Administrative Law Section Newsletter

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Standing in Rule Challenges After *Office of Insurance Regulation & Financial Services Commission v. Secure Enterprises, LLC*

By Brittany Adams Long

Last fall, the First District Court of Appeal issued an opinion that, at least at first glance, appeared to substantially depart from established precedent governing standing[1] in rule challenge proceedings. *See Office of Ins. Reg. & Fin. Servs. Comm'n v. Secure Enters., LLC*, 124 So. 3d 332 (Fla. 1st DCA 2013). The court reversed a determination by Administrative Law Judge ("ALJ") Robert Meale that a company had standing to challenge a form incorporated into a rule.[2] Following issuance of the opinion, in a subsequent rule challenge Judge Meale wrote an 80-page Final Order analyzing appellate case law concerning standing in rule challenges and outlining the courts' sometimes inconsistent application of the standing test. *See Guardian Interlock, Inc. v. Dep't of Highway Safety & Motor Vehicles*, Case No. 13-3685RX (DOAH Jan. 10, 2014).

Judge Meale's Final Order in *Guardian Interlock* should be reviewed by every practitioner grappling with standing issues in a rule challenge. He carefully chronicles each appellate court opinion that addresses standing in a rule challenge proceeding between 1977 and 2013 and demonstrates how the doctrine of standing has evolved and why it can be so confusing. This article summarizes some key themes found in Judge Meale's *Guardian Interlock* Final Order and in the cases he addresses.

See "Rule Challenges" page 14

From the Chair

by Daniel E. Nordby

The Administrative Law Section's 2014-15 year is off to a great start. In my inaugural chair's column, I noted that the Pat Dore Administrative Law Conference would provide a showcase for administrative law practitioners to hear about the leading issues in Florida government and administrative law from a tremendous lineup of presenters and panelists. I am pleased to report that the conference was a resounding success, due in no small part to the tireless efforts of conference co-chairs Gar Chisenhall and Judge Cathy Sellers. The Section is also grateful to Judge Kent Wetherell for his timely, topical, and entertaining keynote address.

The Section's executive council met on October 16 to discuss the programming and budget for the year ahead. I was very excited to hear about the continued success of the "Table for Eight" initiative organized by the young lawyers committee. This program offers an opportunity for newer administrative law attorneys to have dinner and meet more experienced colleagues in a less formal environment. If you're interested in

See "From the Chair," next page

INSIDE:

FROM THE CHAIR
from page 1

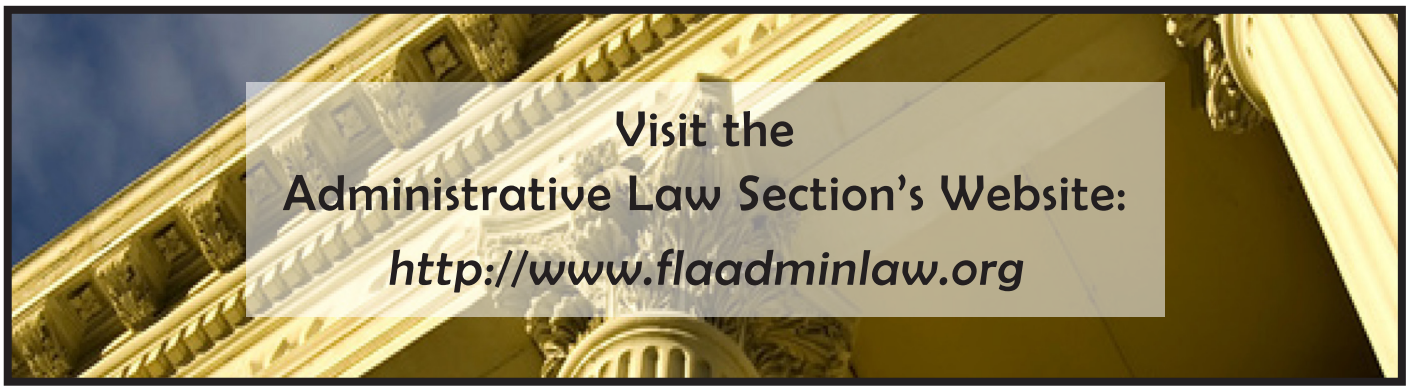
participating in a future "Table for Eight" dinner, please email any of the Section's officers.

This spring, the Section will sponsor an Advanced Administrative and Environmental Law Conference. This CLE program will double as a certification review course for attorneys who are board certified, or are seeking to become board certified, in State and Federal Government and Administrative Practice. Be on the lookout for more information on this conference in the coming months.

The ad hoc committee on access to agency orders has developed draft legislation intended to modernize the APA's indexing provisions and to expand the use of DOAH as the official reporter of agency final orders. The Section's legislative committee has determined that the proposal falls within the current approved lobbying positions. Stay tuned as this proposal moves forward.

Finally, the executive council is closely monitoring a proposal before the Board of Governors to amend Rule 4-4.2 of the Florida Bar's Rules of Professional Conduct. This rule governs communication with persons represented by counsel—an issue that can present particular challenges when the represented party is a government agency. An informal working group will be meeting to determine whether a consensus position of the Section can be formed around a proposal that protects both the sanctity of the attorney-client relationship and the right of citizens to freely petition their government for redress of grievances.

Please enjoy this edition of the Administrative Law Section Newsletter and consider getting more involved with the Section's activities and programs. Happy holidays and happy New Year to all.



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APPELLATE CASE NOTES

by Larry Sellers and Gigi Rollini

Administrative Orders

Borges vs. Dep't of Health, 143 So. 3d 1185 (Fla. 3d DCA 2014).

Gustavo Borges (Borges) appealed a final order of the Florida Board of Dentistry (Board) that revoked his license to practice dentistry based on a conviction of the knowing receipt of child pornography under a federal statute.

At hearing, eight lay witnesses and four expert witnesses testified. In the recommended order's discussion of the evidence presented, which was the basis for the Board's final order, the administrative law judge (ALJ) discussed the testimony of only one witness—Borges—after concluding that a statement by Borges constituted a concession that established that his conviction was related to his ability to practice dentistry. No other testimony was discussed in the order, or even acknowledged.

On appeal, the appellate court concluded that the ALJ's recommended order adopted by the Board did not comply with one of the requirements of section 120.57, Florida Statutes—that an ALJ's order must contain "express findings of fact." The court was quick to point out that, while the findings of fact did not have to address the testimony of every witness (i.e., all twelve here), the order must at least address the factual controversies at issue to the extent they are relevant to the disposition, or address why the testimony is irrelevant. Having failed to do so in this case, the appellate court reversed and remanded.

Due Process

Citizens of the State of Fla., et al. v. Fla. Public Service Comm'n, et al., 146 So. 3d 1143 (Aug. 28, 2014).

Citizens of the State of Florida (Citizens), represented by the Office of Public Counsel (OPC), appealed from a decision of the Florida Public Service Commission (Commission) relating to the rates of a public utility providing electric service.

Florida Power & Light (FPL) filed an application for a rate base increase. FPL reached a negotiated settlement agreement with three intervenors, and the Commission approved the agreement to resolve FPL's application for a rate base increase.

Citizens contended that: (1) the Commission erred by approving a non-unanimous negotiated settlement agreement over Citizens' objection; (2) the Commission violated Citizens' due process rights by creating a rushed hearing track to consider the settlement agreement; and (3) the Commission's decision that the settlement agreement and its terms result in rates that are fair, just, reasonable, and in the public interest is not supported by competent, substantial evidence.

The Florida Supreme Court rejected all three arguments and affirmed.

The Court found that Citizens' argument regarding the Commission's authority to approve a settlement agreement objected to by the OPC was without merit because the Commission independently determines rates for utilities; the Commission is authorized by statute to resolve rate-making proceedings by approving negotiated settlements; and, nothing in the language of the relevant statutes or the Court's holdings supports Citizens' position that the Commission is precluded by law from authorizing a non-unanimous settlement where the OPC objects to the terms of the settlement.

The Court also rejected Citizens' due process claims, finding that the Commission complied with all of the procedural requirements in chapters 120 and 366, Florida Statutes, and the Florida Administrative Code; and concluding that the process followed by the Commission in this case was sufficient.

Finally, the Court found that the Commission's findings and conclusions that the settlement agreement established rates that were just, reasonable, and fair, and that the agreement is in the public interest were supported by competent, substantial evidence.

Licensing

All Saints Early Learning & Community Care Ctr., Inc. v. Dep't of Children & Families, 145 So. 3d 974 (Fla. 1st DCA 2014).

All Saints Early Learning and Community Center (All Saints) appealed an amended final order of the Department of Children and Families (DCF) finding that All Saints violated a licensing standard under section 402.305(1)(a), Florida Statutes, which DCF had defined as a "class I violation" under Florida Administrative Code Rule 65C-22.010(1)(d). As a result of the class I violation, DCA imposed a $500.00 administrative fine and, importantly, terminated All Saints' "Gold Seal Quality Care" designation.

DCF subsequently filed an administrative complaint against All Saints, alleging a violation stemming from inadequate supervision of children while they were playing outside. An informal hearing was held, after which the hearing officer concluded that All Saints had committed a class I violation when it allowed a child to leave the facility unsupervised. The hearing officer recommended the imposition of a $500.00 fine and the revocation of All Saints' Gold Seal Quality Care designation. All Saints filed a written statement challenging the grounds for the administrative penalties, but the agency upheld them in its amended final order.

All Saints argued on appeal that DCF is not authorized to penalize it for violations by its employees, where it has implemented the standards required by statute. All Saints argued that, otherwise, the effect is to impose liability due to employee negligence, which is the equivalent of subjecting licensees to a "strict liability" standard. The appellate court focused, however, on the activity regulated, and concluded that child care facilities are held to a stricter standard. The court looked to the stated legislative intent in sections 402.26 and 402.301, Florida Statutes, to reach that conclusion.

All Saints also argued that, under DCF's rule, it should be shielded from liability because it is the child care personnel (i.e., the employees), and

continued...

APPELLATE CASE NOTES
from page 3

not the entity or owners, who "shall remain responsible for the . . . children in care." The court rejected this claim because the owners and operators are included in the statutory definition of "child care personnel." Thus, licensed owners and operators are required to ensure that their facilities comply with the statutory and rule requirements, and will be subject to administrative sanctions for employee negligence that endangers a child.

Emiddio v. Fla. Office of Fin. Reg., 147 So. 3d 587 (Fla. 4th DCA 2014).

Jeanne Emiddio appealed the administrative order of the Office of Financial Regulation (OFR), denying her application for a loan originator license because she had been convicted of felonies involving crimes of fraud.

In 2002, Emiddio, a licensed mortgage broker, pled nolo contendere and was adjudicated guilty of one count of organized fraud involving less than $20,000, one count of making a false statement for public aid, and four counts of Medicaid provider fraud. These convictions were not related to her practice as a mortgage broker. At the time, section 494.0041(2)(a), Florida Statutes, gave OFR discretion to take disciplinary action, including probation, suspension, or revocation of the license of any mortgage broker who pled nolo contendere to a crime involving fraud. OFR sought to revoke Emiddio's license based on the 2002 convictions. Following an informal hearing as to an appropriate penalty, the hearing officer recommended probation, which was adopted by OFR in a 2004 final order. Thereafter, Emiddio renewed her license every two years. In 2009, the Governor restored her civil rights, except the right to possess or own a firearm.

The federal government responded to the 2008 mortgage crisis with legislation that required states to adopt strict minimum standards for licensing "loan originators," including mortgage brokers. Florida adopted the new standards in 2009, including a new requirement that a license applicant must not have been convicted of, or pled guilty or nolo contendere to, a felony involving an act of fraud, dishonesty, breach of trust, or money laundering, at any time before the date of the license application. The new provisions required all mortgage brokers to file new applications for licensure as "loan originators" through the national system.

Emiddio's timely filed loan originator application under the new law was initially denied by OFR, because of her 2002 felony convictions involving fraud. After an informal hearing in which Emiddio argued that res judicata and collateral estoppel should apply to preclude denial of her license on the same grounds as OFR's 2004 disciplinary action, OFR entered a final order denying her license application under the new law.

On appeal, the court affirmed, finding that neither res judicata nor collateral estoppel applied. The court recognized the Florida Supreme Court precedent establishing that "the principles of res judicata do not always neatly fit within the scope of administrative proceedings" and should be applied with great caution, and that "the proper rule in a case where a previous . . . application has been denied is that res judicata will apply only if the second application is not supported by new facts, changed conditions, or additional submissions by the applicant." Likewise, with collateral estoppel, the doctrine will not be applied if there is a change in circumstances creating a new issue to be litigated. The court acknowledged that "the determination of whether a significant change in circumstances has occurred lies primarily within the discretion of the administrative agency." Applying these rules, the court held that the hearing officer and OFR acted within their discretion to find a significant change in circumstances and an unanticipated subsequent event that created a new legal situation.

The court also distinguished the First District's decision in *Kauk v. Department of Financial Services,* 131 So. 3d 805 (Fla. 1st DCA 2014), in which the First District considered whether OFR could impose a per se bar to insurance agent licensure to an applicant who was previously convicted of a felony involving a crime of fraud where OFR found that the applicant was fully rehabilitated and his civil rights had been restored. The court also found that the argument that the denial constitutes an unconstitutional infringement on the executive's clemency power had not been preserved for review.

Public Records

Chmielewski v. City of St. Pete Bch., 39 Fla. L. Weekly D1815 (Fla. 2d DCA Aug. 27, 2014).

Chester and Katherine Chmielewski (Chmielewskis) appealed a trial court's order dismissing, with prejudice, their complaint for failure to state a cause of action after they filed suit to secure the disclosure of public records.

In 2006, the Chmielewskis sued the city to quiet title to a beachfront lot adjacent to their residential lot. The City of St. Pete Beach (City), through mediation, ultimately settled the suit. Before settling, the City engaged in private discussions with its counsel under section 286.011(8), Florida Statutes, which sets forth a limited exception to the public meeting laws for "shade meetings."

In a separate action, the Chmielewskis sued the city for inverse condemnation of the adjacent lot due to continuous use by trespassers, and they sought the transcripts from the shade meeting in the now-ended quiet title suit. When the city refused, the Chmielewskis filed a public records request under chapter 119, Florida Statutes. When the City continued to refuse to release the transcript of the shade meeting, the Chmielewskis filed an action to compel the City to provide the public records.

The trial court dismissed the public records lawsuit under the theory that the facts and issues of the quiet title and inverse condemnation lawsuits were alike (though the legal theories differed); the inverse condemnation lawsuit was "still pending"; thus, the records were shielded from public disclosure because the quiet title action, through the related inverse condemnation suit, was not concluded for purposes of section 286.011(8)(e), Florida Statutes.

The appellate court reversed the

continued...

APPELLATE CASE NOTES
from page 4

dismissal of the public records suit. First, the court rejected the argument that the quiet title suit, which had been disposed of by final judgment, was not over. The court emphasized that the statute makes clear that, upon conclusion of the lawsuit, the shade meeting transcript becomes public, and the City's position was a call for "an unwarranted expansion of a limited legislative exemption."

Second, while the Chmielewskis invoked in the inverse condemnation lawsuit the mediation process contained in the quiet title settlement agreement, the appellate court concluded that the "potential" for post-judgment enforcement proceedings could not indefinitely shield a shade meeting transcript from the public after the underlying lawsuit ends.

Finally, the court found no meaningful connection between the quiet title and inverse condemnation suits. Given that the legislative exemption is very narrow, as indicated by the statute's language, and the strong presumption that the government should act in a transparent fashion, the court reversed and remanded to the trial court to order the City to disclose the shade meeting transcript.

Clay Cnty. Ed. Ass'n v. Clay Cnty. Sch. Bd., 144 So. 3d 708 (Fla. 1st DCA 2014).

After requesting various public records related to the Clay County School Board's operation, and receiving only some of the responsive documents, the Clay County Education Association (CCEA) filed a petition for a writ of mandamus with the circuit court to compel production of the records. In unsworn defenses to the complaint, the school board stated that it had already produced the documents, did not have the information in the requested format, or that the requested documents did not exist. The circuit court granted the school board's motion to dismiss the complaint, and the CCEA appealed.

The First District Court of Appeal reversed, finding that CCEA's petition for writ of mandamus was legally sufficient. The complaint alleged a violation of a clear legal right and breach of an indisputable legal duty, thereby showing a prima facie basis for relief.

The appellate court also concluded that the circuit court erred by failing to hold an evidentiary hearing to resolve disputed issues of fact, which CCEA requested. The school board's defenses likewise created issues of fact that should have been grounds for a priority hearing under section 119.01, Florida Statutes.

Promenade D'Iberville v. Sundy, 145 So. 3d 980 (Fla. 1st DCA 2014).

After receiving a public records request from Promenade D'Iberville, LLC (Promenade), with whom the Jacksonville Electric Authority (JEA) was in active litigation in Mississippi, the JEA filed a motion for protective order in the Mississippi court to circumvent the request. The JEA eventually turned over the requested records, but only after two months had passed and Promenade was forced to file an action for the public records.

The appellate court framed the issue as whether the JEA had violated the public records law by withholding requested non-exempt public records. The court noted that, as a general rule, governmental entities in Florida are broadly responsible to make public records available to all who request them. The JEA did not argue that any statutory exemption excused its obligation to make the requested documents available. Rather, the JEA delayed making the records available pending a ruling on its Mississippi motion, even though the pending litigation was not grounds for a public records exemption. Thus, the appellate court concluded, the JEA violated the public records law by delaying Promenade's access to non-exempt public records for legally insufficient reasons.

Moreover, the appellate court concluded that JEA's delayed production of records did not "cure" its unjustified delay. Only justified delay is permissible, such as to determine whether such records exist or due to a belief that some or all of the requested records are exempt from disclosure. Unjustified delay violates Florida public records law. Where there is unjustified delay to the point of forcing a requester to file a lawsuit that, alone, is "tantamount to an unlawful refusal to provide public records in violation of the Act."

Rule Challenges

G.B. v. Ag. for Pers. with Disab., 143 So. 3d 454 (Fla. 1st DCA 2014).

Several adults with developmental disabilities appealed an administrative final order determining that rules proposed by the Agency for Persons with Disabilities (APD) to implement Florida's iBudget statute were valid. Concluding the proposed rules contravened the law they purported to implement, the appellate court reversed and invalidated the proposed iBudget rules in their entirety.

The First District noted that pursuant to section 120.52(8)(c) and (9), Florida Statutes, "[a]n agency may not propose or create a rule that 'enlarges, modifies, or contravenes the specific provisions of … the language of the enabling statute." It is "not enough that the Agency's rule is 'reasonably related' to the Legislature's purpose or statutory provisions," but rather, the "rule and interpretation must comport with the specific authorizing statute" and must "comply with the Legislature's particular requirements."

The court found that the Legislature was clear on the specific, sole mechanism by which APD may set an individual's funding, or iBudget, with only three exceptions specifically delineated in the statute. In contravention of this clear requirement, APD's proposed rules offered an alternative system that vested in APD "various modification mechanisms—none of which are contemplated by the clear statutory mandate" for setting funding levels, including mechanisms for impermissibly decreasing funding below the statutorily required levels.

As a result, the appellate court held that the proposed rules directly conflict with and contravene the Legislature's clear language. While recognizing the challenges APD faces in finding a reasonable way to administer funds to a large base of people in need, the court reiterated that "when, as here, the Legislature is clear, there is no room for deviation."

continued...

APPELLATE CASE NOTES
from page 5

Standing
Conservation Alliance of St. Lucie Cnty., Inc., et al. v. Fla. Dep't of Envtl. Prot., 144 So. 3d 622 (Fla. 4th DCA 2014).

Conservation Alliance of St. Lucie County and Treasure Coast Defense Fund (Appellants) appealed a final order of the Department of Environmental Protection (DEP) dismissing their petition for a formal administrative proceeding.

In 2010, Allied Universal Corporation and Chem-Tex Supply Corporation negotiated a settlement agreement with DEP to remediate soil and groundwater contamination at a bleach-manufacturing and chlorine-repackaging facility. Appellants petitioned for an administrative hearing to challenge the settlement agreement. They claimed standing under section 403.412(6), Florida Statutes, which grants automatic standing to initiate an administrative proceeding to certain Florida corporations which were "formed at least one year prior to the date of the filing of the application for a permit, license, or authorization that is the subject of the notice of proposed agency action."

DEP's dismissal order adopted the administrative law judge's recommended order of dismissal, which found that Appellants did not have standing to challenge the settlement agreement. The ALJ concluded that the settlement agreement resolved an enforcement action and, thus, did not constitute a "permit, license, or authorization" within the meaning of the statute.

On appeal, the court held that DEP's reading of section 403.412(6) was reasonable, and affirmed. The court noted that the language of section 403.412(6) is not ambiguous, and that it is clearly premised upon an application for the permit, license, or authorization that the complaining party seeks to challenge. Because this case did not concern an application for a permit, license, or authorization—but instead involved a third-party challenge to a settlement agreement—the court held that Appellants did not have standing to challenge the settlement agreement under section 403.412(6).

Statutory Construction
School Bd. of Polk Cnty. v. Renaissance Charter School, Inc., et al., 147 So. 3d 1026 (Fla. 2d DCA 2014).

The School Board of Polk County (School Board) appealed an order of the State Board of Education allowing Renaissance Charter School (Renaissance) to operate a charter school in Polk County.

Renaissance's application sought approval under a statute allowing "high performing" charter schools to apply for additional charters that "substantially replicate" the education program of the high-performing school. The School Board initially denied the application, finding that the new school's educational program did not "substantially replicate" that of the high-performing school. The Board of Education overturned the School Board's decision, and approved the application.

On appeal, the Second District reversed, finding that the School Board had met its burden to prove by clear and convincing evidence that the charter application did not materially comply with section 1002.33(6)(c)3.b., Florida Statutes. In doing so, the court quoted the Fifth District's decision in *School Board of Seminole County v. Renaissance Charter School, Inc.*, which held that, "to be 'substantially similar' within the meaning of the Florida Statutes, a charter school must have the same characteristics and be alike in substance or essentials to the school it is replicating." 113 So. 3d 72 (Fla. 5th DCA 2013). The court noted that the charter school proposed for Polk County intended to serve approximately 1,400 children in kindergarten through eighth grade, whereas the school ostensibly being replicated served only 200 children in grades 6 through 8.

The court also rejected Renaissance's cross-appeal that asserted a due process violation for failure to hold a hearing. Concluding that the APA did not apply, and that Renaissance did not request a formal hearing, no due process violation occurred in the School Board's original decision not to conduct an evidentiary hearing.

So. Fla. Racing Ass'n, LLC v. Dep't of Bus. & Prof. Reg., 143 So. 3d 1149 (Fla. 3d DCA 2014).

South Florida Racing Association, LLC (SFRA), appealed a final order issued by the Division of Business and Professional Regulation, Division of Pari-Mutuel Wagering (Division), which denied SFRA's application seeking a permit to conduct summer jai alai under section 550.0745(1), Florida Statutes. The Division denied SFRA's permit application on the basis that no summer jai alai permit was available. For the same reason, the Division denied SFRA's competitor, West Flagler Associates, Ltd.'s (West Flagler), summer jai alai permit application as well. West Flagler appealed its denial to the First District Court of Appeal (which reversed). Meanwhile, SFRA appealed its denial to the Third District Court of Appeal.

In the SFRA appeal, the Third District adopted the majority opinion of the First District in *West Flagler Associates, Ltd. v. Department of Business & Professional Regulation, Division of Pari-Mutuel Wagering*, 139 So. 3d 419 (Fla. 1st DCA 2014) (the *West Flagler* Appeal), and held that the Division erred in denying SFRA's application for a summer jai alai permit. [For a summary of this opinion, *see* the September issue of this newsletter.] The Third District agreed with the First District's conclusion in the *West Flagler* Appeal that the Division's interpretation of the relevant statute governing creation of new summer jai alai permits (section 550.0745, Florida Statutes) was erroneous.

However, the court affirmed the Division's final order to the extent it rejected SFRA's additional argument that it is entitled to priority over other applications for a summer jai alai permit. The court concluded that the plain and unambiguous language of section 550.0745, Florida Statutes, does not provide any priority treatment to an applicant for a summer jai alai permit. The statute simply provides criteria for conversion of a pari-mutuel permit to a summer jai alai permit, and if the eligible permit holder declines to convert, the statute authorizes the creation of a new summer jai alai permit.

continued...

APPELLATE CASE NOTES
from page 6

Thrivent Financial for Lutherans v. State of Fla., Dep't of Fin. Servs., 145 So. 3d 178 (Fla. 1st DCA 2014).

Thrivent Financial for Lutherans (Thrivent) appealed a declaratory statement issued by the Department of Financial Services (DFS) interpreting section 717.107, Florida Statutes. That statute requires insurers to remit to DFS any life insurance funds that remain "unclaimed" for a certain period after the funds become "due and payable as established from the records of the insurance company."

Thrivent contended that life insurance funds become "due and payable" when the insurer receives proof of the insured's death and surrender of the policy, based on section 627.461, Florida Statutes, which requires that insurance contracts provide that settlement of a claim for the death of the insured "shall be made upon receipt of due proof of death and surrender of the policy." Instead, DFS issued a declaratory statement finding that life insurance funds are "due and payable" upon the death of the insured. DFS further found that section 717.107, Florida Statutes, created an affirmative duty on insurers to use due diligence in searching databases, such as the Social Security Administration's Death Master File, to determine if any of its insureds has died.

The court reversed, finding DFS' interpretation of section 717.107 to be clearly erroneous. The plain language of section 717.107(1) states that life insurance funds "become due and payable as established by the records of the insurance company." Section 627.461 states that payment "shall be made upon receipt of due proof of death and surrender of the policy." Therefore, the records of the insurance company do not establish funds as "due and payable" under section 717.107(1) until the insurer receives proof of death and surrender of the policy. Nothing in the plain language of section 717.107 supports DFS' interpretation that funds become "due and payable" the moment the insured dies.

The court also rejected DFS's argument that section 717.107 should be interpreted to impose an affirmative duty on insurers to search death records to ascertain whether any insured has died; the plain language of the statute imposes no such duty. The court declined to rewrite the statute, saying that policy concerns must be addressed by the Legislature.

Sunshine Law

Anderson v. City of St. Pete Beach, et al., 39 Fla. L. Weekly D2180 (Fla. 2d DCA Oct. 15, 2014).

Anderson appealed an adverse final judgment in an action against the City, individual commissioners, and the mayor for allegedly violating section 286.011, Florida Statutes, Florida's Government in the Sunshine Law, during a series of seven shade meetings. Anderson alleged that, over a period of eight months, the Commissioners met in secret and formulated a strategy to readopt a comprehensive plan amendment that had been judicially invalidated, and to insulate the readopted plan from future administrative or judicial challenges.

The appellate court reversed, noting that the exemption from the Sunshine Law for shade meetings is limited to discussions with counsel involving the actual settlement of presently pending litigation or the expenses of litigating the pending cases. The court found that the discussions in the seven closed meetings at issue covered a wide range of political and policy issues not connected to settlement of the pending litigation or related to the expenses of litigating the pending cases, which at that point were on appeal.

The court also found that, while there was some discussion at these meetings about costs associated with the pending litigation, the primary focus of the meetings was finding a way to readopt the invalidated comprehensive plan amendment, avoiding future litigation regarding the readopted amendment, and keeping its strategy secret to ensure the success of its planned strategy to readopt the comprehensive plan amendment while insulating it from future challenges. The court held that because the City's discussions exceeded the limited scope of the shade meeting exemption, it was error for the trial court to enter judgment in the City's favor and to deny Anderson's motion for summary judgment.

The appellate court also rejected the City's argument (and the trial court's alternative finding) that, even if the discussions exceeded the scope of the shade meeting exemption, any Sunshine Law violation was "cured" because it was voted on again after full public discussion and participation. The court found that, to the extent the board discussed and took actions on the "comp plan strategy" in public, its actions amounted to nothing more than a "perfunctory ratification" of what had clearly been decided in the secret meetings.

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AVE MARIA SCHOOL *of* LAW
LAW REVIEW

PUBLICATION NOTE

Eric H. Miller's article "The Direction and Supervision by Elected Officials of Florida Executive Branch Agencies and Administrative Rulemaking: 1968 – 2012," was published in the *Ave Maria Law Review* (Volume 12, No. 2, Summer 2014).

We invite our readers to forward information concerning recently published articles of interest to administrative law practitioners to the co-editors.

DOAH CASE NOTES

Substantial Interest Hearings

Senior Lifestyles, LLC d/b/a Kipling Manor Retirement Center v. AHCA, DOAH Case No. 13-4660 (Recommended Order June 10, 2014), AHCA Rendition No. 14-0677-FOF-OLC (Final Order July 29, 2014).

FACTS: The Agency for Health Care Administration ("AHCA") licenses and monitors assisted living facilities in Florida. On September 6, 2013, AHCA notified Senior Lifestyles, LLC, d/b/a Kipling Manor Retirement Center ("Kipling") that it was denying Kipling's licensure renewal application. Kipling requested an administrative hearing, and DOAH issued a Recommended Order on June 10, 2014, recommending that AHCA rescind its denial. The AHCA advocate filed exceptions.

OUTCOME: AHCA rendered a Final Order on July 29, 2014, that rejected the ALJ's recommended action and, instead, reverted to its initial decision to deny Kipling's license renewal application. In the course of doing so, AHCA rejected substantial portions of the ALJ's Recommended Order. For instance, the ALJ concluded that once Kipling demonstrated that it met the minimum standards for approval of its licensure application, then AHCA had to prove by clear and convincing evidence that the allegations supporting its denial were true. AHCA rejected that conclusion as a misreading of the Florida Supreme Court's decision in Department of Banking & Finance v. Osborne Stern & Co., 670 So. 2d 932, 934 (Fla. 1996). AHCA pointed to the Court's approval of the statement in the dissenting opinion below that "an applicant for licensure bears the burden of ultimate persuasion at each and every step of the licensure proceedings, regardless of which party bears the burden of presenting certain evidence." AHCA also rejected the ALJ's conclusion that "denial of Kipling's license renewal application is tantamount to revocation of its license to operate." AHCA cited Osborne Stern, 670 So. 2d at 934, for the proposition that "[t]he denial of [a license] . . . is not a sanction for the applicant's violation of the statute, but rather the application of a regulatory measure." Finally, AHCA rejected the ALJ's conclusion that "the deficiencies cited by AHCA do not indicate a pattern of deficient practice as much as they represent the nature of the on-going problems faced by Kipling in trying to serve its unique class of residents." In rejecting that conclusion, AHCA noted it had cited Kipling "with one hundred and nineteen deficiencies over a three-year time period, clearly demonstrating that [Kipling] has had a pattern of deficient performance." (emphasis in original).

Kipling appealed AHCA's Final Order to the First District Court of Appeal, where the case is proceeding under case number 1D14-3910.

Kimberly A. Campbell v. State Bd. of Admin., DOAH Case No. 14-2803 (Recommended Order Sept. 18, 2014).

FACTS: Kimberly Campbell ("Campbell") was a member of the Florida Retirement System ("FRS") while employed as an Assistant State Attorney from January 2, 2001, through September 30, 2003. Campbell was initially enrolled in the FRS's defined benefit retirement program ("the Pension Plan"), but switched to the defined contribution program ("the Investment Plan") on August 31, 2002. On September 30, 2003, Campbell left the State Attorney's Office for private law practice and took a lump sum distribution from the Investment Plan in January 2006. By taking a lump sum distribution, Campbell became a "retiree," according to section 121.4501(2)(k), Florida Statutes (defining "retiree" to mean a former member of the Investment Plan who has terminated employment and taken a distribution of vested employee contributions). Campbell was elected Circuit Judge for the Sixth Judicial Circuit, taking office in January 2013, and she requested enrollment in the FRS. However, the State Board of Administration ("SBA") notified Campbell that she was ineligible because section 121.122, Florida Statutes, prohibits retirees of a state-administered retirement system initially reemployed in a regularly established position on or after July 1, 2010, from receiving additional retirement benefits. Campbell timely requested an administrative hearing to challenge SBA's proposed action.

OUTCOME: While deeming it "a harsh result," the ALJ recommended that the SBA enter a final order denying Campbell's request to reenroll in the FRS. In the course of doing so, the ALJ noted the Legislature made it clear that the prohibition on renewed FRS membership also applies to elected officials. See §121.053(3)(a), Fla. Stat. (mandating that a retiree of a state-administered retirement system elected or appointed for the first time to an elective office may not reenroll in the FRS).

Disciplinary/Enforcement Actions

AHCA v. Alfred Murciano, M.D., DOAH Case No. 13-0795MPI (Recommended Order May 22, 2014), AHCA Rendition No. 14-687-FOF-MDO (Partial Final Order July 31, 2014).

FACTS: The Agency for Health Care Administration ("AHCA") is responsible for administering Florida's Medicaid program and conducting investigations and audits of paid claims to ascertain if Medicaid providers have been overpaid. With regard to investigations of physicians, section 409.9131, Florida Statutes, provides that AHCA must have a "peer" evaluate Medicaid claims before the initiation of formal proceedings by AHCA to recover overpayments. Section 409.9131(2)(c) defines a "peer" as "a Florida licensed physician who is,

continued...

DOAH CASE NOTES
from page 8

to the maximum extent possible, of the same specialty or subspecialty, licensed under the same chapter, and in active practice." Section 409.9131(2)(a) deems a physician to be in "active practice" if he or she has "regularly provided medical care and treatment to patients within the past two years."

Alfred Murciano, M.D., treats patients who are hospitalized in Level III neonatal intensive care units and pediatric intensive care units in Miami-Dade, Broward, and Palm Beach County hospitals. His practice is limited to pediatric infectious disease. He has been certified by the American Board of Pediatrics in two areas: General Pediatrics and Pediatric Infectious Diseases. AHCA initiated a review of Medicaid claims submitted by Dr. Murciano between September 1, 2008, and August 31, 2010, and referred those claims to Richard Keith O'Hern, M.D., for peer review. Dr. O'Hern practiced medicine for 37 years, and was engaged in a private general pediatric practice until he retired in December of 2012. During the course of his career, he was certified by the American Board of Pediatrics in General Pediatrics, completed a one-year infectious disease fellowship at the University of Florida, and treated approximately 16,000 babies with infectious disease issues. However, he was never board-certified in pediatric infectious diseases, and at the time he reviewed Dr. Murciano's Medicaid claims, Dr. O'Hern would have been ineligible for board certification in pediatric infectious diseases. In addition, Dr. O'Hern would have been unable to treat Dr. Murciano's hospitalized patients in Level III NICUs and PICUs.

After Dr. O'Hern's review, AHCA issued a Final Agency Audit Report alleging Dr. Murciano had been overpaid by $1,051,992.99, and that he was required to reimburse AHCA for the overpayment. In addition, AHCA stated it was seeking to impose a fine of $210,398.60.

OUTCOME: Dr. Murciano argued at the formal administrative hearing that Dr. O'Hern was not a "peer" as that term is defined in section 409.9131(2)(c). The ALJ agreed and issued a Recommended Order on May 22, 2014, recommending that AHCA's case be dismissed because it failed to satisfy a condition precedent to initiating formal proceedings. While recognizing that AHCA is not required to retain a reviewing physician with the exact credentials as the physician under review, the ALJ concluded Dr. O'Hern was not of the same specialty as Dr. Murciano.

On July 31, 2014, AHCA rendered a Partial Final Order rejecting the ALJ's conclusion that Dr. O'Hern was not a "peer." In the course of ruling that it has substantive jurisdiction over such conclusions and that its interpretation of section 409.9131(2)(c), Florida Statutes, is entitled to deference, AHCA stated that it interprets the statute "to mean that the peer must practice in the same area as Respondent, hold the same professional license as Respondent, and be in active practice like Respondent." AHCA concluded that "Dr. O'Hern is indeed a 'peer' of Respondent under the Agency's interpretation of Section 409.9131(2)(c), Florida Statutes, because he too has a Florida medical license, is a pediatrician and had an active practice at the time he reviewed Respondent's records. That Dr. O'Hern did not hold the same certification as Respondent, or have a professional practice identical to Respondent in no way means he is not a 'peer' of Respondent." AHCA's rejection of the ALJ's conclusion of law regarding Dr. O'Hern's "peer" status caused AHCA to remand the case back to the ALJ to make the factual findings on the claimed overpayments that were not made in the Recommended Order because of the ALJ's conclusion that Dr. O'Hern did not qualify as a "peer."

On August 18, 2014, the ALJ issued an Order respectfully declining AHCA's remand. AHCA then filed a Petition for Writ of Mandamus in the First District Court of Appeal, asking the court to direct the ALJ to accept the remand and to enter findings of fact and conclusions of law with regard to each overpayment claim. The court assigned case number 1D14-3836 to AHCA's Petition, and the case is pending.

Dep't of Bus. & Prof'l Reg., Div. of Hotels and Restaurants v. Clinton Green, DOAH Case No. 14-2557 (Corrected Recommended Order Aug. 20, 2014).

FACTS: On April 7, 2014, the Department of Business and Professional Regulation, Division of Hotels and Restaurants ("DBPR") issued an Administrative Complaint alleging Clinton Green violated section 508.013(5), Florida Statutes, by operating a mobile food establishment without a license. Mr. Green requested a formal administrative hearing and represented himself at the final hearing. He readily admitted at the hearing that he did not have a license to operate a public food service establishment. In his defense, Mr. Green asserted he did not need a license, for various reasons. For instance, Mr. Green asserted that he has a God-given right to provide for his family, which cannot be restricted by man. Mr. Green also argued that the State of Florida is the only "entity" which can require him to have a license, but that since the State of Florida is a fictitious person, it is unable to speak directly to him to impose such a requirement. Instead, the proceeding was based solely on the words of the State's agents, which he contended have no force or effect because they are not the State. Lastly, Mr. Green argued that he could only be required to have a license to sell food if he entered into a contract with the State, giving the State permission to govern his actions.

OUTCOME: The ALJ found that Mr. Green was operating without the required license. Because of Mr. Green's "utter disregard for the applicability of law to his operations," the ALJ recommended imposition of a $500 fine.

AHCA v. The Chrysalis Center, Inc., DOAH Case No. 14-0136MPI (Recommended Order June 3, 2014), AHCA

continued...

DOAH CASE NOTES
from page 9

Case No. 14-757-FOF-MDO (Final Order Sept. 2, 2014).

FACTS: Via three Final Audit Reports dated July 10, 2013, AHCA advised the Chrysalis Center that it had overbilled the Medicaid program by $284.535.83 for community mental health services. The Chrysalis Center responded on August 23, 2013, by asserting in a letter that one of AHCA's program analysts had previously determined that the vast majority of the services at issue were reimbursable by Medicaid. Nevertheless, AHCA transmitted the three files to DOAH.

OUTCOME: The ALJ's Recommended Order concluded that the overpayments proved by AHCA were less than 1% of the cumulative amounts identified in the Final Audit Reports. In the course of doing so, the ALJ characterized AHCA's transmittal of the case files to DOAH as a "rejection" of the program analyst's determination. Accordingly, the ALJ sua sponte determined (in a portion of the Recommended Order that was characterized as a "Final Order") that the Chrysalis Center was entitled to an award of attorneys' fees under section 57.105(1)(a), Florida Statutes, because AHCA "knew or should have known from the outset that it lacked necessary material facts to support its claim." The AHCA advocate filed several exceptions to the ALJ's findings of fact regarding the overpayments claimed in the Final Audit Reports, but AHCA rejected those exceptions and rendered a Final Order on September 2, 2014, requiring the Chrysalis Center to only repay $5,232.54 in Medicaid overpayments.

Separately, on June 30, 2014, AHCA appealed the ALJ's determination that the Chrysalis Center was entitled to an award of attorneys' fees. However, the First District Court of Appeal dismissed the appeal because the "Final Order" was not truly final, having only determined entitlement to fees without also determining the amount of fees. The case remains pending at DOAH under the same case number (14-0136MPI) for entry of a final order determining the amount of fees to which the ALJ previously determined Chrysalis Center is entitled.

Bid Protests

AT&T Corp. v. Brevard County Sch. Bd. and Bright House Network, LLC, DOAH Case No. 14-1024BID (Recommended Order Oct. 1, 2014)

FACTS: The Brevard County School Board ("the Board") issued a request for proposals ("RFP") for internet and wide area network services. Pricing terms set forth in a fee schedule were the heaviest weighted criteria. Five vendors submitted responses to the RFP. After evaluation of the proposals by the selection committee, the committee exercised the option in the RFP of inviting two responding vendors, AT&T Corp. ("AT&T") and Bright House Network, LLC ("Bright House"), to make oral presentations to the committee. Prior to the oral presentations, neither bidder knew what pricing terms the other had included in its response to the RFP. The oral presentations were open to the public, including representatives of the bidders. AT&T acknowledged during its oral presentation that the fee schedule it was describing was lower than the one set forth in its RFP response. Because members of Bright House's presentation team were allowed to be present, they learned of AT&T's new prices and quickly modified their own presentation so that Bright House's prices were below those now being offered by AT&T. After the oral presentations, the selection committee chose Bright House for the intended award, and AT&T filed a challenge alleging Bright House obtained an unfair advantage by being present during AT&T's presentation. However, after discovering that Bright House had lowered its fee schedule in response to the AT&T oral presentation, the Board announced its intention to award the contract to AT&T.

OUTCOME: Despite concluding that Bright House took unfair advantage and enjoyed a competitive edge not afforded AT&T, the ALJ recommended that the Board reject all proposals. Section 120.57(3)(f), Florida Statutes, mandates that proposals in response to an RFP cannot be amended after they have been opened. By allowing AT&T to fine-tune its pricing between submission of the original proposal and the oral presentation, the Board impermissibly utilized a hybrid of the RFP and Invitation to Negotiate ("ITN") procurement methods. Neither bidder should have been allowed to modify its fee schedule after responses to the RFP were submitted and opened.

Attorney's Fees

Non-Final Orders

Fla. Quarter Horse Racing Ass'n, Inc., et al. v. Dep't of Bus. & Prof'l Reg., Div. of Pari-Mutuel Wagering, DOAH Case No. 13-2068F (Non-Final Order on Entitlement to Attorney's Fees July 30, 2014).

FACTS: The Petitioners filed a rule challenge on November 10, 2011, alleging the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("the Division") utilized an unadopted rule by allowing Gretna Racing to use its quarter horse racing permit to conduct pari-mutuel wagering on a variation of traditional rodeo-style barrel racing. The ALJ issued a Final Order ruling for the Petitioners, and that decision was affirmed by the First District Court of Appeal. See Fla. Quarter Horse Track Ass'n, Inc. v. Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering, 133 So. 3d 1118 (Fla. 1st DCA 2014). When the Petitioners moved to recover the attorneys' fees they incurred in the unadopted rule challenge, the Division responded in opposition, asserting that the Petitioners were not entitled to attorneys' fees because they failed to provide the notice required by section 120.595(4)(b), Florida Statutes. That statute provides that attorneys' fees "shall be awarded only upon a finding that the agency received notice that the statement may constitute an unadopted rule at

continued...

DOAH CASE NOTES
from page 10

least 30 days before a petition under s. 120.56(4) was filed and that the agency failed to publish the required notice of rulemaking pursuant to s. 120.54(3) that addresses the statement within that 30-day period." The statute further provides that "[n]otice to the agency may be satisfied by its receipt of a copy of the s. 120.56(4) petition, a notice or other paper containing substantially the same information, or a petition [to initiate rulemaking] filed pursuant to s. 120.54(7)." The Petitioners countered that they satisfied the notice requirement by means of a letter from Dr. Stephen D. Fisch, the President of the Florida Quarter Horse Racing Association, Inc. ("the FQHRA"), delivered to the Secretary of the Department of Business and Professional Regulation on September 27, 2011 ("the Fisch Letter"). The Fisch Letter communicated the FQHRA's strong opposition to the Division authorizing Gretna Racing to conduct pari-mutuel wagering on barrel racing. If it were to do so, Dr. Fisch asserted the Division would be exceeding its statutory authority. The Division asserted the Fisch Letter was legally insufficient to constitute notice because it failed to: (1) explicitly state that an unadopted rule was currently being utilized; (2) state that the filing of a rule challenge petition was imminent; and (3) contain substantially the same information as an unadopted rule challenge petition.

OUTCOME: The ALJ issued a non-final order determining that the Fisch Letter satisfied the notice requirement of section 120.595(4), Florida Statutes. While acknowledging the principle that statutes authorizing the recovery of attorneys' fees must be strictly construed, the ALJ concluded that the principle could not be invoked by the Division as justification for reading nonexistent requirements into section 120.595(4)(b). The ALJ ruled that section 120.595(4)(b) only requires that an agency receive notice that a particular statement may constitute an unadopted rule and that the ensuing rule challenge petition be filed more than 30 days after the agency's receipt of such notice. The ALJ determined that section 120.595(4)(b) recommends, but does not require, that the notice contain "substantially the same information" as an unadopted rule challenge petition. As for the Division's argument that no unadopted rule was in use on September 27, 2011, when the Fisch Letter was delivered to the Secretary, the ALJ found that "[w]hile it might not have been inevitable, on September 27, 2011, that the Division would issue Gretna Racing a license, such an outcome was neither remote nor speculative because the Division was just then actively weighing whether or not to approve the license application."

Law School Liaison

Fall 2014 Update from the Florida State University College of Law

by David Markell, Associate Dean for Environmental Programs and Steven M. Goldstein Professor

This column highlights three of the many programs the College of Law hosted this fall. The column also features updates on student accomplishments.

Division of Administrative Hearings (DOAH) Rule Challenge Final Hearing

The Division of Administrative Hearings convened a rule challenge final hearing in the College of Law's Advocacy Center on October 14 and 15, 2014. The final hearing involved three consolidated challenges pursuant to section 120.56(1) and (2), Florida Statutes, to proposed Florida Administrative Code chapter 64-4, which provides for the dispensing of low THC cannabis. Petitioners claimed the proposed rules are an invalid exercise of delegated legislative authority under section 120.52(8), Florida Statutes. Hosting the rule challenge hearing at the College of Law provided an outstanding opportunity for College of Law students to observe top lawyers in action.

Energy Day at Florida State: November 5

The College of Law hosted two events on November 5, 2014, that related to energy legal and policy issues. The Environmental Law Society hosted a lunch meeting on the siting of renewable energy projects that featured Doug Roberts of Hopping Green & Sams as a guest speaker. In addition, the College of Law's Fall 2014 *Environmental Forum* on Florida Renewable Energy was held on November 5, 2014. A panel of leading experts, including Patrick Sheehan, Executive Director of the Florida Office of Energy; Mary Anne Helton, Deputy General Counsel of the Florida Public Service Commission; Michael Sole, Vice President, State Government Affairs, Florida Power & Light Company; and Barry Weiss, Attorney at Law and former partner, Greenberg Traurig LLC and Squire Sanders LLP, discussed the availability of renewable resources within our state, recent and current laws and policies that impact renewable energy development, and the likely trajectory of renewable development in Florida. Professor Hannah Wiseman moderated the program.

Fall 2014 Distinguished Lecture

David Adelman, Harry Reasoner Regents Chair in Law at the University of Texas at Austin School of Law, was the Fall 2014 Distinguished Lecturer. Professor Adelman presented his paper "Environmental Federalism: When Numbers Matter More Than Size." The Lecture is available via the following link for Section members who were not able to attend. http://mediasite.apps.fsu.edu/Mediasite/Play/2efd3c5b838047aeb8b2fea23513501d1d

Recent Student Achievements

We are pleased to feature recent accomplishments by several of our College of Law students:

- Claire Armagnac earned 3rd place in the Environmental and Land Use Law Section (ELULS) Maloney Contest for her paper entitled *Worse than the Tourists: Non-Native Invasive Species in Florida, Lionfish, Pythons, and What New Laws and Federal Funding Can Do to Help.*
- JD Benton's article, entitled *Oil is the New Orange: A Look at Why Florida's Ancient Oil and Gas Regulations are Causing Growing Pains,* was published in the OIL & GAS COMMITTEE NEWSLETTER (ABA Section of Env't, Energy, & Res., Chicago, Ill, Aug. 2014).
- Davis Moye, Daria Sakharova, and Nemi Cole, tied for 3rd place in the Air and Waste Management Association Environmental Challenge International.
- James Parker-Flynn has had three articles accepted for publication: *A Race to the Middle in Energy Policy*, 15 SUSTAINABLE DEV. L. & POL'Y __ (forthcoming 2014); *The Intersection of Mitigation and Adaptation in Climate Law & Policy*, 38 ENVIRONS: ENVTL L. & POL'Y J. __ (forthcoming 2014); and *The Fraudulent Misrepresentation of Climate Science*, 43 ELR 11098 (2013).
- Theodore Stotzer coauthored *Statewide Environmental Resource Permitting*, *in* Florida Treatise on Environmental and Law Use Law 9.15-1 (June 2014) (with Amelia Savage of Hopping Green and Sams). His case summary of *Friends of Merrymeeting Bay v. Hydro Kennebec, LLC* (1st Cir. 2014) was published by the ABA Section of Environment, Energy, and Resources (Sept. 24, 2014).
- Robert Volpe has had an article accepted for publication: *The Role of Advanced Cost Recovery in Nuclear Energy Policy*, 15 SUSTAINABLE DEV. L. & POL'Y __ (forthcoming Fall 2014).

RULE CHALLENGES
from page 1

I. Elements of Standing

The test for standing in a rule challenge appears to be relatively straightforward. Section 120.56(1)(a), Florida Statutes, provides that "[a]ny person substantially affected by a rule or proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority." To establish that someone is "substantially affected," the person or entity must demonstrate:

> (1) that the rule or policy will result in a real and immediate injury in fact, and (2) that the alleged interest is within the zone of interest to be protected or regulated.

Jacoby v. Fla. Bd. of Med., 917 So. 2d 358, 360 (Fla.1st DCA 2005). The application of this test has sometimes proved difficult for the courts. Judge Meale's analysis in *Guardian Interlock* highlights both some consistencies and some inconsistencies in the case law.

II. Historical Application of the Standing Test

In the majority of rule challenge cases, especially in recent years, the appellate courts have found that the party challenging the rule had standing.[3] The facts and interests of the party vary widely in these cases, and often cases that seem factually similar result in different outcomes, even by the same court. However, some overarching themes in the cases do emerge.

A. Injury in Fact

The first, and most important, element to establish standing in a rule challenge is to prove that the rule or proposed rule will cause immediate and real injury in fact. The person/entity challenging the rule must be the one to suffer the actual injury.[4] *See All Risk Corp. of Fla. v. State, Dep't of Labor & Emp't Security, Div. of Workers' Comp.*, 413 So. 2d 1200, 1202 (Fla. 1st DCA 1982) (finding that a service company to self-insurers did not have standing to challenge a rule that applied only to the self- insurers).[5] While this injury can be prospective, it cannot be speculative. There are several categories of cases in which standing is analyzed in particular ways.

1. Rules affecting professional licenses

A person suffers an injury in fact when a rule directly regulates his or her profession or encroaches upon his or her license. *Ward v. Bd. of Trs. of the Internal Improvement Trust Fund*, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995) ("A real and sufficiently immediate injury in fact has been recognized where the challenged rule or its promulgating statute has a direct and immediate effect on one's right to earn a living."). A license is a protected right and any rule that encroaches upon that license will be immediate and sufficient to confer standing. *Dep't of Prof'l Reg., Bd. of Dentistry v. Fla. Dental Hygienist Ass'n, Inc.*, 612 So. 2d 646, 650 (Fla. 1st DCA 1993) (explaining that the court had previously found it sufficient to confer standing with "allegations that the rule constituted an encroachment upon a valuable property right, i.e., the right to practice medicine, which is protected by due process"); *Fla. Med. Ass'n Inc. v. Dep't of Prof'l Reg.*, 426 So. 2d 1112, 1117 (Fla. 1st DCA 1983) (explaining that the right to practice medicine was a valuable property right and the right of professionals to practice their professions conferred standing to challenge encroachments upon their professional interests). *See also Jacoby*, 917 So. 2d at 360 (finding that an out-of-state physician who was denied a Florida license was adversely affected and within the zone of interests because his license was denied and "if an individual is affected by licensing rules because that individual works in the area that is regulated, the 'substantially affected' requirement is satisfied.").

2. Economic Injury

Before *Secure Enterprises*, economic injury was sufficient to confer standing in a rule challenge case. For example, the Florida Medical Association was found to have standing to challenge a rule promulgated by the Board of Optometry that would allow optometrists to prescribe certain drugs when the statutes in effect at that time permitted only physicians to prescribe drugs. *Fla. Med. Ass'n*, 426 So. 2d at 1114-15.[6] *See also Fla. Dental Hygienist Ass'n* 612 So. 2d at 651-52 (finding that the Dental Hygienist Association had standing to challenge a proposed rule of the Board of Dentistry that would permit Board approval of dental hygiene schools that did not meet certain accreditation standards).

In *Televisual Communications, Inc. v. State, Department of Labor and Employment Security*, 667 So. 2d 372 (Fla. 1st DCA 1995) (a case with facts similar to *Secure Enterprises*, but with a different result), the Department of Labor and Employment Security proposed rules establishing the procedures and requirements for health care providers to be eligible for workers' compensation payments. *Id.* at 373. The rules included a requirement that physicians complete a minimum five-hour training course, and required that in order for a training course to be approved, any audio-visual materials must be used in conjunction with a qualified and approved instructor who is present to answer questions. *Id.* Televisual challenged the portions of the rules requiring an instructor and argued that its sales of medical educational videos would be impacted by these rules. *Id.* The court found that the financial impact of the rule on Televisual (which was supported by testimony of the company's president) was not speculative, and Televisual was found to have standing. *Id.* at 373-74.

3. Collateral Regulation of Profession or Industry

A rule that does not "directly" regulate a profession, but has the collateral effect of regulating the professional conduct of a person

continued...

RULE CHALLENGES
from page 14

within an occupation is also sufficient to demonstrate injury in fact. *Ward*, 651 So. 2d at 1238. In *Ward*, an engineer was found to have suffered a sufficiently immediate and direct injury from proposed rules of the Board of Trustees of the Internal Improvements Trust Fund (Board of Trustees) regulating the construction of certain docks. The court explained that it was "clear that appellant would be immediately affected by these rules relating to the construction of docks . . . *in that he must comply with them*." *Id.* (emphasis added).

In *Televisual*, in addition to the financial impact, the court determined that the company was affected by the rule because the rule had a collateral effect of regulating its industry. *Id.* at 374. *See also Fla. Bd. of Med. v. Fla. Acad. of Cosmetic Surgery, Inc.*, 808 So. 2d 243, 251 (Fla. 1st DCA 2002) (finding that a proposed rule of the Board of Medicine that would require anesthesiologists be present for all level III office surgeries collaterally affected Certified Registered Nurse Anesthetists (CRNA), based on testimony of doctors that they would not hire CRNAs if they were required to hire anesthesiologists).

4. Rules subjecting a person / entity to a penalty

A sufficient and immediate injury exists when a person or entity will be subject to a penalty by the proposed rules. *Ward*, 651 So. 2d at 1237. In *Ward*, an engineer contended that complying with the rules of the Board of Trustees relating to the construction of docks on aquatic preserves would create unsafe docks, which would subject him to discipline under the engineering licensing statutes. *Id.* The court agreed that he would be subject to discipline and thus was substantially affected by the rule. *Id. See also Lanoue v. Fla. Dep't of Law Enforcement,* 751 So. 2d 94, 98 (Fla. 1st DCA 1999) (finding that the party suffered injury by failing a breathalyzer test and he could challenge the rules providing specifications for the breathalyzer test because he had been charged with driving under the influence and if he were to be found guilty he would be subject to penalties); *Cole Vision Corp. v. Dep't of Bus. & Prof'l Reg.*, 688 So. 2d 404, 407 (Fla. 1st DCA 1997) (finding that corporations that operated retail optical establishments were substantially affected by a rule prohibiting anyone other than a licensed optometrist from practicing optometry because the rule purported to regulate corporations and potentially expose them to legal action and monetary fines).

5. Prospective Injuries

A party does not have to comply with the rule or already have suffered injury from the rule to have standing. *Ward*, 651 So. 2d at 1238 ("Appellant need not comply with the rules and suffer the resulting injury in order to obtain standing to challenge the rules."); *Prof'l Firefighters of Fla., Inc. v. Dep't of Health & Rehab. Servs.*, 396 So. 2d 1194, 1195 (Fla. 1st DCA 1981) ("The APA permits prospective challenges to agency rulemaking and does not require that an affected party comply with the rule at his peril in order to obtain standing to challenge the rule."). A party may, instead, show that "a rule has a real and immediate effect upon his case." *Id.* at 1196 (finding that paramedics who performed paramedic services were substantially affected by a rule requiring them to become certified because they would not be able to continue in their jobs without complying with the rule).[7] *See also Montgomery v. Dep't of Health & Rehab. Servs.*, 468 So. 2d 1014, 1015-16 (Fla.1st DCA 1985) (finding that heads of households receiving food stamps were likely to be subjected to new workfare rules, but finding the issue moot because workfare was not being implemented where they lived); *NAACP, Inc. v. Fla. Bd. of Regents*, 863 So. 2d 294, 298-300 (Fla. 2003) (finding that students in the association were substantially affected by changes in the affirmative action rules because they were "genuine prospective candidates for admission to the state university system").

Although the injury can be prospective, it cannot be speculative. *See State, Bd. of Optometry v. Fla. Soc'y of Ophthalmology*, 538 So. 2d 878, 881 (Fla. 1st DCA 1988) (finding that whether the application of a rule implementing a new law that authorized optometrists to prescribe certain drugs would cause any harm to ophthalmologists was "purely a matter of speculation and conjecture.").

If a person was previously affected by a rule, the person must demonstrate that there is a "present adverse effect." *Fla. Dep't of Offender Rehab. v. Jerry*, 353 So. 2d 1230, 1235 (Fla.1st DCA 1978) (finding that an inmate lacked standing to challenge a rule related to discipline because he had already been disciplined and any future disciplinary proceedings were based on future infractions and thus speculative, but explaining that if he had shown that he lost gain time, he would have had standing). *See also State, Dep't of Health & Rehab. Servs. v. Alice P.*, 367 So. 2d 1045, 1051-52 (Fla. 1st DCA 1979) (finding that a woman who was no longer pregnant did not have standing to challenge a rule related to Medicaid funding for abortions). A person may demonstrate standing based on past injury if he or she is likely to be affected by the rule again. *Jacoby v. Fla. Bd. of Med.*, 917 So. 2d 358, 360 (Fla.1st DCA 2005) (finding that the injury to a person denied a license was not speculative because it was likely the person would apply again).

6. Rules affecting a person's right or interest

A person may be substantially affected by a rule if the rule has the effect of taking away a person's right or interest. In *Professional Firefighters*, prior to the rule, paramedics could practice without certification, but the rule created new restrictions that would prohibit them from practicing unless they were certified. 396 So. 2d at 1196. Likewise, in *Cole*, corporations could operate retail establishments without a license to practice. Thus, a rule that would

continued...

RULE CHALLENGES
from page 15

require corporations to be licensed would take away that ability. 688 So. 2d at 407.

B. Zone of Interests

Perhaps most interesting in Judge Meale's *Guardian Interlock* order are his observations about the application of the zone of interest test in appellate cases. His conclusion is that the test is "useless, at best." *Guardian Interlock*, ¶ 159. Judge Meale posits that, at worst, the "test imposes access requirements not authorized by statute." *Id.* Judge Meale explains that the zone of interest test has been applied in several different ways and often not at all. In fact, there is not one single rule challenge appellate opinion in which injury has been found, but standing was denied because the injury was not within the zone of interests protected by the statute.[8]

Some cases that discuss standing in rule challenges do not mention the zone of interest test at all. *See NAACP, Inc. v. Fla. Bd. of Regents*, 863 So. 2d 294 (Fla. 2003); *State, Dep't of Fin. Servs. v. Peter R. Brown Constr., Inc.*, 108 So. 3d 723,725-26 (Fla. 1st DCA 2013).[9] Many other cases mention zone of interest when explaining the standing test, but then do not apply it. *See Cosmetic Surgery*, 808 So. 2d at 250-51; *Cole*, 688 So. 2d at 407; *Dental Hygienists*, 612 So. 2d at 649-52. In *Montgomery*, the First District Court of Appeal stated, "In Florida, the courts have adopted the federal 'injury-in-fact' test governing standing, . . . and the federal 'zone of interest' test *where applicable*." *Montgomery*, 468 So. 2d at 1016 (emphasis added). The court then said that it was only concerned with whether the parties met the injury in fact test. *Id.* The court did not explain when the zone of interest test was "applicable."

Judge Meale asserts that when the zone of interest test is applied, the courts apply it in two different ways. Under Judge Meale's analysis, the "conventional" zone of interest test looks only to the statute under which the rule was adopted to determine whether standing exists. *Guardian Interlock*, ¶ 160. Under the "loosened" test, however, courts consider whether there is a zone of interest under any relevant statute. *Id.*[10] Judge Meale plainly finds these differing approaches difficult to reconcile.

III. *Secure Enterprises, LLC*

In *Secure Enterprises*, the Office of Insurance Regulation ("OIR") amended several rules and incorporated new forms in response to a statutory change requiring insurers to give discounts or credits to homeowners who implemented certain mitigation measures to reduce loss in a windstorm. *Secure Enterprises*, 124 So. 3d at 334. One of the new forms provided that homeowners were entitled to "opening protection" credit for "Windows or All," meaning that homeowners who upgraded only windows received the same credit as those homeowners who upgraded both windows and doors. *Id.*

Secure Enterprises, a company that manufactured a residential wind-resistant garage door bracing system, challenged the form because it did not include a separate credit for homeowners who upgraded their garage doors, which it contended was required by the new law. *Id.* at 335-36. Secure Enterprises also challenged another form, alleging that it did not give notice to homeowners of discounts provided for the installation of a certain type of garage door. *Id.* Secure Enterprises argued that it was substantially and negatively affected because it had experienced a loss of sales to homeowners who would otherwise purchase Secure Enterprises' product if the OIR forms informed homeowners that the product qualified for an insurance premium credit. *Id.*

In his Final Order, Judge Meale found that economic injury to Secure Enterprises could be inferred because a premium discount for the one-time purchase and installation of the product, given the low cost, would mean increased sales. *Id.* at 336. Judge Meale also found that Secure Enterprises' financial interest was "collaterally" within the zone of interest protected by the statute, which mandated insurance discounts for mitigative goods and services, including those provided by Secure Enterprises, and therefore, collaterally protected or regulated those goods and services. *Id.*

In rejecting the ALJ's findings, the court distinguished each of the three cases it said the ALJ primarily relied upon: *Televisual*; *Abbott Labs*; and *Dental Hygienist*. *Id.* at 336-39. The court found that while economic injury could sometimes form the basis for injury in a rule challenge, it could not here because it was not a situation in which economic competition was going to create injury, which had been the case in *Abbott Labs* and *Dental Hygienist*. *Id.* at 338-39. Instead, Secure Enterprises was claiming economic injury based on the absence of an insurance credit that homeowners had never been provided before. *Id.* Thus, Secure Enterprises did not have a protected right that had been impaired. *Id.* The court, however, stated that if a credit had been taken away, Secure Enterprises would have had a stronger argument. *Id.* at 339. The court also found that the proposed rule did not collaterally affect or regulate the appellant's industry as had been the case in *Televisual*. *Id.* Finally, the court found that the injury was speculative and the Secure Enterprises failed to show immediate or real harm. *Id.*

As to zone of interests, the court found that the economic injury was not within the zone of interest protected by the statutes or rules. *Id.* The Legislature had specifically stated that the statutes were intended to require that insurers provide savings to consumers who install equipment to mitigate windstorm damage, and there was nothing in the statutory language that indicated any purpose of providing a financial benefit to manufacturers of products that may be used in this endeavor. Thus, the court held that Secure Enterprises had no standing to bring the rule challenge. *Id.* at 340.

After *Secure Enterprises*

As Judge Meale points out in *Guardian Interlock*, the appellate cases inconsistently apply the standing test. In fact, the First District Court of Appeal has acknowledged

continued...

RULE CHALLENGES
from page 16

this inconsistency, stating that "[t]he federal law of standing is complex, inconsistent, and unreliable" and that Florida law "arguably may be said to be subject to the same vagaries." *Montgomery*, 468 So. 2d at 1016 n.4. *Secure Enterprises* does not add any clarity.

One thing that is clear after *Secure Enterprises* is that proving injury is the most important factor in obtaining standing in a rule challenge. In all cases, the courts determine whether there is an injury in fact, but only sometimes do the courts address whether that injury is within the zone of interests to be protected by statute. As a matter of historic results, when courts do apply the zone of interests test, the zone of interest tends to go hand-in- hand with the injury test. If injury is found, so is zone of interest. If injury is not found, neither is zone of interest.[11]

As of September 2014, at least two ALJs have issued orders suggesting that *Secure Enterprises* represents a change in the law of standing in a rule challenge. Judge Meale's Final Order in *Guardian Interlock* provides a detailed standing analysis suggesting that *Secure Enterprises* is inconsistent with prior case law. Judge John Van Laningham issued an order in which he acknowledged several older cases but stated that the opinion in *Secure Enterprises* appears to take "a more restrictive view of standing to challenge a rule." *Fla. Cmty. Health Action & Info. Network, Inc. v. Financial Servs. Comm'ner*, Case No. 13-3116RP, ¶ 18 (DOAH Nov. 4, 2013). Judge Van Laningham then relied primarily on *Secure Enterprises* in determining that a party did not have injury and that the alleged injury was not within the zone of interest protected by the statute. *Id.* at ¶¶ 22-32.[12] However, another ALJ, Bram Canter, has issued two orders finding standing, but relying on older cases and not citing *Secure Enterprises*. *See Still v. Suwannee River Water Mgmt. Dist.*, Case No. 14-1420RU, ¶¶ 73-78 (DOAH Sept. 11, 2014) (finding standing for the petitioner and intervenor, but not for an association); *Conservancy of Southwest Fla. v. South Fla. Water Mgmt. Dist.*, Case No. 14-1329RP (DOAH Order on Motion to Dismiss, Apr. 9, 2014).

This begs the question of whether *Secure Enterprises* actually changes the law or just adds one more layer of confusion. The court in *Secure Enterprises* did not denounce any previous opinions or precedent. Instead, the court attempted to distinguish these cases factually. Thus, all of these cases are still good law. It appears that *Secure Enterprises* has not necessarily changed the law, but it is one more case to consider when applying the standing analysis to a specific factual scenario, especially when the arguments include economic injury or collateral regulation of an industry—the two issues in the cases the court distinguished in *Secure Enterprises*.

Because the issue of whether a person or entity has standing in a rule challenge is a fact-specific inquiry, a practitioner needs to be familiar with all of these cases. A party seeking to establish standing should try to fit the case in one of the categories in which the courts have found a party to be substantially affected: 1) the rule regulates the profession the party is in; 2) the rule collaterally regulates the profession the party is in; 3) the rule imposes a penalty on the party seeking standing; or 4) the rule takes away a right, or directly affects the party. It appears from *Secure Enterprises* that if a party is arguing that it is collaterally regulated by a rule, the party needs to show not just that the rule affects its industry, but that it actually places some kind of requirement or prohibition on those in the industry.[13]

A party also needs to identify a specific injury to the party itself and demonstrate proof of the injury. If the injury is prospective, this proof is essential. If the injury is economic and not related to competition, the party may have a higher burden to meet and needs proof that the injury is not speculative.

As to zone of interests, *Secure Enterprises* does little to clarify what test applies. In *Guardian Interlock*, Judge Meale opted to apply a broad federal test for zone of interest instead of any state test. *Guardian Interlock*, ¶¶ 163-73. Federal cases may be useful in rule challenge proceedings, but a party should not solely rely on them to prove standing, as other ALJs may not find them as persuasive as precedent from Florida courts.

IV. Summary

Whether a party in a rule challenge is seeking standing or arguing against it, case law exists that may support either position. A good place to start preparing for a standing argument is to read Judge Meale's order in *Guardian Interlock* to find those cases that are most helpful to the particular situation. Additionally, it is always important to research other rule challenge orders the assigned ALJ may have written to determine how he or she has approached standing in the past and which appellate cases he or she found most persuasive.

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Endnotes:

[1] Section 120.56, which governs rule challenge proceedings, does not use the term "standing"; instead, the statute allows any person who is "substantially affected" to challenge a rule. For the sake of simplicity, this article uses the term standing to refer to a person who is substantially affected by a rule. Courts have explained that in administrative proceedings, standing is a matter of subject matter jurisdiction. *Abbott Labs. v. Mylan Pharms., Inc.*, 15 So. 3d 642, 651 n.2 (Fla. 1st DCA 2009).

[2] *See Secure Enters., LLC v. Office of Ins. Reg. & Fin. Servs. Comm'n*, Case No. 12-1944RX (DOAH Oct. 19, 2012). The facts of the rule challenge are discussed later in this article.

[3] In cases brought under section 120.57, such as licensing and permitting cases, standing is predicated on whether a person's "substantial interests" are affected rather than whether the person is "substantially affected." Standing in rule challenges has typically been found to be broader than third party standing in licensing/permitting cases brought under section 120.57. *See Abbott Labs.*, 15 So. 3d at 652 (explaining that the difference between standing in a rule challenge and third-party standing in a licensing case was "significant" in determining that economic interests can be the basis for standing in a rule challenge); *Fla. Med. Ass'n Inc. v. Dep't of Prof'l Reg.*, 426 So. 2d 1112, 1114-15 (Fla. 1st DCA 1983) (distinguishing a permitting case in which standing was not found because in the permitting case, the petitioners were not challenging the validity of a rule). *But see State, Bd. of Optometry v. Fla. Soc'y of Ophthalmology*, 538

continued...

RULE CHALLENGES

from page 17

So. 2d 878, 881 (Fla. 1st DCA 1988) (finding that under the specific facts in that rule challenge there was not a difference between substantially affected and substantial interests).

[4] An association has standing in a rule challenge on behalf of its members when its members would otherwise have standing to sue in their own right; the interests the association seeks to protect are germane to the organization's purpose; and neither the claim nor the relief requires the participation of individual members in the lawsuit. *Fla. Home Builders Ass'n v. Dep't of Labor & Emp't Sec.*, 412 So. 2d 351, 353 (Fla. 1982).

[5] The court allowed leave to amend the petition challenging the rules, however, because there was one rule that applied to service companies. *All Risk*, 413 So. 2d at 1202.

[6] In a later rule challenge, the Board of Ophthalmology did not have standing to challenge a similar rule, but the law had changed to provide optometrists with the ability to prescribe certain drugs and the court found economic injury to be speculative. *See Fla. Soc'y of Ophthalmology*, 538 So. 2d at 881.

[7] The court also found the firefighters were affected by the licensing rules because they worked in the regulated area. *Prof'l Firefighters*, 396 So. 2d at 1196.

[8] In *Agrico Chemical Co. v. Department of Environmental Protection*, 406 So. 2d 478, 482 (Fla. 1st DCA 1981), the court found that economic injury existed, but it was not within the zone of interest of the applicable permitting statute so the parties lacked standing. *Agrico*, however, did not involve a rule challenge; instead, third parties were attempting to challenge the proposed issuance of a construction permit to their business competitor. *Id.* at 478. *See also Int'l Jai-Alai Players Ass'n v. Fla. Pari-Mutuel Comm'n*, 561 So. 2d 1224, 1226 (Fla. 3d DCA 1990) (finding no injury or zone of interest in an attempt by an association of jai alai players to challenge the proposed approval of an application by jai alai fronton owners to change jai alai operation dates). The court in *Florida Medical Association* explained that the standing issue was different in the rule challenge it was considering than in a permitting case such as *Agrico*, because "the petitioners challenged the validity of the proposed rule," and in *Agrico* "there was no contention of unlawful exercise of authority." *Fla. Med. Ass'n*, 426 So. 2d at 1114-15.

[9] The zone of interest issue was raised and fully argued in the appellate briefs.

[10] Judge Meale asserts that the courts applied the conventional test in *Lanoue* and *Abbott Labs*; the loosened test in *Ward* and *Florida Medical Association*; and that in *Cosmetic Surgery* and *Jacoby* it was impossible to tell what test was used. *Guardian Interlock*, ¶160.

[11] There is only one case in which the court found that the alleged injury was "arguably" within the zone of interest of the statute, but the petitioners had not demonstrated that application of the rule would result in a real and immediate injury. *See Office of Ins. Reg. v. AIU Ins. Co.*, 926 So. 2d 479, 480 (Fla. 1st DCA 2006). The opinion is of limited value, however, as it does not explain the facts or why injury was not demonstrated in its one-paragraph opinion. It may simply stand for the proposition that the injury must be clearly identified and supported by evidence.

[12] This case involved a challenge to a rule incorporating a form providing a consumer notice concerning the impact of federal health care reform on health plan costs. The challenge was brought by an entity that provides services to low- and moderate-income individuals who lack health insurance coverage or perceive their coverage to be unaffordable or inadequate. *Fla. Cmty. Health Action & Info. Network*, ¶¶ 1-2.

[13] For example, in *Televisual*, any company that provided audiovisual training materials was also required by the rule to provide a live instructor. 667 So. 2d at 373. In *Cosmetic Surgery*, an anesthesiologist was required to be in level III surgeries, thus prohibiting CRNAs from providing anesthesia services in level III surgeries without supervision by an anesthesiologist. 808 So. 2d at 251. This is in contrast to *Secure Enterprises*, where the rule may have had an effect on Secure Enterprises, but it did not place any requirements on garage door manufacturers generally and did not prohibit such manufacturers from doing anything. 124 So. 3d at 339.

Section Budget/Financial Operations

Administrative Law	2012-2013 Budget	2013-2014 Actual	2014-2015 Budget
REVENUE			
Section Dues	26,875	25,964	26,875
Affiliate Dues	400	445	350
Admin Fee to TFB	(19,133)	(19,303)	(22,163)
CLE Courses	5,000	6,933	5,000
Section Differential	2,500	2,943	2,500
Section Service Programs	2,000	2,880	2,400
Investment Allocation	6,511	19,045	6,467
TOTAL REVENUE	**24,153**	**38,907**	**21,429**
EXPENSE			
Credit Card Fees	35	47	50
Staff Travel	1,477	313	578
Internet Charges	420	367	450
Postage	75	57	75
Printing	75	11	75
Membership	500	0	500
Supplies	50	13	50
Photocopying	60	38	50
Officer Travel	1,000	1,140	1,250
Newsletter	6,500	10,315	6,500
Meeting Travel	1,000	0	1,000
CLE Speaker Expense	100	0	100
Reception	1,500	1,156	0
Committees	500	42	500
Council Meetings	300	211	300
Bar Annual Meeting	2,200	1,852	2,210
Newsletter	5,006	10,315	10,500
Section Service Programs	750	150	750
Retreat	3,000	2,244	3,000
Public Utility Committee	2,000	1,717	1,750
Awards	700	660	700
Legislative Consulting	5,000	5,000	7,500
Law School Liaison	3,000	0	3,000
Website	1,500	1,349	2,500
Council of Sections	300	300	300
Operating Reserve	265	0	3,188
Miscellaneous	100	0	100
TFB Support Services	2,462	3,517	2,525
TOTAL EXPENSE	**39,875**	**40,814**	**49,501**
BEGINNING FUND BALANCE	**224,659**	**221,217**	**215,571**
PLUS REVENUE	**24,153**	**38,907**	**21,429**
LESS EXPENSE	**(39,875)**	**(40,814)**	**(49,501)**
ENDING FUND BALANCE	**208,937**	**219,310**	**187,499**

SECTION REIMBURSEMENT POLICIES:
General: All travel and office expense payments are in accordance with Standing Board Policy 5.61.

Travel expenses for other than members of Bar staff may be made if in accordance with SBP 5.61(e)(5)(a)-(i) or 5.61(e)(6) which is available from Bar headquarters upon request.

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