IV, Section 9 of the Florida Constitution, which created FWC, states: "The Commission shall establish procedures to ensure adequate due process in the exercise of its regulatory and executive functions." At FWC's first meeting in 1999, the Commission adopted Due Process Procedures that assure adequate due process.[9] These procedures have been in effect and complied with ever since.

FWC's Due Process Procedures address all of the constitutional due process requirements: FWC provides notice of rulemaking through the Florida Administrative Weekly and the FWC website; FWC rules are approved by the Commission at a public hearing; FWC decisions affecting substantial interests, such as permits, must meet the requirements of the Administrative Procedure Act; FWC rules based on constitutional authority can be challenged in the court; and FWC's rules based on statutes, such as rules relating to boating, manatees or marine turtles, can be challenged at DOAH.

FWC's Due Process Procedures have never been invalidated by any appellate court or administrative tribunal in Florida, nor have they been found to violate due process of law. The procedures are consistent with constitutional principles of procedural and substantive due process and fully comply with the legislative directive in section 20.331(9), Florida Statutes.[10] These procedures are now incorporated by reference into FWC's General Provisions, Rule Chapter 68-1001, Florida Administrative Code. (At its December 2007 meeting, the Commission is expected to approve Rule 68-1.008, which will publish the Due Process Procedures verbatim into a rule).

I submit that due process is not the issue in the shark feeding case. The plaintiffs' attorney simply failed to convince the circuit and appellate court that FWC rules were outside of its authority or unnecessary to protect marine fish and the public.

The history of FWC is relevant in understanding that FWC is meeting its mandate to provide adequate due process in exercising its regulatory and executive functions. Up until 1943, Florida regulated wildlife, including hunting and fishing, through a multitude of city and county ordinances, local acts, special acts of local application and state statutes. In the face of this fragmented form of governance and dwindling game populations, the Florida Legislature enacted a joint resolution to create in the constitution a Game and Fresh Water Fish Commission, whose members would be appointed by the Governor

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**FWC**
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and confirmed by the Florida Senate. The resolution was approved by the electors, and GFC was born effective 1943. Over the years, there were revisions to the Florida Constitution, but GFC remained intact in the Constitution until 1998.[11]

That year, the Constitution Revision Commission, through Revision 5, added marine fish to the constitutional commission's authority in order to unify regulation and management of freshwater fish, marine fish and wildlife. The new agency was renamed the Florida Fish and Wildlife Conservation Commission.[12] In 1998, the electors of Florida voted to approve this provision with 72% in favor, and FWC was created effective July 1, 1999.[13] Article IV, Section 9, of the Florida Constitution states: "The commission shall exercise the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic species, and shall also exercise regulatory and executive powers of the state with respect to marine life, except that all license fees for taking wild animal life, fresh water aquatic life, and marine life and penalties for violating regulations of the commission shall be prescribed by general law." Thus, in 1942 and again in 1998, the people of Florida decided that the agency entrusted to manage and regulate fish and wildlife should be constitutionally created.

What is different about a constitutional agency? The Florida courts have determined that GFC's authority to make rules is derived from the Constitution, not the Legislature.[14] Recent DOAH decisions have confirmed this conclusion as to FWC.[15] These decisions have concluded that FWC's constitutionally based rules, unlike rules of other state agencies, are not subject to the rule challenge procedures of Chapter 120, Florida Statutes, the Administrative Procedure Act ("APA"). The primary purpose of APA rule challenges is to determine if a state agency rule is based upon delegated legislative authority. FWC rules that are based in the Constitution, such as rules governing the taking and management of fish and wildlife, are not derived from legislative authority, and therefore, are not subject to administrative challenge at DOAH. FWC's constitutionally based rules are subject to challenge through the courts.[16]

The Legislature has recognized that FWC's constitutionally based rules are subject to a different standard of review. Section 120.52(1)(b)4. states that FWC is an agency within the meaning of the APA only when acting pursuant to statutory authority derived from the Legislature. Just because FWC's constitutionally based rules are challenged differently -- through the courts rather than through DOAH -- does not mean there is a lack of due process. As the Florida Supreme Court noted in *Department of Law Enforcement v. Real Property*:[17] "The manner in which due process protections apply vary with the character of the interests and the nature of the process involved. There is no single inflexible test by which courts determine whether the requirements of procedural due process have been met."

FWC is sensitive to any allegation that constitutionally based rulemaking violates principles of due process. In 2006, FWC conducted a series of workshops to better educate its stakeholders about FWC's Due Process Procedures and to hear suggestions for changes. Many stakeholders were satisfied with these procedures; some were not. Some suggested that FWC subject its rules to the rule challenge procedures under the APA, and some responded that this suggestion was unconstitutional. Some suggested a hybrid system for administrative review of rules. Overall, no real consensus for change was evident from FWC stakeholders. While the Commissioners recognized the need to improve public and stakeholder notification about rulemaking, they voted to maintain the current procedures.[18]

FWC places great emphasis on involving the public and FWC stakeholders in its rulemaking. Under its stakeholder involvement process, FWC solicits input and involves stakeholders and the public in rulemaking.[19] In fact, FWC's mission statement provides: "Managing fish and wildlife resources for their long-term well-being and the benefit of people." When FWC provides for meaningful participation for citizens in workshops and public hearings, it is providing a fundamental element of due process that will lead to better decisions. While some stakeholders may not always agree with Commission decisions, FWC's decision-making processes are fair. In fact, Governor Crist's transition team noted that FWC's stakeholder involvement process was a model for government agencies.[20] To further enhance due process, FWC has also enacted rulemaking standards for rules relating to hunting and fishing. Standards 2, 3, 6 and 8 state that FWC will use the best information available in its rulemaking, will provide fair decision-making processes for these rules, and will certify that hunting and fishing rules meet these standards.[21]

The authors of the article in the September issue of this Newsletter state that the FWC's Due Process Procedures are not what the "framers" of the Constitution or the "Legislature" intended and not what the "people" expected.[22] They suggest that the rational basis test is inadequate and does not provide due process of law. This belief reflects a complete absence of faith in the courts of Florida to assure due process of law by FWC. Contrary to the authors' belief, the rational basis test is not a "free pass" for any FWC rule. To satisfy this test, an FWC rule must be within its authority under Article IV, Section 9, of the Florida Constitution, and the rule must be rational, that is, be rationally related to its intended action. The rule should also be supported by the best information available and should not be arbitrary or capricious or deviate from principles of procedural or substantive due process. FWC has more than met the rational basis test in the shark feeding case and in cases involving other rules.[23]

In the shark feeding case, FWC properly exercised its constitutional authority, consistent with principles of due process, to protect sharks and other marine fish from practices that may alter normal feeding behavior and thereby pose risks to the public. Having taken public and expert comments at several public hearings, FWC carefully weighed and considered the need to protect marine species and the interests of all citizens of Florida, including the relatively few

dive operators who were engaging in shark feeding. FWC used the best scientific information available to enact a rule to prohibit shark feeding and the rule has been upheld by both a circuit and an appellate court.

If FWC had not acted consistently with principles of due process of law under the Florida and United States Constitutions in the shark feeding case, I believe the courts would have said so.

**Endnotes:**

[1] This article was prepared in response to an article in the September 2007 Newsletter by Bob L. Harris, E. Gary Early, and Michael Dutko, Jr., entitled: "*Wanted: Due Process from the Florida Fish and Wildlife Conservation Commission.*"

[2] Minutes of the Florida Fish and Wildlife Conservation Commission ("FWC") Meetings, September 5-7, 2001, and October 31-November 2, 2001.

[3] http://Discovery.com/video; Shark week 2007

[4] R. 68B-5.005, Fla.Admin.Code.

[5] *Diving Equip. and Marketing Ass'n v. Fla. Fish and Wildlife Conserv. Comm'n*, DOAH Case No. 01-4072RP (November 8, 2001); *see also Airboat Ass'n of Florida, Inc. v. Florida Game and Fresh Water Fish Comm'n*, 498 So.2d 629 (Fla. 3d DCA 1986); *Osbourne v. Fla. Game and Fresh Water Fish Comm'n*, 3 F.A.L.R. 1483-A (DOAH, February 25, 1981); *Fla. Minerals Ass'n Inc., v. Fla. Fish and Wildlife Conserv. Comm'n*, DOAH Case No. 01-0746RU (March 20, 2001); *Resource Preservation Alliance v. Fla. Fish and Wildlife Conserv. Comm'n*, DOAH Case No. 01-2132RP (October 11, 2001).

[6] *Diving Equip. and Marketing Ass'n v. Fla. Fish and Wildlife Conserv. Comm'n*, Second Circuit Court Case No. 01-CA-2553 (Summary Judgment, February 5, 2004); (*See* Affidavit of Dr. William Alevizion, attached to Motion for Summary Judgment).

[7] *Diving Equip. and Marketing Ass'n v. Fla. Fish and Wildlife Conserv. Comm'n*, 892 So. 2d 1017 (Fla. 1st DCA 2005). In both cases, FWC was represented by the Attorney General's Office.

[8] *Dep't of Law Enforcement v. Real Prop.*, 588 So.2d 957 (Fla.1991).

[9] FWC meeting minutes, July 7, 1999. The FWC Due Process Procedures can be found at the FWC website: www.myfwc.com/aboutfwc/legal.

[10] This statute governs FWC's due process procedures.

[11] *Florida Wildlife Magazine*, Volume 47, Number 6, November-December, 1993, Special Anniversary Edition.

[12] William Clay Henderson and Deborah Ben-David, *Revision* 5: *Protecting Natural Resources*, 72 Fla. Bar J. 22 (Oct. 1998); William Clay Henderson, *Florida Constitutional Revision Update: Commission Sends Revisions to the November Ballot*, 1998 Florida Bar Environmental and Land Use Section Annual Meeting.

[13] 1998 General Election Results, State of Florida, Department of State.

[14] *Airboat Ass'n of Fla., Inc. v. Fla. Game and Fresh Water Fish Comm'n*, 498 So.2d 629 (Fla. 3d DCA 1986); *Osbourne v. Fla. Game and Fresh Water Fish Comm'n*, 3 F.A.L.R. 1483-A (DOAH, February 25, 1981).

[15] *Fla. Minerals Ass'n, Inc., v. Fla. Fish and Wildlife Conservation Comm'n*, D.O.A.H. Case No. 01-0746 RU (March 20, 2001); *Resource Preservation Alliance v. Fla. Fish and Wildlife Conserv. Comm'n*, DOAH Case No. 01-2132RP (October 11, 2001).

[16] Rules that are statutorily based, such as rules relating to boating, manatees, and sea turtles, must comply with all requirements of the APA and are subject to administrative challenges at DOAH.

[17] *See* note 8, *supra*.

[18] FWC Staff Report on Due Process Workshops, Commission Meeting Minutes, September 13, 2006.

[19] Stakeholder Participation Process, *Florida Fish and Wildlife Conservation Commission Sunset Review Report,* Section III A, January 1, 2007.

[20] *Transition Team Report on FWC to Governor Charlie Crist Transition and Lieutenant Governor Jeff Kottkamp,* January 3, 2007, pp. ii and 44.

[21] R. 68-1.004(6), Fla. Admin. Code: "Conservation and management decisions shall be derived through processes which are fair and accessible to all the people of the state and which are consistent with the procedures in Rule 68-1.001, F.A.C." (Uniform Rules of Procedure and Due Process Procedures).

[22] *Wanted: Due Process from the Florida Fish and Wildlife Conservation Commission*, Bob L. Harris, E. Gary Early, and Michael Dutko, Florida Bar Administrative Law Section Newsletter, September 2007.

[23] *Wakulla Commercial Fisherman's Ass'n v. Fla. Fish and Wildlife Conserv. Comm'n*, Circuit Court Case No. 1D06-1554 (Summary Judgment, February 2, 2007); *Wakulla Commercial Fishermen's Association, Inc. v. Fla. Fish and Wildlife Conserv. Comm'n*, 951 So. 2d 8 (Fla. 1st DCA 2007).

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# APPELLATE CASE NOTES

by Mary F. Smallwood

**Adjudicatory Proceedings**

*Coastal Fuels Marketing, Inc. v. Canaveral Port Authority*, 32 Fla. L. Weekly 1741 (Fla. 5th DCA 2007) (Opinion filed July 20, 2007)

The Canaveral Port Authority (the "Authority"), the governing body of the Canaveral Port District, rejected the proposal of Coastal Fuels Marketing, Inc. ("Coastal") to construct a petroleum terminal on Authority land. Coastal appealed pursuant to section 120.68, Florida Statutes. While the Authority had previously taken the position with Coastal that it was an agency under the Administrative Procedure Act, on appeal the Authority argued that it did not fall within the definition of an agency under Section 120.52(1), Florida Statutes.

On appeal, the court agreed and transferred the case to the circuit court. The court noted that the Authority's initial submission to the court's jurisdiction was not binding on either the court or the parties. It concluded that the Authority, which was created as a special taxing district, was not an entity with statewide or regional jurisdiction. Instead, it operated only within the boundary of Brevard County. The fact that the entity was identified as an "authority" did not bring it within the purview of the statute.

*Smith v. Florida Department of Corrections*, 32 Fla. L. Weekly 1750 (Fla. 1st DCA 2007) (Opinion filed July 24, 2007)

Smith, an employee of the Department of Corrections for 22 years, was terminated after getting into a violent confrontation with another law enforcement officer during an argument with his estranged wife. After an administrative hearing, the administrative law judge recommended that Smith be suspended without pay for 60 days rather than be terminated. The Public Employees Relations Commission ("PERC") adopted all of the findings of fact in the recommended order but rejected the proposed penalty, concluding that marital strife and emotional states are not mitigating factors in PERC proceedings.

On appeal, the court reversed and remanded. The court rejected PERC's conclusion that it could never consider such emotional factors, noting that section 110.227, Florida Statutes, had been amended in 2001 to give PERC broader discretion in evaluating penalties when a law enforcement or correctional officer was involved. Since PERC failed to consider the mitigating factors identified in the recommended order as required by section 120.57(1)(l), Florida Statutes, the court remanded the matter to the agency.

*Community Health Charities of Florida v. Department of Management Services*, 32 Fla. L. Weekly 1810 (Fla. 1st DCA 2007) (Opinion filed July 31, 2007)

Community Health Charities of Florida ("Charities") and other charities filed a petition with the Department of Management Services challenging the manner in which the Department had allocated undesignated funds under the 2006 Florida State Employees' Charitable Campaign. The petition raised issues of fact related to the petitioner's entitlement to a portion of such funds and also raised challenges to one of the Department's rules and alleged that the Department had improperly relied upon non-rule policy. The petition was filed with the Department. The initial petition was dismissed with leave to amend. The amended petition was dismissed with prejudice as the Department concluded that it raised issues under section 120.56, Florida Statutes.

On appeal, the court reversed. It rejected the Department's argument that separate petitions must be filed under sections 120.569 and 120.56. Instead, the court granted Charities' request for a writ of mandamus and directed the Department to comply with sections 120.569(2)(a) and (c) by either forwarding the petition to the Division of Administrative Hearings or denying the petition stating its basis with particularity. Since the court determined that the petition met the pleading requirements of the Uniform Rules, it concluded that the Department's only basis for dismissing the petition was that it was a challenge to a rule.

*Johnson v. Department of Management Services*, 32 Fla. L. Weekly 1929 (Fla. 1st DCA 2007) (Opinion filed August 14, 2007)

The Department of Management Services rejected the recommendation of the administrative law judge and denied Johnson monthly retirement or Deferred Retirement Option Program benefits. In doing so, the Department concluded that she was an employee of a Florida Retirement System ("FRS") employer. The administrative law judge had expressly declined to make a finding in the recommended order on that issue.

The court reversed. It held that the determination of whether one is a FRS employee is a factual determination that must be made by the trier of fact. The case was remanded with instructions for the administrative law judge to make the necessary findings.

**Licensing**

*Rupp v. Department of Health*, 32 Fla. L. Weekly 17124 (Fla. 3d DCA 2007) (Opinion filed July 18, 2007)

Dr. Rupp, a physician licensed in Florida and several other states, retained the services of a firm in Atlanta, Georgia to assure that her licenses remained current, including notifying various licensing agencies of changes in her address. Dr. Rupp had requested the firm to notify the Commonwealth of Virginia of her address change when she moved to Florida, but the firm failed to do so. Subsequently, the firm closed its Atlanta office.

Dr. Rupp learned after the fact that she had been disciplined by the Virginia licensing board for failing to notify it of the address change. Within

30 days of receiving actual notice of the Virginia board's action, Rupp notified the Florida Department of Health (the "Department") of that action.

The Department instituted disciplinary action against Rupp for failing to notify it of the Virginia action within 30 days of the entry of the Virginia order. Rupp requested an administrative hearing. The administrative law judge entered a recommended order finding that Rupp did not receive notice of the Virginia action until about two months after it occurred, that she could not have notified the Department of that action within 30 days of its occurrence, and that she notified the Department within 30 days of receiving actual notice. Despite those findings, the judge recommended the imposition of a penalty. Rupp filed no exceptions to the recommended order but did file a pleading with the Board of Medicine objecting to the recommended penalty. The Board treated that pleading as an exception and rejected it. It adopted the recommended order and ordered Rupp to pay a $500 penalty and $10,000 in costs. Rupp's request to present argument at the Board's hearing was denied. Rupp appealed.

The court reversed. It held that Rupp could not be disciplined for failure to take an action that was impossible to perform. The court further held that the Board's failure to conduct a de novo review of the record of the hearing in determining whether the recommended penalty was correct was a material error in procedure. Finally, the court held that the Board's refusal to allow Rupp to present arguments on the validity of the penalty denied her due process of law. The court noted that the characterization of her pleading before the Board as an exception to the recommended order was incorrect as Rupp did not disagree with any of the administrative law judge's recommended findings or conclusions.

*Waters v. Department of Health*, 32 Fla. L. Weekly 1881 (Fla. 3d DCA 2007 (Opinion filed August 8, 2007)

The Board of Medicine filed several administrative complaints against Waters alleging violations of Chapter 458, Florida Statutes, including prescribing controlled substances other than in the course of his professional practice. The administrative law judge found competent substantial evidence to support the other alleged violations and recommended revocation of Waters' license. However, he concluded as a matter of law that there was no violation with respect to prescribing controlled substances as there were conflicting final orders of the agency relating to the proof required to find a violation of the statutory provision on controlled substances. In its final order, the Board rejected the judge's conclusion of law in that regard. Waters appealed.

The court affirmed. It held that the agency's interpretation of its substantive statute was entitled to great weight, and its conclusion was within the delegated range of discretion.

*Aleong v. Department of Business and Professional Regulation*, 32 Fla. L. Weekly 1776 (Fla. 4th DCA 2007) (Opinion filed July 25, 2007)

Aleong, a veterinarian, failed to file a timely petition for hearing to challenge a complaint by the Department of Business and Professional Regulation alleging violations of recordkeeping requirements and imposing a penalty. The failure was the result of Aleong's attorney incorrectly calendaring the time for the filing. On appeal, Aleong argued that the doctrines of equitable tolling and excusable neglect should be applied.

The court rejected Aleong's arguments. It agreed with the First, Second and Fifth District courts that the failure of counsel to timely file a petition did not rise to the level of extraordinary circumstances required for the assertion of equitable tolling. In addition, it held that excusable neglect is not available in Chapter 120 proceedings.

However, the court did hear Aleong's argument that the Department had erred in assessing a penalty in excess of the regulatory guidelines without stating in its order the aggravating circumstances justifying the greater penalty. It remanded the case for the agency to either reduce the penalty or state the aggravating circumstances involved.

**Rulemaking**

*Courts v. Agency for Health Care Administration*, 32 Fla. L. Weekly 1811 (Fla. 1st DCA 2007) (Opinion filed July 31, 2007)

James Courts, a quadriplegic, appealed a decision of the Agency for Health Care Administration ("AHCA") denying his request for 24-hour care while his wife was caring for her terminally ill father. Previous requests for such care had been approved by AHCA; however, AHCA took the position that the decision to provide 24-hour care in the past had been in error. Under its new interpretation, the request was characterized as "respite care" rather than "companion care." There was undisputed testimony at the hearing that without 24-hour care, the appellant would have to be institutionalized and was in much greater danger of severe health risks.

The court reversed and remanded. It held that AHCA's new interpretation was a change in agency policy that was neither adopted as a rule or explained by the agency. The court remanded with directions to AHCA to reinstate Court's care plan with the 24-hour care.

**Appeals**

*Verizon Business Network Services, Inc. v. Florida Department of Corrections*, 32 Fla. L. Weekly 1809 (Fla. 1st DCA 2007) (Opinion filed July 31, 2007)

Verizon Business Network Services, Inc. ("Verizon") filed an interlocutory appeal of an order of the administrative law judge denying Verizon's motion to compel production of documents. Prior to denying the motion, the judge reviewed the documents in camera and they were identified in a privilege log.

The court denied the appeal holding that Verizon had failed to demonstrate that review of the final order would provide inadequate relief. It noted that only in extraordinary circumstances would an appeal of a discovery order be taken.

**Bid Protests**

*Eyemed Vision Care, LLC v. Department of Management Services*, 32 Fla. L. Weekly 2044 (Fla. 1st DCA 2007) (Opinion filed August 24, 2007)

The Department of Management Services issued an invitation to negotiate, seeking a vendor to provide group vision insurance to state em-

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ployees. After further negotiations with the top four vendors, the Department posted notice of its intent to award a contract to Spectera, Inc. Two of the other vendors filed timely protests of the award of the contract. The Department, however, issued an order citing section 110.123(3)(d)4.b., Florida Statutes, stating its intent to continue with the contract award process, notwithstanding the timely protests pending before the Division of Administrative Hearings.

This order was appealed by the losing vendors. On appeal, the Department argued that it was not subject to section 120.57(3)(c), Florida Statutes, because section 110.123(3)(d)4.b. controlled. Section 120.57(3)(c) requires that an agency head who intends to continue the solicitation process before final resolution of a timely bid protest must set forth in writing the "particular facts and circumstances which require the continuance of the solicitation … process without delay in order to avoid an immediate and serious danger to the public health, safety, or welfare." In contrast, section 110.123(3)(d)4.b. provides that notwithstanding section 120.57, the Department must set forth in writing "particular facts and circumstances which demonstrate the necessity of continuing the procurement process in order to avoid a substantial disruption to the provision of any scheduled insurance services."

The agency's order, issued on August 3, stated that the continuation of the procurement process was necessary because open enrollment was to take place during the month of October. The Department needed to have all materials available to employees prior to that time, and Spectera was not presently providing insurance coverage.

On appeal, the court held that the Department's order did not meet the requirements of section 110.123. While recognizing that the agency was acting under a statutory provision different from section 120.57(3), the court relied on case law construing that section in interpreting the requirements of section 110.123. It cited *Avmed, Inc. v. State, School Board of Broward County*, 790 So. 2d 571, (Fla. 4th DCA 2001), in which the school board faced the likelihood that health insurance coverage for its employees would be discontinued if the solicitation process was delayed, as an example supporting such an order. In contrast, the court found that the Department had failed to state facts in its order demonstrating that continuance of the process was anything other than efficient.

**Emergency Orders**

*St. Michael's Academy, Inc. v. Department of Children and Families*, 32 Fla. L. Weekly 1902 (Fla. 3d DCA 2007)

The Department of Children and Families issued an emergency order revoking the child care facility license for St. Michael's Academy ("Academy"). The order cited four incidents that the Department alleged warranted the emergency revocation. First, the Department cited the Academy for allowing a three-year-old child to wander away from the facility into a street. There were no injuries. Second, the Academy was cited for maintaining inadequate personnel records. Third, a mother of a child at the facility alleged that her child had been bitten by another child. Each of these incidents occurred between August and November of 2006. The Academy challenged the Department's imposition of fines in the first and third circumstances and requested an administrative hearing. Finally, in February 2007, the Department alleged that the designated representative and director of the Academy was employed at another day care facility in violation of state law.

The Department's final order concluded that, based on the four incidents and what the Department found to be an attempt to conceal the director's outside employment, continued operation of the facility constituted an immediate danger to the health and safety of the children.

The court reversed. It found the Department's order to be conclusory and inadequate to sustain an emergency order. It held that the order failed to include any findings that would support a conclusion that there was an ongoing danger to the children at the facility. Moreover, there were no findings in support of the Department's statements that the Academy engaged in intentional and deceitful behavior.

**Attorney's Fees**

*Brown v. Commission on Ethics*, 32 Fla. L. Weekly 2342 (Fla. 1st DCA 2007) (Opinion filed September 28, 2007)

Brown, the property appraiser for Santa Rosa County, sought attorney's fees and costs after ethics complaints filed by two citizens were dismissed by the Commission on Ethics. One

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complaint was filed by an individual running against Brown for office on the same day he qualified to run. It alleged that Brown had improperly reinstated a religious exemption for a church. The second complaint was filed by the brother of one of the opponent's primary supporters. That complaint alleged that Brown had improperly reduced the value of certain property to obtain the political support of the property owner.

After a formal hearing, the administrative law judge found that Brown had reinstated the religious exemption because the property was once again being used as a church. He further found that the reduction in property value was the result of the building on site having burned down. The judge concluded that the complaints had been filed for the purpose of impugning Brown's reputation and that neither complainant had attempted to ascertain the actual facts before filing a complaint. He recommended that Brown be awarded attorney's fees and costs.

The Commission, while recognizing that the complaints were filed for political purposes and were egregious misuses of the ethics process, concluded that an award of attorney's was not justified because there was no evidence of "actual malice" as defined by the United States Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The case was remanded to the administrative law judge for further findings in that regard. In the meantime, the judge who issued the recommended order had retired. The judge replacing him, applying the actual malice standard, concluded that an award of attorney's fees was not justified.

On appeal, the court reversed. First, it held that the plain language of section 112.317(8), Florida Statutes, did not incorporate the concept of actual malice. The court noted that the statutory language did not include that specific term, although the Legislature had chosen to use the term in other statutory schemes. In addition, the court found that the use of the term "reckless disregard for whether the complaint contains false allegations" should not be interpreted to require that the complainant had serious reasons to doubt the truth of his allegations as is required to show actual malice. Instead, it should be construed to mean a conscious indifference to the truth. Finally, the majority distinguished between the appropriate standard in a defamation action and one in an action under section 112.317. Judge Wolf, in a concurring opinion, would not have justified the reversal on that basis, however.

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

# Update on *Mae Volen Senior Center, Inc. v. Area Agency on Aging – Palm Beach/ Treasure Coast, Inc.*

**by Amy W. Schrader**

In the October 2007 issue of this Newsletter, an article discussed the Fourth District Court of Appeal's determination that an Area Agency on Aging is an "agency" for the purposes of Chapter 120, Florida Statutes. *See Protest-Proof Procurements?: A Commentary on Mae Volen Senior Center, Inc. v. Area Agency on Aging Palm Beach / Treasure Coast, Inc.* (Case No. 4D06-2992). On October 24, 2007, the court granted a motion for rehearing by the Department of Elder Affairs ("DOEA") and vacated its original opinion. In its Order, the court stated that it would reconsider the case on the merits of all issues raised by the parties after supplemental briefing concludes.

The court's original opinion determined that an Area Agency on Aging ("Area Agency") is an "agency" for Chapter 120 purposes based on the Legislature's use of the word "board" in section 20.41(7), Florida Statutes, in referring to an Area Agency. No party had discussed in its briefs whether the language of section 20.41 gives an Area Agency "agency" status under Chapter 120.

In its motion for rehearing, DOEA asserted that the word "board" does not convey the Legislature's intent to treat an Area Agency as an "agency," but rather only refers generally to the Area Agency's governing body. Mae Volen responded that while the court may legally rest its decision on the language in section 20.41(7), there are other and perhaps better justifications for a determination that an Area Agency is an "agency" under the APA. Those reasons include that the Area Agency serves as an extension of DOEA by performing its procurement duties and that it carries out a public function in a multi-county jurisdiction.

In response to the court's order granting rehearing, DOEA stated that it would not file an additional brief and would rely on its prior pleadings.

***Amy W. Schrader*** *is an attorney in the Tallahassee office of GrayRobinson, P.A.*

# Florida Gives Final Order Authority to ALJs in Elections Commission Cases

**by Lawrence E. Sellers, Jr.**

A measure adopted by the 2007 Legislature and signed by the Governor makes a number of changes to Florida's elections laws. Among other things, Chapter 2007-30, Laws of Florida, provides that a person charged by the Elections Commission with a violation may elect a formal hearing before an administrative law judge ("ALJ") and that in such cases, the ALJ shall render a final order. Previously, the ALJ entered a recommended order (as in most cases involving disputed facts under Florida's APA), and the Commission entered the final order. This change may have been prompted by cases such as *Wills v. Florida Elections Commission*, 955 So. 2d 61 (Fla. 1st DCA 2007), where the court determined that the Commission improperly rejected the ALJ's findings of facts. In the *Wills* case, the court also ordered the Commission to pay attorney fees pursuant to section 120.595(5), Florida Statutes.

Chapter 2007-30 also directs the Commission to maintain a database of all final agency actions. The database must be available to the public and must be searchable by issue, statute, person or entity referenced.

***Lawrence E. Sellers, Jr.*** *is a partner in the Tallahassee office of Holland & Knight LLP.*

**The Florida Bar Administrative Law Section Public Utilities Law Committee presents**

# Practice Before the Public Service Commission:

## Things You Should Know About Public Service Commission Ethics Requirements

**January 15, 2008**
**Betty Easley Conference Center, Room 152**
**4075 Esplanade Way, Tallahassee, FL 32399**
**(850) 413-6082**

**Course No. 8481 7**

8:30 a.m. – 9:00 a.m.
**Late Registration**

9:00 a.m. – 9:10 a.m.
**Introductory Remarks**
*Commissioner Lisa Polak Edgar, Florida Public Service Commission*

9:10 a.m. – 9:55 a.m.
**Ethics Rules and State Agencies**
Ethics rules are more than requirements of acceptable professional conduct; by understanding specific ethics rules in relation to the important values they are meant to protect, rule-following can be transformed from compliance to commitment.
*Robin N. Fiore, PhD, Adelaide R. Snyder Professor of Ethics, Florida Atlantic University*

9:55 a.m. – 10:40 a.m.
**Unique Ethics Issues for the Public Service Commission**
Chapter 350, Florida Statutes, provisions on ex parte matters; communications generally; rules on gifts; and Sunshine Law.
*Michael Cooke, General Counsel, Public Service Commission*
*Mary Anne Helton, Deputy General Counsel, Public Service Commission*
*Caroline Klancke, Attorney, Public Service Commission*

10:40 a.m. – 11:10 a.m.
**Public Service Commission Clerk's Office Procedures and Ethical Considerations**
*Ann Cole, Clerk, Florida Public Service Commission*

11:10 a.m. – 11:25 a.m.
**Break**

11:25 a.m. – 12:10 p.m.
**Case Studies**
Real-world examples of potential ethics issues and best practices.
*Cindy Miller, Attorney, Florida Public Service Commission*
*Caroline Klancke, Attorney, Florida Public Service Commission*
*Bruce May, Partner, Holland & Knight LLP*
*Richard D. Melson, Former Private Practitioner and General Counsel, Florida Public Service Commission*
*Joe A. McGlothlin, Associate Public Counsel, Florida Office of Public Counsel*

*continued...*

# CLE CREDITS

## CLER PROGRAM

(Max. Credit: 3.5 hours)

General: 3.5 hours
Ethics: 3.5 hours

## CERTIFICATION PROGRAM

(Max. Credit: 3.5 hours)

City, County, Local Government: 3.5 hours
State & Federal Government & Administrative Practice: 3.5 hours

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

**REFUND POLICY:** Requests for refund must be in writing and postmarked no later than two business days following the course presentation. Registration fees are non-transferable, 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"**
**ONE LOCATION: BETTY EASLEY CONFERENCE CENTER, TALLAHASSEE (JANUARY 15, 2008)**

TO REGISTER 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.

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**(AL005)**

**REGISTRATION FEE:** $50

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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.

# Minutes — Administrative Law Section Executive Council Meeting and Administrative Law Section Annual Meeting

## June 28, 2007
## Orlando, Florida

*Approved by the Executive Council at its October 26, 2007, meeting.*

**I. CALL TO ORDER:** Executive Council Chair Booter Imhof called the meeting to order at 3:05 pm.

Present: Booter Imhof, Andy Bertron, Elizabeth McArthur, Seann Frazier, Kent Wetherell, Bill Williams, Linda Rigot, Scott Boyd, Debby Kearney, Allen Grossman, Donna Blanton, Cathy Sellers, Li Nelson, Bruce Lamb, Larry Sellers, Daniel Nordby, Mike Cooke, Joe Mellichamp, Nathan Skop, and Jackie Werndli.

Absent: Mary Ellen Clark, Cathy Lannon, Clark Jennings, Wellington Meffert, Cynthia Miller, and Dave Watkins.

**II. PRELIMINARY MATTERS:**

A. Minutes — April 5, 2007

The minutes of the April 5, 2007, Executive Council meeting were approved.

B. Treasurer's Report

Seann Frazier was late, due to an accident tying up traffic on the highway. Jackie Werndli addressed the June 8, 2007, section statement of operations, and handed out an updated report on revenues and expenses assigned so far to the section from the Pat Dore Administrative Law Conference. These are the best projections so far of what the bottom line will be as a result of The Florida Bar's new expense allocation system. The conference will be treated as a CLE program, instead of a section program, retroactive to last year's conference and from now on. The section will have latitude on setting fees for the conference even though it will not be a section program. The apparent bottom line is that with the expense allocations, it will be tough to break even for the live conference, because of the charges, but that the section should make that up with CLE tape/CD sales because they are very popular.

Jackie Werndli noted that some other sections were discontinuing audiotapes, and offering CLE programs on just CDs because many more are being sold in that format now. The section could save the additional $750 per-format fee by doing this. On motion by Bruce Lamb, duly seconded, the council voted to eliminate audiotapes from CLE sales, and only offer CDs.

C. Chair's Report

Booter Imhof reported that the agency snapshots he had agreed to do were forthcoming for publication in the Newsletter, and he would save the rest of his comments for closing remarks.

**III. COMMITTEE/LIAISON REPORTS**

A. Continuing Legal Education

Seann Frazier reported that the certification review course would be held in Tallahassee on August 16-17, at the Civic Center. In addition, Cathy Sellers and Li Nelson were working on plans for the Practice Before DOAH program in November. Jackie Werndli will be talking to the Young Lawyers Division contacts about replaying the Basic Administrative Law program in the spring.

B. Publications

Debby Kearney reported that she has articles lined up for the The Florida Bar *Journal*, and Donna Blanton reported that she has articles promised for the Newsletter. However, more articles are always needed and welcome.

Donna Blanton noted that Amy Schrader will be helping with agency snapshots for the coming year, and urged members to help Amy by offering to cover agencies that had not yet been profiled, or that had been profiled a long time ago. Allen Grossman agreed to update the Department of Health snapshot, which was one of the first two agencies profiled when this feature was started years ago.

C. Legislative

Bill Williams reported that on June 27, 2007, Governor Crist vetoed the APA bill. The veto message was short, only mentioning the provision about not using agency statements after a challenge is filed, and also stated that the Governor's office will continue working with the Legislature and the JAPC on these issues.

Linda Rigot reported on several bills that passed, including SB 1270, regarding billing state universities for use of DOAH; HB 537, giving ALJs final order authority in election cases brought under Chapters 104 and 106; and HB 7203, establishing pilot projects with alternative expedited state review of local comp plan amendments under chapter 163.

D. Public Utilities Law

Mike Cooke reported that he will be coordinating a three-hour CLE program for telecom practitioners. He also introduced new Commissioner Nathan Skop in attendance, who was welcomed by council members.

E. Membership

Kent Wetherell reported that section membership was up a bit, but might go through a cyclical drop in the fall. He reported that the Tal-

*continued...*

**MINUTES**
*from page 13*

lahassee Bar Association had a very good panel discussion at the FSU College of Law, to speak with students about why to stay in Tallahassee for their legal careers. There was a disappointing turnout of students, but there was a very good panel, including DOAH ALJs Wetherell and Bruce McKibben, and Circuit Judge Ferris. Information about administrative law section membership was made available at this panel presentation.

F. Webpage

Daniel Nordby reported that it has been a good year for the website, with ten years of Newsletters now available, plus a separate page of just the agency snapshots, along with a directory of agency general counsels that was published in a recent Newsletter. Listserv will get rolled out next week, and will start as announcements (one-way messages) only.

Discussion was had regarding whether Newsletters further back than ten years ago were available, and if so, whether they should be added to the website Newsletter archives. The council agreed that this would be a great resource if it could be done. Jackie Werndli said that she had all of the old Newsletters in notebooks. Elizabeth McArthur volunteered to have the old Newsletters scanned and sent to Daniel Nordby.

G. Uniform Rules of Procedure

Linda Rigot reported that there had been no notice yet of changes to the Uniform Rules as previously discussed at the last council meeting. She will continue to watch for notice of any proposed amendments.

H. Board of Governors Liaison

Larry Sellers reported that attorney grievance records were now available on The Florida Bar's website. In addition, lawyers can put information about their practice on the website, and this is a good tool that everyone should consider using. On the subject of professionalism, Justice Cantero is looking at adapting the Georgia mentoring model, where mentors are assigned to new lawyers, to implement in Florida.

I. Law School Liaison

Cathy Sellers reported that the presentation made at the FSU College of Law went well, with 25-30 students attending. Professors helped spread the word for the program and encourage attendance, but they agreed that they did not want to make attendance mandatory.

There was discussion about trying to put on a similar program at FAMU's law school in Orlando or at Barry College's law school. Kent Wetherell noted that DOAH hearings in Orlando are in the Zora Neal Hurst Building, which is connected to FAMU, and that perhaps they could arrange to have students observe DOAH hearings there. He agreed to make contact if someone could provide him the name of the administrative law professor there.

J. CLE Committee Liaison

Booter Imhof reported that he had attended the CLE Committee meeting this morning, and that it was noted that a feature of The Florida Bar's new website reporting on disciplinary actions would be to include disciplinary actions based on failure to comply with CLE requirements. In addition, lawyers can access their own reports showing their compliance status in the current reporting period, and should check periodically, since this information is no longer included on mailing labels on The Florida Bar Journals and Newsletters.

K. Council of Sections

No report.

L. Section Liaison

1. Environmental and Land Use Law – No news to report.

2. Health Law – The section is putting on a CLE program tomorrow; otherwise no news to report.

3. YLD Liaison – No report.

M. DOAH Update

Linda Rigot reported that DOAH was rehired by the Senate to be special masters for claims bills. ALJs Kent Wetherell, Bram Canter, and Eleanor Hunter handled these last year. June McKinney is a new DOAH ALJ, assigned to the South Florida division.

N. Appellate Court Rules ad hoc Committee

No news to report.

**IV. OLD BUSINESS**

None.

**V. NEW BUSINESS**

Annual officer and council elections: The Nominating Committee presented its recommendations for officer and council positions, as follows:

**Officers**:

| | |
|---|---|
| Chair-elect | Elizabeth McArthur |
| Secretary | Seann M. Frazier |
| Treasurer | Cathy M. Sellers |

**Executive Council**:

Terms expiring 2009:
- Donna E. Blanton
- Allen R. Grossman
- Lisa S. Nelson
- Linda M. Rigot
- W. David Watkins
- William E. Williams
- Daniel E. Nordby

Term expiring 2008:
- Deborah K. Kearney

**P.U.L.C. Chair**:

Michael G. Cooke

The floor was opened up for additional nominations, and there were none. The slate recommended by the Nominating Committee was moved, seconded, and unanimously approved.

Other new business: Andy Bertron reported that Rhonda Chung-DeCambre Stroman had agreed to serve as Young Lawyers Division Liaison again this year. However, she said that she would have to drive from Gainesville to attend meetings, and she requested that the council agree to reimburse her for mileage and authorize a per diem amount to cover one night's hotel stay. After discussion, the request failed for lack of a motion.

Outgoing Chair's Remarks: Booter Imhof made his closing remarks as Chair. He stated it was an honor to serve as the Chair of the Administrative Law Section, and he was very appreciative of all of the help everyone had given him throughout the year, particularly Andy Bertron who had

come to his aid in covering meetings. He also thanked Elizabeth McArthur for serving as editor of the Administrative Law Section Newsletter, and presented her with a plaque for her decade of service. After presentation of gifts to members of the council, he turned the gavel over to the incoming chair, Andy Bertron.

Incoming Chair's Remarks: Andy Bertron, the incoming Chair, thanked Booter Imhof for his service to the section, and presented him with a bronze bust of Thomas Jefferson. Andy spoke to the need to continue to build on the efforts recently started to recruit new interested and hard-working members to become involved in section committees, and ultimately, the executive council. He circulated his list of committee and liaison assignments for 2007-2008, and noted the goal for each committee to recruit at least one member who is not on the executive council as a way to extend involvement in section activities and leadership. A copy of the list of Committees and Liaisons for 2007-2008 is attached to these minutes.

On motion, duly seconded, the meeting was adjourned at 4:30 pm.

Respectfully submitted,

Elizabeth McArthur
Secretary

**WHAT'S UP WITH *RUPP*?**
*from page 1*

statutorily required "*de novo*" review under section 120.57(1)(k), Florida Statutes, a provision that has long been interpreted to describe the process due before the ALJ and not the Board's standard of review of a Recommended Order.

**Facts and Procedural Course of the Case**

On June 20, 2006, the Board of Medicine entered a Final Order adopting a Recommended Order of an ALJ finding Corliss Rupp, M.D., in violation of two provisions of chapter 458, Florida Statutes. First, the Board concluded that Dr. Rupp violated section 458.331(1)(b), Florida Statutes,[3] because action was taken against her medical license by the professional licensing entity in Virginia.[4] The second violation was for failing to report to the Florida Board the Virginia action within thirty days, under section 458.331(1)(kk), Florida Statutes.[5]

Before coming to Florida in March 2003, Dr. Rupp, a practicing psychiatrist of some twenty years' experience, worked through a *locum tenens* company providing temporary professional services in areas in need of a psychiatrist. In order to do this kind of work, Dr. Rupp became licensed in several states, including Virginia, Georgia and Florida. Dr. Rupp contracted with an Atlanta-based firm, Daniel and Yeager, to ensure her compliance with the licensure requirements of the various states in which she was licensed. That compliance included notification to each licensing jurisdiction of Dr. Rupp's address changes as she moved from location to location as a *locum tenens* physician.

In March of 2003, Dr. Rupp relocated to Florida and personally advised the Florida Department of Health, Board of Medicine, of her change of address in April 2003. Dr. Rupp also notified Daniel and Yeager, with the expectation that it would notify all other states, including the Virginia licensing authority, of her change of address. Apparently Daniel and Yeager did not do so, and indeed, sometime in early 2004, closed its Atlanta office. Dr. Rupp's address of record with the Virginia medical board continued to be the Atlanta address of the Daniel and Yeager firm, now closed.

By written order on August 18, 2004, the Virginia Board of Medicine concluded that Dr. Rupp violated Virginia's statutory requirement to update her practitioner profile and advise the Board within 30 days of any address change, and ordered her to pay a monetary penalty of $1,500. This order became final on September 22, 2004.[6] Under section 458.331(1)(kk), Florida Statutes, Dr. Rupp was required to report the imposition of the Virginia discipline by October 22, 2004.[7]

Because of the apparent lack of a current, correct address on file with the Virginia Board of Medicine,[8] however, Dr. Rupp was unaware of the Virginia action until October 11, 2004, when she received notification of final agency action through the mail from the Compliance Unit of the Virginia Department of Health Professions.

The Florida Department of Health also received a report of the Virginia action, and on November 2, 2004, the Department advised Dr. Rupp that an investigation was being initiated based upon the Virginia disciplinary action. Upon the issuance of the Administrative Complaint by the Department of Health charging her with violations of section 458.331(1)(b) and (kk), Florida Statutes, Dr. Rupp sought a hearing before an ALJ at the Division of Administrative Hearings.

Following a hearing, the ALJ issued her Recommended Order, finding:

> 19. The Department has established by clear and convincing evidence that disciplinary action was taken against Dr. Rupp's Virginia medical license by the Virginia Board of Medicine. Thus, the Department has established a violation of Subsection 458.331(1)(b), Florida Statutes.
>
> 20. Dr. Rupp physically did not receive notice of disciplinary action taken against her until almost two months after the order was entered. Therefore, she could not have notified the Department within 30 days of the date the order was entered. She did provide notice to the Department within 30 days of the date that she received notice from Virginia.[9] However, Subsection 458.331(1)(kk), Florida Statutes, does not provide that notice must be given within 30 days of receipt of the disciplinary action, but within 30 days of the action being taken….The Department has established a violation of Subsection 458.331(1)(kk), Florida Statutes, by clear and convincing evidence.

*continued...*

**WHAT'S UP WITH *RUPP*?**
*from page 15*

In concluding that Dr. Rupp violated the two provisions of the Medical Practice Act, the ALJ acknowledged that there were "mitigating circumstances" in the case that would warrant deviation downward from the penalty guidelines for the two violations,[10] and recommended a penalty of a letter of concern and an administrative fine of $500.

On June 2, 2006, the Board of Medicine held a hearing on the Recommended Order in Dr. Rupp's case. The Department of Health filed no exceptions to the Recommended Order. The Board determined that a post-hearing submission filed by Dr. Rupp's counsel was meant to be Dr. Rupp's exceptions to the Recommended Order. Those exceptions were not timely filed, and therefore the Board rejected them.[11] The findings of fact and conclusions of law of the ALJ were approved and adopted by the Board, and a penalty of a letter of concern and a $500 administrative fine was imposed. In addition, the Board assessed its costs associated with investigating and prosecuting the case in the amount of $10,118.19 against Dr. Rupp. The Final Order of the Board was filed on June 20, 2006, and a timely appeal to the Third District Court of Appeal followed.

On appeal, Dr. Rupp argued that the action against her was invalid based upon a theory of "impossibility." Specifically, she asserted that the ALJ's Recommended Order was invalid because it imposed sanctions on Dr. Rupp for her failure to take actions that the ALJ acknowledged were impossible for Dr. Rupp to perform.[12] Dr. Rupp also asserted that the Board of Medicine erred in failing to conduct a *de novo* review of the Recommended Order, which she claimed she was entitled to under section 120.57(1)(k), Florida Statutes.[13] The opinion of the Third District Court of Appeal, reversing and remanding the case for the entry of "judgment in favor of Dr. Rupp," was filed on June 18, 2007.

**The Principle of Personal Responsibility in Licensure and the *Rupp* Defense of "Impossibility"**

As a preliminary matter, a review of a few well-settled principles of Florida licensing law is instructive. First, Florida professional licensees are presumed to have knowledge of the laws regulating their profession.[14] A failure of the licensee to conform professional conduct to the laws and rules of his or her profession subjects the licensee to disciplinary action.[15] The professional licensee has personal responsibility for compliance with the laws and rules that govern his or her profession.[16] Until *Rupp*, a licensee of the State could not escape the obligations under his or her license by contractually delegating performance of these requirements to an independent contractor.[17] This is true because only the licensee is under control of the licensing board charged with enforcing the licensing statute.[18]

The ALJ's Recommended Order makes little mention of this principle of personal responsibility.[19] The Department's focus for prosecuting the case was the date the Virginia Order was entered – August 18 – and not the effective date of the Order – September 22.[20] Because the Department focused on the charging date rather than the effective date, Dr. Rupp defended the failure to report the Virginia action based upon Daniel and Yeager's failure to report the action within 30 days of the proposed agency action and not its effective date. She remained silent as to why she did not report the final agency action prior to October 22 even though she had received notice eleven days before the expiration of the thirty-day reporting period.

In its Answer Brief, the Department addressed Dr. Rupp's defense of "impossibility" by stating:

> Contrary to Appellant's assertion that she "should be excused because she did not know, nor could she have known that the Virginia action had taken place…(citation omitted), the Appellant could very easily have ensured that the Virginia Board of Medicine had her correct contact address on file. After all, she was aware, at the very least, that Daniel and Yeager, her *locum tenens* company, had closed. (citation omitted). ("Nancy Yeager [an employee of Daniel and Yeager] called me the day following the closure…"). She also stopped working for the company completely in March 2004.[21]

The Department argued that, notwithstanding any purported delegation of this responsibility to the now-defunct *locum tenens* company, Dr. Rupp knew by at least March 2004 that the company was closed and no longer acting on her behalf. The Department maintained that it was her responsibility to report to the Virginia Board of Medicine her change of address.[22] There was nothing that made it impossible for her to do so personally, so her defense of "impossibility" was inapplicable.[23]

Oddly, no argument was made that while the Virginia Order had become final agency action on September 22,[24] the deadline to report the action to Florida within thirty days had not yet passed when Dr. Rupp personally received notice at her Florida address of Virginia's final action on October 11, 2004. Because the *Rupp* court was impressed with her efforts to stay in compliance with regulatory requirements imposed by multiple licensing jurisdictions,[25] it is unknown how the court would have treated the case had the arguments been focused on "personal responsibility" for compliance with the licensing laws, and had the Department pursued the reporting issue based on the final agency action date rather than the date that the formal charges and recommended penalty were issued.

**The Court's Internally Inconsistent Opinion and the Failure to Address the Violation of Section 458.331(1)(b), Florida Statutes**

The court's opinion in *Rupp* also departs from well-settled administrative law principles by appearing to address only the "impossibility" of Dr. Rupp's ability to timely report Virginia's disciplinary action to the Florida Board of Medicine, without directly addressing the statutory violation based on the Virginia action, section 458.331(1)(b), Florida Statutes. The court states:

> Dr. Rupp did not file "exceptions" because she recognized that the Judge's findings of law and fact were accurate, as she tried to explain at the hearing. She does not dispute the sequence and timing of

> events as detailed in the Recommended Order, and she does not take issue with the Judge's conclusion of law that "[s]ubsection 458.331(1)(kk), Florida Statutes, does not provide that notice must be given within 30 days of receipt of the disciplinary action, but within 30 days of the action being taken." Dr. Rupp…did not disagree with the Judge's findings of fact or conclusions of law....[26]

Despite this acknowledgement by the court that even Dr. Rupp believed the Recommended Order was factually and legally correct, the court states later in the opinion that "the Judge's Recommended Order is incorrect because it seeks to impose liability upon Dr. Rupp for not doing what was impossible for her to do."[27] The court then reverses and remands the entire Final Order (and thus, all of its findings and conclusions) for a judgment in Dr. Rupp's favor. In so doing, the court delivers a scathing indictment of the Department and the Board's pursuit of the case as "a shocking waste of everyone's resources."[28]

The court's opinion focuses exclusively on the issue of the required reporting of the Virginia action and whether it was excused by "impossibility." It fails to address the arguably more substantive violation under section 458.331(1)(b), Florida Statutes, charging Dr. Rupp for having been disciplined by the Virginia Board of Medicine. Even assuming that it was "impossible" for Dr. Rupp to report the Virginia action in a timely manner, there can be no defense of impossibility for the existence of the underlying action by Virginia, which by itself, establishes the (b) violation. The ALJ found that there was action by Virginia against Dr. Rupp's license there, and the court itself acknowledged that Dr. Rupp concurred in this finding. Yet the court's opinion fails to directly address this second count. While the Virginia action was based on Dr. Rupp's failure to report her change of address to the Virginia Board, the Florida Board of Medicine could not look behind the Virginia Order or ignore its existence.[29]

Arguably, the court's determination to reverse as to the (b) violation may be premised on its determination that the proceedings before the Board of Medicine were fundamentally flawed, due to what the court calls the Board's failure to provide Dr. Rupp with the "*de novo*" review the court asserts she was entitled to under section 120.57(1)(k), Florida Statutes.[30] As shown below, the court's determination that the Board should have conducted a *de novo* review appears to be a departure from the statutorily established review standard.

**A New Requirement of "De Novo" Review?**

The third way the *Rupp* decision appears to depart from settled administrative licensing law is the court's declaration that the Board failed to provide Dr. Rupp with her statutorily required "*de novo*" review under section 120.57(1)(k), Florida Statutes.[31] In so stating, the court correctly quotes the one statement in that provision that articulates a standard of review. However, a review of the entire provision — taking that sentence in context — reveals that the *de novo* review language refers to the hearing before the ALJ, and not the standard of review by the agency of the proceedings before the ALJ.[32]

Instead, it is section 120.57(1)(l), Florida Statutes,[33] that articulates the standard of review that the agency, in this case the Board of Medicine, must apply in its consideration of a

*continued...*

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Recommended Order of an ALJ. This provision clearly does not authorize a *de novo* review by the Board. Rather, the Board's standard of review of the findings of fact, found in section 120.57(1)(l), is that of "competent substantial evidence" and its standard of review of the proceedings below at the administrative hearing is whether the proceedings on which the findings were based "compl[ied] with essential requirements of law."[34]

In a previous decision, the Third District court articulated the respective roles of the agency and the appellate court in reviewing administrative proceedings in what has become one of the leading opinions on this subject.[35] In its *Gershanik* opinion, the court stated: "Agency determinations may be set aside only if the court finds that the agency's action depends on a finding of fact not supported by competent evidence in the record."[36] Further, "[t]he construction of a statute by the administrative agency entrusted with its interpretation is accorded great weight and persuasive force [and] [t]he agency's interpretation will not be overturned unless it is clearly erroneous."[37]

Reviewed under established case law and under the standards set forth in section 120.57(1)(l), in considering the *Rupp* Recommended Order, the Board of Medicine was within its statutory authority to adopt the findings of fact and conclusions of law of the ALJ. The Board did not modify or reject the findings of fact of the ALJ. The Board did not find the ALJ's interpretations of the applicable substantive law in her Recommended Order inconsistent with the Board's interpretation. Therefore, there was no reason for the Board to do anything other than adopt the Recommended Order and make a determination as to penalty.

By contrast, the court's references to Dr. Rupp's purported entitlement to a *de novo* review by the Board appear to ignore the law established by the *Gershanik* decision and illustrate the confusion engendered by the *Rupp* opinion.[38] That opinion states:

> With regard to the standard of review, this Court reviews a lower court's interpretation of a statute de novo. *Romine v. Fla. Birth Related Neurological Injury Comp. Ass'n.,* 842 So. 2d 148 (Fla. 5th DCA 2003). Furthermore, an agency abuses its discretion when it ignores findings of fact based upon competent substantial evidence. *See Strickland v. Florida A & M Univ.,* 799 So. 2d 276, 277 (Fla. 1st DCA 2001).[39]

In *Rupp*, the court does not acknowledge or cite to its own decision in *Gershanik,* one of the leading administrative cases in which the standards of review for both the agency and appellate court are identified and discussed. The *Romine* case cited in support of its *de novo* review of the Board's "interpretation of a statute" does not deal with whether an agency erred in interpreting a statute it was charged with enforcing, but with whether an amendment to the Florida Birth-Related Neurological Injury Compensation Plan (NICA)[40] could be applied retroactively so as to bar payment of NICA benefits to parents. In NICA cases, the ALJ has final order authority, not the agency. As the court's cited authority for its *de novo* review of the Board's Final Order is inapposite, the application of the principles articulated in its decision in *Gershanik* make more sense in the context presented in Dr. Rupp's case.

The court in *Rupp* was clearly disturbed by what it considered violations of Dr. Rupp's right to due process and the "serious disciplinary penalties" for not taking actions "that were … impossible to take." In taking the unusual step of reversing a Final Order of the Board without regard for the standard set forth in section 120.57(1)(l), the violation of section 458.331(1)(b), and the *Gershanik* opinion, the court delivered a scathing assessment of the prosecution of Dr. Rupp's case.[41] The court's final comments provide fodder for continuing debate as to whether a *de novo* review of the hearing before the ALJ is required of the Board of Medicine.[42]

As a final observation, one other issue raised in the court's opinion in *Rupp* will, no doubt, provide fertile ground for future litigation and consideration by the courts. As to the Board's assessment of the penalty against Dr. Rupp, the court commented: "And finally, the Board decided the issue of imposing a cost judgment against Dr. Rupp without allowing Dr. Rupp any opportunity to be heard."[43] Although the Board has statutory authority to impose its costs on its licensees in its final orders,[44] in the authors' experience, the licensee typically does not know the exact amount of these costs until the day of hearing and does not have an adequate opportunity to challenge either the amount sought by the Department or the Department's underlying affidavit with attached documentation in support of the asserted costs. The *Rupp* court's comments on this practice will serve as authority for future challenges to this practice by this Board and all others.

As illustrated, the Third District Court's opinion in *Rupp* has raised more issues than it settled. Is there a new defense of "impossibility" that trumps the long-established principle of the licensee's personal responsibility for compliance with the legal requirements of his or her profession? Is the Board now required to provide a *de novo* review of an ALJ's recommended order in addition to, or instead of, the review standards articulated in section 120.57(1)(l), Florida Statutes, and in cases such as *Gershanik*? And what of the Board's almost unchallengeable ability to assess extraordinary sums against the licensee in the form of prosecutorial "costs"? Only time will tell "what's up with *Rupp*?"

## Endnotes:

[1] *Rupp v. Dep't of Health,* 963 So. 2d 790 (Fla. 3d DCA 2007).

[2] *Id.* at 796.

[3] The full text of this violation reads: "Having a license or the authority to practice medicine revoked, suspended, or otherwise acted against…by the licensing jurisdiction including its agencies or subdivisions."

[4] The ALJ's finding of fact 14 found that Dr. Rupp's claim that the action by Virginia was not disciplinary action was not credible. This finding was based on a letter written by Dr. Rupp, dated October 21, 2004, asking the Virginia Board to expunge the disciplinary action. *See Dep't of Health, Board of Medicine v. Corliss A. Rupp, M.D.*, 2006 WL 842899, *3 (Fla. Div. Admin. Hrgs.

[5] "Failing to report to the board, in writing, within 30 days if action as defined in paragraph (b) has been taken against one's license to practice medicine in another state, territory, or country."

[6] *See Dep't of Prof. Reg. v. Stern*, 522 So. 2d 77 (Fla. 1st DCA 1988); *Rife v. Dep't of Prof. Reg.*, 638 So. 2d 542 (Fla. 2d DCA 1994). It is unclear whether the court, the Board, or the ALJ considered the effective date of the Virginia Order as the date for the 30-day reporting period under section 458.331(1)(kk), Florida Statutes.

[7] The Department did not charge Dr. Rupp with failing to update her Florida practitioner profile. Section 456.042, Florida Statutes, (2003) requires updates to the Department of Health Practitioner Profile within 15 days of the date of the event.

[8] Virginia did send notice of license renewal to Dr. Rupp at her correct Florida address in June 2004. *See* Respondent's Order/Recommendation to the Board of Medicine, 2006 WL 842899, *3 (Fla. Div. Admin. Hrgs., June 20, 2006).

[9] The ALJ does not state the date on which Dr. Rupp reported the Virginia action to Florida. However, Dr. Rupp sent a packet of information about the Virginia action to the Florida Department of Health on November 8, 2004. *Id.* at *8. This package of information was most likely a response to the Department's notification of its investigation of the Virginia action.

[10] "There was no harm to patients or the public; other than the disciplinary action by Virginia there has been no other disciplinary [action] taken against Dr. Rupp; and the Virginia violation was not a willful violation." *Id* at *5.

[11] At the hearing before the Board, Dr. Rupp's counsel advised the Board that, to the extent the document was meant to constitute exceptions, they were withdrawn.

[12] Curiously, neither the ALJ nor the Board of Medicine addressed the notice Dr. Rupp received on October 11, 2004, advising her of the action by Virginia and why Dr. Rupp could not have reported the action to Florida by October 22, 2004, thus meeting the 30-day Florida reporting requirement. The court also failed to note or comment on this.

[13] "The presiding officer shall complete and submit to the agency and all parties a recommended order consisting of findings of fact, conclusions of law, and recommended disposition or penalty, if applicable, and any other information required by law to be contained in the final order. *All proceedings conducted pursuant to this subsection shall be de novo*. The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. An agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." (Emphasis supplied).

[14] *See, e.g., Florida Bd. of Pharmacy v. Levin*, 190 So. 2d 768, 770 (Fla. 1966) ("Licensed pharmacists undoubtedly are familiar with the laws regulating their profession and must be presumed to have knowledge of [drug regulatory law].").

[15] *See e.g.* §§ 456.072 and 458.331, Fla. Stat. (2007)

[16] *State ex rel. Munch v. Davis*, 196 So. 491, 493-94 (Fla. 1940) ("The license … to practice medicine in Florida was by him accepted with a full knowledge of the inherent power of the State of Florida to enact laws, promulgate rules and regulations controlling the privilege….").

[17] *Id.*

[18] *Shimkus v. State, Dep't of Bus. and Prof. Reg.*, 932 So. 2d 223, 224 (Fla. 4th DCA 2005) ("[I]t is only the licensee who is under the control of the Board.").

[19] Although the ALJ found that Dr. Rupp received notice from Virginia of the action taken against her Virginia license on October 11, 2004, and transmitted payment of the Virginia fine by letter dated October 21, 2004, she later found that Dr. Rupp did not receive notice of the Virginia action for almost two months after the order was entered. 2006 WL 842899 (Fla. Div. Admin. Hrgs., June 20, 2006). No comment was made as to why she could not have reported the Virginia action within 30 days of the effective date.

[20] *See id*., Petitioner's Proposed Recommended Order. The Virginia Order took the form of a statement of formal charges with proposed penalty which, unchallenged, would become final agency action on September 22, 2004. Petitioner's Amended Motion for Official Recognition. *Id*. Florida's licensure statute has a similar mechanism in place for citations. § 456.077, Fla. Stat. (2007).

[21] *Rupp v. Dep't of Health*, 963 So. 2d 790 (Fla. 3d DCA 2007), Appellee's Answer Brief, at 11.

[22] *Id*. As previously noted, Dr. Rupp personally notified the Florida Board of her change of address in April 2003.

[23] *Id.*

[24] Virginia's August 18 notice regarding the proposed order and disposition was allegedly not received by Dr. Rupp due to the board's lack of a current address for her. 2006 WL 842899 (Fla. Div. Admin. Hrgs., June 20, 2006).

[25] "Dr. Rupp is a physician with an unblemished record providing services to the poor, who took the step of hiring a firm to keep her licenses current, and yet was disciplined for not doing the impossible. The Florida Department of Health, Board of Medicine, should be encouraging other physicians to do what Dr. Rupp has been doing." 963 So. 2d at 796.

[26] *Id.* at 794.

[27] *Id.* at 793.

[28] *Id.* at 796.

[29] *See generally Rife v. Dep't of Prof'l Regulation*, 638 So. 2d 542 (Fla. 2nd DCA 1994).

[30] As noted, the court was concerned with what it perceived to be an extraordinary waste of resources prosecuting a physician that the court saw as trying to do the right thing in attempting to comply with the requirements of multiple licenses. The court asserted that the Department should focus its resources on physicians more deserving of punishment. 963 So. 2d at 796.

[31] *See* Endnote 13, *supra*, for the language of section 120.57(1)(k).

[32] As additional support for its contention that Dr. Rupp was entitled to a *de novo* review before the Board, the court repeats Dr. Rupp's claim that the written script read by the Board Chair before this case contained the statement: "No new evidence will be admitted because this proceeding is not a de novo review." However, the transcript of the Chair's reading of the script at the meeting shows that he stated: "No new evidence will be admitted because this is a de novo review." Dr. Rupp makes the assumption that the Chair's oral reading of the script was both correct and correctly transcribed, and when setting forth what was on the written script distributed prior to the hearing, inserted "(sic)" after the word "not" in this sentence. The Department's Answer Brief does not address these discrepancies, and the court was persuaded by Dr. Rupp's explanation of these confused facts as further indication that she was entitled to a *de novo* review of the proceedings below by the Board. 963 So. 2d at 792.

[33] "The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and state with particularity in the order, that the 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. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action." (Emphasis added).

[34] *Id.*

[35] *Gershanik v. Dep't of Prof. Reg., Bd. of Medical Examiners*, 458 So. 2d 302 (Fla. 3d DCA 1984).

[36] *Id.* at 304 (and cases cited therein).

[37] *Id.* at 305 (and cases cited therein).

[38] Albeit, at the hearing before the Board of Medicine, the Chair of the Board may have advised the parties by possible error in the transcript that the proceeding was a "*de novo* review." *See* Transcript of hearing, June 2,

2005, p. 3. ("no new evidence will be admitted because this proceeding is a *de novo* review….") (emphasis added).

[39] *Rupp*, 963 So. 2d at 793.

[40] *Romine v. Fla. Birth Related Neurological Injury Comp. Ass'n.,* 842 So. 2d 148, 149 (Fla. 5th DCA 2003) ("The sole issue on appeal is whether it was error to retroactively apply the … amendment to section 766.304, Florida Statutes, barring recovery of NICA benefits where, as here, there has previously been a civil recovery.").

[41] The authors of this article are both former members of the prosecutorial staff for the health care regulatory boards and both now defend physicians before this Board and others. In our experience, most of these (b) and (kk) violation cases are resolved by settlement agreements, and clients typically elect this avenue to avoid the protracted proceedings and the extraordinary time and expense to litigate these violations before the Division of Administrative Hearings. This is especially true where, as here, the underlying violation in the other jurisdiction is a relatively minor technical matter and not one that is related to patient care, mishandling or abuse of drugs, fraud in the practice of medicine, or sexual misconduct. Many clients choose a quick settlement of a relatively minor violation over expensive proceedings to defend what is often perceived as a case that can be proven just on the documents.

[42] See section 456.073(5), Florida Statutes, which states: "…The determination of whether or not a licensee has violated the laws and rules regulating the profession, including a determination of the reasonable standard of care, is a conclusion of law to be determined by the board, or department when there is no board, and is not a finding of fact to be determined by an ALJ…."

[43] 963 So. 2d 795. Just prior to the hearing, Dr. Rupp's counsel filed a response to the motion for final order and a motion opposing costs. After adopting the facts and conclusions of law, the Board permitted Dr. Rupp to personally address it. In her statements, she commented on the amount of costs sought to be imposed, noting the financial devastation to her practice by multiple hurricanes, including Wilma, and the focus of her practice in treating the poor. Transcript of June 2, 2006, Board proceeding, at pp. 20-21. When the Board took up the issue for costs, no other comments were made by Dr. Rupp. One board member made note of Dr. Rupp's financial circumstances and the time for payment of the costs was extended from the normal 30-day time period to a year from the date of the final order.

[44] See section 456.072(4), Florida Statutes, which states: "In addition to any other discipline imposed through final order or citation, entered on or after July 1, 2001, under this section or discipline imposed through final order, or citation, entered on or after July 1, 2001, for a violation of any practice act, the board, or the department when there is no board, shall assess costs related to the investigation and prosecution of the case. The costs related to the investigation and prosecution include, but are not limited to, salaries and benefits of personnel, costs related to the time spent by the attorney and other personnel working on the case, and any other expenses incurred by the department for the case. The board, or the department when there is no board, shall determine the amount of costs to be assessed after its consideration of an affidavit of itemized costs and any written objections thereto."

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