ADMINISTRATIVE LAW SECTION NEWSLETTER

Vol. XXX, No. 3 Donna E. Blanton and Amy W. Schrader, Editors March 2009

Florida Supreme Court Eliminates Automatic Stay Pending Review for Governmental Entities In APA Proceedings

by Katherine E. Giddings & Mark D. Schellhase

INTRODUCTION

For years, under the Florida Rules of Appellate Procedure, governmental entities have enjoyed the right to an automatic stay when appealing adverse orders. That automatic stay, however, appeared in direct conflict with certain provisions in Chapter 120, Florida Statutes. Effective January 1, 2009, the Florida Supreme Court resolved this conflict. The Court amended Rule 9.310(b)(2) to eliminate the automatic stay when the order arises from a Chapter 120 proceeding. Rule 9.190 was also amended for consistency.[1]

STAY PENDING REVIEW — GENERALLY

Under Rule 9.310, a party seeking to stay a final or non-final order pending review must file a motion in the lower tribunal. The lower tribunal retains continuing jurisdiction, in its discretion, to grant, modify, or deny such relief.[2] A stay pending review may be conditioned on the posting of a good and sufficient bond, other conditions, or both.[3] An exception exists for public bodies and officers.[4] The timely fil-

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From the Chair

by Elizabeth McArthur

We are all painfully aware that state budget cuts cannot seem to come fast enough to keep apace of growing shortfalls as the revenue stream continues to shrink. What used to be an occasional recalibrating of state budget expenses and revenues has become a constant preoccupation, and all signs are that more pain from the budget axe could be on the horizon despite the just-completed special session.

Funding reductions have been the name of the game in changes over the past several years to the community-based Medicaid waiver program, which provides funding for services to persons with certain developmental disabilities. It was the 2007 program overhaul, with the new four-tier system, that led to the current explosion in administrative hearings; then more budget cuts further reduced funding in 2008, so the case volume will continue to grow. And in the recently completed 2009 special legislative

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session, conducted to shave still more from the state budget, another 5% reduction in funding was proposed for the developmental disability community-based program. A portion of this was restored, but the trend remains the same: the huge waiting lists of developmentally disabled persons needing community-based services will grow while funding and services for those currently in the program will shrink, and the need for volunteer lawyers to provide representation in administrative hearings will continue to multiply.

It is therefore timely, to say the least, to report that our section's pro bono program has made great progress. Thanks to the tireless efforts of a group of volunteers, led by Andy Bertron as chair of the pro bono program committee, we now have the foundation in place and are focusing on building up the pool of volunteer administrative lawyers.

On November 14, 2008, Andy helped to coordinate a free seminar put on by a consortium of legal services organizations and advocacy groups, to educate potential volunteers on the substantive law issues that are being litigated in these administrative hearings. The materials from this seminar are available on our section's website, including helpful forms and checklists, as well as power point presentations used at the seminar, prepared by Jodi Segal of Southern Legal Counsel (Due Process Rights in Medicaid Waiver Determinations); Anne Swerlick of Florida Legal Services (Medicaid Overview: Representing Clients Who Challenge Medicaid Waiver Determinations); and Gabriella Ruiz, also with Southern Legal Counsel (Tier System Enactment and Implementation). Any administrative lawyer willing to volunteer for these cases will be well ahead of the learning curve through this material. For those unable to attend, a video replay of the whole seminar is available on Florida Legal Services' website, at http://www.floridalegal.org/Training/2008/november/medicaid/index.htm. A highlight of the seminar was the surprise appearance by John Newton, general counsel of the Agency for Persons with Disabilities, who bravely took the podium to explain his agency's efforts to carry out the legislative will during these very trying times, and to field questions from the audience. Many thanks to all of those who helped make this seminar a great success.

For the second part of foundation-building for our pro bono program, while many people were busy planning their holidays, Andy Bertron was busy organizing a second free seminar, this time to focus on procedure instead of substance. Held on December 19, 2008, this seminar sponsored by our section was designed to provide an elementary overview of how to try an APD case at DOAH. Andy started off the seminar by addressing procedures "Before the Hearing," covering such basics as the agency initial decision and point of entry, drafting the petition, responding to the DOAH initial order, and conducting discovery. Seann Frazier, our section's chair-elect, took on the next phase, "During the Hearing," in which he addressed opening statements and presentation of evidence through testimony and documents. My partner, Donna Blanton, volunteered to cover "After the Hearing," which included preparation of proposed recommended orders and exceptions. And finally, section member Julie Waldman, an experienced APD lawyer who represents the agency from its area office in Gainesville, wrapped up the seminar by putting the procedures in context by addressing common issues in APD hearings. The course materials from this seminar are available on our section's website, linked on the homepage. These materials will provide a lasting benefit by serving as great basic training tools for newcomers to this area.

So now that the training materials are in hand for both substance and procedure, there is no reason not to sign up today to volunteer. Our section's homepage has a link to the pro bono sign-up page maintained by Florida Legal Services – click on the link, and then scroll down on the pro bono page to the banner for "New Pro Bono Opportunity: Help Support Persons with Disabilities," which will tell you how to sign up. The need is great, particularly in the southern part of the state, where the case volume is highest.

It seems like many of our section's hot topics and activities are taking their shape from the looming influence of the recession. My last column touched on the great success of our 2008 Pat Dore Administrative Law Conference, but that was only the hindsight perspective. In the early stages of planning the conference, the section's executive council voted to adopt a discount for the registration fee for governmental agency lawyers, after concern was expressed about some governmental agencies reducing or eliminating funding for continuing education for their attorneys. Still, advance registration was slow. So for the first time ever, we found ourselves having to market this always-popular seminar, sending blanket emails to all section members and targeted emails to friends, colleagues, and groups. Ultimately, our efforts paid off with great registration and standing-room-only attendance, but we have taken this experience as a sign of things to come and will be exploring different options to use modern technology for continuing education. We need to provide this service in ways that will reduce the time and cost burden to our members. We will be discussing this and other topics at our next executive council meeting and long-range planning retreat, which will be held on March 19-20. As we turn our attention to putting together our next CLE program, and developing new ways to provide continuing education to our membership, please contact Bruce Lamb, our CLE Committee Chair. He could use your input and the benefit of your experiences – good and bad, what works and what hasn't worked.

And maybe it goes without saying, but I will say it (again) anyway – we could use your help, with putting together CLE programs and with all other section activities. Please contact me, or go to our website, look over our committees, and contact a committee chair to express your interest in getting involved.

Appellate Case Notes

by Mary F. Smallwood

Adjudicatory Proceedings

Blackwood v. Division of Administrative Hearings and School Board of Broward County, 34 Fla. L. Weekly 85 (Fla. 4th DCA 2009) (Opinion filed January 5, 2009)

The Broward County School Board filed an administrative complaint seeking to terminate Blackwood's employment as a supervisor of inspections with the Board's building department. Under the collective bargaining agreement applicable to Ms. Blackwood, all discipline of subject employees must occur within 20 days of the date of the offense or the date the violation was first known to have occurred. Under the School Board's policies, the Board could consider prior employment history in determining an appropriate penalty for violations. The administrative law judge entered a recommended order detailing numerous occurrences of inappropriate behavior by Blackwood but finding no such behavior occurred within 20 days of the Board's action.

The Board, after considering the recommended order and exceptions filed by both parties, entered a final order terminating Blackwood's employment based on her employment history.

On appeal, the court reversed. It rejected the School Board's argument that it was simply correcting a misapplication of its policies by the administrative law judge. Instead, the court held that the School Board erred by essentially rejecting a finding of fact of the administrative law judge who found that Blackwood had not been guilty of any infraction within 20 days of the time the Board sought to discipline her.

Heiken v. University of Central Florida, 995 So. 2d 1145 (Fla. 5th DCA 2008)

Heiken, a student, challenged disciplinary action against him by the University arguing that his due process rights were violated by the University's use of an unsworn police report. He relied on *Morfit v. University of South Florida*, 794 So. 2d 655 (Fla. 2d DCA 2001), in which a student who was dismissed successfully argued that use of a report of a security guard who did not testify at the hearing was a violation of his due process rights.

The court held that Heiken's due process rights were not violated. It rejected Heiken's reliance on *Morfit* noting that there was a difference in language between the two universities' rules. The University of South Florida code provided that the student had a right to hear and question adverse witnesses while the University of Central Florida's code provided that a student could hear and question adverse witnesses "who testify at the hearing." The court further held that the reliance of the University on hearsay evidence was not a violation of Heiken's due process rights as he had the opportunity to refute any charges at the hearing and chose not to do so.

Eden Isles Condominium Assoc. v. Department of Business and Professional Regulation, 34 Fla. L. Weekly 163 (Fla. 3d DCA 2009) (Opinion filed January 14, 2009)

The Eden Isles Condominium Association Board (the "Board") decided to modify the manner in which it assessed condominium fees after receiving a complaint from a resident that similarly sized units were assessed different fees. The modification was made at a public meeting in 2004 for 2005 fees. Subsequently, another resident filed a complaint with the Division of Florida Land Sales on the grounds that the new fee assessment method was inconsistent with an amendment to the Declaration of Condominium prescribing each unit's share of common expenses. In response to the complaint, the Board reverted to the pre-2004 assessment for the year 2006. It also offered to refund any excess fees paid by any resident in 2005; however, no one requested a refund.

Despite the second modification to the assessment method and the offer to refund certain 2005 fees, the Division sought to impose a penalty on the Condominium Association. Following an administrative hearing, which no resident attended, the administrative law judge concluded that the Division had not proven by clear and convincing evidence that a penalty was justified, finding the language in the Declaration of Condominium ambiguous. The Division entered a final order, however, holding that it had authority to impose a Category 2 penalty of $5000 for a major violation based on the potential for consumer harm.

On appeal, the court reversed. It held that the Division had no authority to impose its interpretation of ambiguous language on the Board. Further, it held that no harm was demonstrated by the imposition of assessments that were, in fact, more equitable, and where no resident testified at the hearing or sought reimbursement of paid fees.

Emergency Orders

Machiela v. Department of Health, 995 So. 2d 1168 (Fla. 4th DCA 2008)

The Department of Health entered an emergency order restricting Maciela, a doctor of optometry, from seeing patients under the age of 18. In the final order, the Department found that Machiela had exposed himself to two student patients referred to him by the Palm Beach County Health Care District.

On appeal, Machiela argued that he had not violated section 456.063(1), Florida Statutes, which prohibits attempts by the licensee to induce a person to engage in sexual activity and that he did not engage in sexual misconduct. He also argued that the emergency order was too broad by restricting him from treating younger patients.

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The court agreed with the Department that Machiela was in violation of the statutory provisions cited in the order; however, it concluded that the Department could have tailored the order more narrowly by simply requiring the presence of a parent or other adult in the room while Machiela was treating younger patients. The case was remanded to the Department to revise the restrictions on Machiela's license.

Bid Protests

Blu-Med Response Systems v. Department of Health, 993 So. 2d 150 (Fla. 1st DCA 2008)

In September of 2008, Governor Crist issued Executive Order 08-187 in anticipation of Hurricane Ike striking Florida. The order, issued pursuant to Section 252.36, Florida Statutes, in part, delegated to state agencies "the authority to waive or deviate from such statutes, rules, ordinances or orders [to] the extent that such actions are needed to cope with this emergency." The order was limited to 30 days.

The Department of Health immediately suspended the effect of statutes and rules relating to procurement of supplies and services. It then issued a purchase requisition for three mobile hospital systems. Upon learning of the purchase requisition, Blu-Med Response Systems filed an appeal from a non-final order, sought a writ of mandamus to require the Department to comply with the emergency procurement provisions of either Chapter 287 or 120, Florida Statutes, and sought a writ of prohibition.

The appellate court dismissed the appeal and denied the petitions for a writ of mandamus or writ of prohibition. With respect to the appeal, the court held that it was not timely filed as it was beyond 30 days from the rendition of the order. The court was not persuaded by Blu-Med's argument that it could not have filed within 30 days because it never received notice of the contract award, holding, without further explanation, that Blu-Med's remedy for non-receipt "lies with the agency." The court denied the petition for mandamus on the grounds that the Executive Order waived any requirement for compliance with the emergency procurement provisions in the Florida Statutes. The court found that the Governor's order was authorized by Section 252.36, Florida Statutes. With respect to the petition for prohibition, the court held that Blu-Med had not presented a colorable claim that the Department was proceeding in excess of its jurisdiction.

[Note: The court did not address the question of whether the Governor could delegate to his agency heads the authority to waive statutory or rule provisions; nor did it address the effect of Section 252.46, Florida Statutes, which appears to require agencies to comply with Chapter 120 in making, rescinding or amending rules or orders for emergency management purposes.]

Government-In-The-Sunshine and Public Records

Finch v. Seminole County School Board, 995 So. 2d 1068 (Fla. 5th DCA 2008)

The Seminole County School Board determined that it was necessary to revise the high school board attendance zones as the result of the opening of a new high school in the district. The Board created a Core Committee to assist in this process composed of school officials, parents and other interested parties. The committee met on several occasions in the Sunshine and proposed three alternative plans. The Board then arranged a bus trip with members of the School Board, a deputy superintendant, members of the media and candidates for the School Board to review possible bus routes for the alternative plans. The School Board members were separated on the bus, no opinions were discussed and no vote was taken. The Board considered the trip a fact finding trip and did not give notice of it to the public.

Following the trip, the School Board met on two occasions at publicly noticed hearings to consider the alternative plans. Prior to the second hearing, at which one of the plans was adopted, Finch and others filed an action under Section 286,001, Florida Statutes, alleging that the Government-In-The-Sunshine Act was violated by the unnoticed bus trip. The trial court denied relief, finding that the trip fell within a fact finding exemption to the Act.

On appeal, the District Court held that the fact finding exemption relied upon by the trial court applied only to advisory bodies and not to the ultimate decision-making body, in this case the School Board. However, the court affirmed the trial court's decision, concluding that the violation had been cured by the subsequent meetings of the School Board where the alternatives were fully debated before several hundred members of the public.

Attorney's Fees

Milanick v. Osbourne, 34 Fla. L. Weekly 5 (Fla. 5th DCA 2008) (Opinion filed December 24, 2008)

Milanick appealed an order awarding Osbourne attorney's fees in a proceeding before the Commission on Ethics. Milanick argued that the administrative law judge had erred in denying his request for a continuance to retain counsel. Osbourne cross-appealed the Commission's denial of his request for attorney's fees incurred in the administrative proceeding to determine fees in the main case and fees related to Milanick's attempt to obtain discretionary review by the Florida Supreme Court.

On appeal, the court held that the administrative law judge had not abused his discretion in denying the continuance. It further held that Osbourne was entitled to attorney's fees at all levels of the proceeding.

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.

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Agency Snapshot

Agency for Health Care Administration

by Seann Frazier

The Agency for Health Care Administration ("AHCA") was created by the Legislature in 1992 when its responsibilities were transferred from the Department of Health and Rehabilitative Services. The Department is headed by its Secretary, a gubernatorial appointee subject to confirmation by the Senate.

The Agency is the chief health policy and planning entity for the State. It is responsible for the administration of the Medicaid Program, health facility licensure, certification of managed care plans including prepaid health plans, the certificate of need program, and the operation of the Florida Center for Health Information and Policy Analysis.

AHCA has a budget of nearly $16 billion. The Medicaid Program alone has a $13 billion annual budget.

Head of the Agency:
Holly Benson, Secretary
2727 Mahan Drive, Building 3
Tallahassee, FL 32308

Holly Benson assumed the role of Secretary at AHCA in 2008. Secretary Benson previously served as Secretary for the Department of Business and Professional Regulation and served in the Florida House of Representatives, representing Pensacola.

Agency Clerk:
Richard Shoop
(850) 922-5873

General Counsel:
Justin Senior
(850) 922-5873
Email: *seniorj@ahca.myflorida.com*

The Agency's General Counsel is Justin Senior, a 1992 graduate from McGill University in Montreal Canada and a graduate with honors from the University of Florida Law School in 1995. Justin joined AHCA in June 2007 as its Chief Appellate Counsel. He was promoted to Acting General Counsel in October 2008 and was made General Counsel in January 2009. Before joining the Agency, Justin ran his own practice in Gainesville. Justin was born in Canada, but was an Australian citizen until 2004, when he became a naturalized U.S. citizen.

Number of lawyers on staff: 38, including 28 in Tallahassee and 10 in other Florida offices.

Kinds of cases: The Agency's administrative cases include rule challenges, complex certificate of need proceedings, administrative litigation involving facility regulation and licensure, Medicaid audits, and appeals from all of these types of cases. The Agency also represents itself in bid protests and in complex civil litigation brought in state and federal courts.

Practice Tips: The Agency operates three major divisions. In addition to the Office of the Secretary, which houses the Chief of Staff and General Counsel's Office, the Agency operates a Division of Medicaid, a Division of Health Quality Assurance, as well as the Florida Center for Health Information and Policy Analysis.

The Deputy Secretary for Medicaid is Dyke Snipes. His Division oversees more than 82,000 Medicaid providers serving more than two million recipients. The Medicaid Program processes more than 400,000 claims every day.

Public records requests should be sent to the Agency's Clerk:
Richard Shoop
Public Records Coordinator
2727 Mahan Drive
Ft. Knox Bldg. 3, Mail Stop #2
Tallahassee, FL 32308-5403
Tele. (850) 922-5873
PublicRecordsReq@ahca.myflorida.com

The Deputy Secretary for the Division of Health Quality Assurance, Elizabeth Dudek, has a wealth of experience and perhaps the greatest institutional knowledge of the Agency. Among other things, her Division is responsible for health facility surveys, the investigation of consumer complaints against health care facilities, managed care, plans and construction and the determination of need for certain new health care facilities and services ("CON"). Ms. Dudek also serves as the Agency's Emergency Operations Coordinator and as a registered lobbyist providing testimony before the legislature on behalf of the agency.

Administrative Law Section Executive Council Special Telephone Conference Meeting

January 20, 2009 – Minutes

Draft: not yet reviewed or approved by Executive Council

I. Call to Order: The meeting was called to order at 10:35 a.m. by Executive Council Chair Elizabeth McArthur

Present: Elizabeth McArthur, Allen Grossman, Lisa Nelson, Linda Rigot, Kent Wetherell, Bill Williams, Donna Blanton, Dave Watkins, Deborah Kearney, Shaw Stiller, Daniel Nordby, Seann Frazier, Andy Bertron, Wellington Meffert, and Jackie Werndli

Absent: Cathy Sellers, Bruce Lamb, Paul Amundsen, Scott Boyd, Clark Jennings, and Michael Cooke

II. Budget

The meeting was called to address the proposed budget for the section for 2009-2010, along with the mid-year numbers for 2008-2009 to address any revisions to the current year's budget based on known and expected section activities through June 30.

Jackie Werndli presented the budget. She explained actual and projected revenue items, including the impact of the allocated share of investment losses and the desirability of looking into adding a CLE course to add something in the pipeline for a revenue stream, particularly given the problem with the Practice Before DOAH equipment failure, meaning no after-seminar sales of course materials.

She also generally reviewed the actual and projected revenue items, making some suggestions of items that could be trimmed in the current year and for the next year, based on actual experience last year and this year-to-date and consideration of planned activities. There was discussion and agreement that various cuts should be made. Upon discussion of the website, though, Daniel Nordby mentioned the range of redesign plus maintenance quotes that he and Scott Boyd had been receiving, to be addressed at the next council meeting, and the quotes suggested that next year's budget line item should be increased.

After discussion, upon motion made and duly seconded, the council voted to approve the following amendments to the proposed budget:

- Line Item 840151 Officers Travel Expense: reduce 08-09 projected actual to $500; keep 09-10 budget the same as proposed
- Line Item 84052 Meeting Travel Expense: reduce 08-09 projected actual to $500; keep 09-10 budget the same as proposed
- Line Item 84209 Retreat: reduce 08-09 projected actual to $2,500; keep 09-10 budget the same as proposed
- Line Item 84310 Law School Liaison: reduce 08-09 projected actual to $1,500; keep 09-10 budget the same as proposed
- Line Item 84422 Website: reduce 08-09 projected actual to $500; increase 09-10 budget to $5,000

A motion was then made and seconded to approve the 08-09 projections and 09-10 budget as amended, and the motion passed.

III. The meeting was adjourned at 11:15 a.m.

Respectfully submitted,

Elizabeth McArthur
(for Cathy Sellers, Secretary)

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

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ing of a notice automatically operates as a stay pending review, except in criminal cases, *when the state, any public officer in an official capacity, board, commission, or other public body seeks review*.[5]

STAY PENDING REVIEW — ADMINISTRATIVE PROCEEDINGS

Administrative appellate proceedings are governed by Rule 9.190. Specifically, Rule 9.190(e) governs stays. Under that rule, "the filing of a notice of administrative appeal or a petition seeking review of administrative action shall not operate as a stay, except that such filing shall give rise to an automatic stay as provided in rule 9.310(b)(2) or when timely review is sought of an award by an administrative law judge on a claim for birth-related neurological injuries."[6] Rule 9.190(e) also provides direction on where a party must file a motion to stay the adverse order pending appeal. Generally, a party seeking to stay administrative action may file a motion with the lower tribunal or, for good cause shown, with the court in which the notice or petition has been filed.[7] The filing of the motion itself does not operate as a stay.[8] The lower tribunal or court may grant a stay upon appropriate terms.[9] Stays in cases impacting a license may be filed directly with the appellate court.[10]

Before January 1, 2009, under the automatic stay provision in Rule 9.310, a public entity or officer could obtain the automatic stay by simply filing the notice of appeal. The notice, by operation of law, would serve to stay the administrative order. In effect, the public entity or officer could delay or frustrate the enforcement or implementation of an administrative order by filing the notice of appeal and asserting its governmental status. This often forced prevailing parties to expend time, money and effort in defending the appeal while being paralyzed from enforcing or implementing the order from the administrative body. At a minimum, the burden fell on the prevailing party to prove to the lower tribunal or appellate court that the automatic stay was inappropriate.

The procedural language found in the previous version of Rule 9.310(b)(2) arguably conflicted with two statutory provisions in Chapter 120: Section 120.068(3) (governing administrative appeals) and Section 120.56(4)(d) (governing rule challenge procedures).

Section 120.68(3) governs review of administrative orders and provides: "The filing of the petition does not itself stay enforcement of the agency decision…." This language negates any automatic stay but allows the lower tribunal or the reviewing court to stay the order when appropriate. Thus, the statute establishes that any agency decision is *not* to be stayed simply by filing a petition for review, regardless of whether the appealing party is a public entity.

Section 120.56(4)(d) governs Division of Administrative Hearing ("DOAH") final administrative orders holding an unadopted rule invalid, and provides:

> When an administrative law judge enters a final order that all or part of an agency statement violates s. 120.54(1)(a), the agency shall immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.

Under this provision, once the final administrative order is entered, any notice of appeal should not operate to stay the order. Rather, the agency must immediately discontinue its reliance on the statement or rule as a basis for agency action.

Because the prior version of Rule 9.310(b)(2) conflicted with these statutes, the Florida Bar's Appellate Court Rules Committee ("ACRC") advocated for an amendment to Rule 9.310(b)(2) to provide consistency between the Florida Rules of Appellate Procedure and the explicit language in Chapter 120.

RULE AMENDMENTS

In November 2008, the Florida Supreme Court amended Rule 9.310(b)(2) to exclude the automatic stay as it applied to public bodies and officers for orders arising under Chapter 120 (the Administrative Procedure Act (the "APA")). Recognizing the Legislature could opt to amend the APA, the Florida Supreme Court modified the proposal submitted by the ACRC by adding the phrase "or as otherwise provided by chapter 120, Florida Statutes." The amendment adds the underlined language to Rule 9.310:

> **Rule 9.310 Stay Pending Review.**
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> * * *
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> **(b) Exceptions.**
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> * * *
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> **(2) Public Bodies; Public Officers.** The timely filing of a notice shall automatically operate as a stay pending review, except in criminal cases, in administrative actions under the Administrative Procedure Act, or as otherwise provided by chapter 120, Florida Statutes, when the state, any public officer in an official capacity, board, commission, or other public body seeks review; provided that an automatic stay shall exist for 48 hours after the filing of the notice of appeal for public records and public meeting cases. On motion, the lower tribunal or the court may extend a stay, impose any lawful conditions, or vacate the stay.

The Court also *sua sponte* amended Rule 9.190(e)(1) of the Florida Rules of Appellate Procedure for consistency with the amendment to Rule 9.310(b)(2). The amendment adds the underlined language Rule 9.190:

> **Rule 9.190 Judicial Review of Administrative Action.**
>
> * * *
>
> **(e) Stays Pending Review.**
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> * * *
>
> **(1) Effect of Initiating Review.** The filing of a notice of administrative appeal or a petition seeking review of administrative action shall not operate as a stay, except that such filing shall give rise to an automatic stay as provided in rule 9.310(b)(2) or chapter 120, Florida

Statutes, or when timely review is sought of an award by an administrative law judge on a claim for birth-related neurological injuries.

ARGUMENTS IN SUPPORT OF THE AMENDMENT[11]

Numerous comments were filed with the Florida Supreme Court during the rule adoption process both in favor of and adverse to eliminating the automatic stay. Arguments in favor of amending the rule included the following.

Rule 9.310(b)(2) Conflicts with the Florida APA

The effect of the new rule is to provide consistency under the Florida Rules of Appellate Procedure and Chapter 120, specifically sections 120.68(3) and 120.56(4)(d). As discussed above, the primary argument in support of the amendment advanced by the ACRC concerned the statutory provisions in Chapter 120 which conflicted with the operation of Rule 9.310(b)(2).

Rule 9.310(b)(2) conflicted with the APA statutes by granting an automatic stay pending review to the state and other public officers and bodies.[12] Chapter 120, however, did not provide this automatic stay mechanism for public entities. Thus, presumably, the Legislature's policy, in accordance with Chapter 120, was that when the government, as a litigating party, sought review of an administrative order, the administrative order was presumed correct and given effect during review. Unless the litigating party demonstrates that a stay is appropriate, deference should be given to the administrative order.

Conversely, Rule 9.310(b)(2) has been interpreted as a mechanism in which courts grant deference to government "planning level decisions."[13] The proponents of the amendment distinguished this rationale from the situation in which the government appeals an administrative tribunal's order. Applying the automatic stay in this context served to elevate the litigating party's "free-form" action over the administrative tribunal's order, when the latter exercises the state's sovereign delegated authority by law to decide the "planning level" issue. Granting the administrative stay to the litigating party defeated the very purpose the automatic stay served in other contexts, to defer to government "planning level" decision pending review. Removing the automatic stay for public entities in the administrative appeal process gives presumptive effect to the administrative tribunal's ruling pending review.

Sound Policy Supports Bringing Rule 9.310(B)(2) into Conformance with the APA

The ACRC also set forth numerous policy considerations to support the amendment to Rule 9.310(b)(2). Some examples included:

• The Florida Constitution provides for legislative control over administrative adjudicative procedures.[14]

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• The statutory provisions contained in Chapter 120 are, themselves, sovereign policy decisions to which deference is given as being presumptively valid.

• The Legislature has the constitutional power to make policy that governs the rights of the state and local governments in litigation. This is an indication that Chapter 120 can be similarly given effect as a waiver of the government's procedural rights conferred by Rule 9.310(b)(2).

• The Legislature has determined the public is better protected by giving presumptive effect to the administrative orders pending appeal, subject to the right to seek a discretionary stay, and to treat government officers and other public bodies like all other litigants. This avoids unfair hardship to opposing parties that may suffer irreparable injury if forced to endure a lengthy appeal process to realize the benefit of a favorable administrative order. These statutes are an integral part of the purpose to provide a fair and effective administrative remedy in lieu of trial court jurisdiction.

• No reason exists for the Florida Supreme Court to impose an unequal advantage for the government in all administrative cases when the Legislature has directed, by law, that government should not have this advantage and that the playing field should be level.

ARGUMENTS IN OPPOSITION TO AMENDMENT[15]

The opponents to the proposed amendment to Rule 9.310(b)(2) provided a lengthy examination of the historic background of the automatic stay rule and related APA provisions. In 1976, the First District Court of Appeal held that a governmental body's appeal of a state agency's order did not automatically stay enforcement of the agency's order under Section 120.68(3).[16] This prompted the Florida Supreme Court to revise the rules governing appellate court procedure. Specifically, Rule 9.310 was adopted to replace former rules 5.1 through 5.12 and expressly stated that it "implements the Administrative Procedure Act, section 120.68(3)…" and that subsection (b)(2) supersedes *Lewis v. Career Service Commission*.[17] The First District Court of Appeal subsequently ruled that the rule provision prevails over the statutory provision because any legislative attempt to create rules of practice or procedure intrudes on the power of the Florida Supreme Court.[18] Finally, through the various rule amendments over the course of the past fifteen years, the Supreme Court has expressly acknowledged the "automatic stay" and the inconsistencies cited by the proponents of the amendment to Rule 9.310(b)(2) do not exist.

No Inconsistency Exists Between Chapter 120 and the Automatic Stay Provision of Rule 9.310(b)(2)

Opposition to the proposed amendment was based on the premise that no inconsistency existed between Chapter 120 and the automatic stay provision of Rule 9.310(b)(2). The opponents to the amendment drew a distinction between a "notice of appeal" and a "petition for review." A "notice of appeal" invokes the appellate court's plenary jurisdiction to review an agency's final order while a "petition for review" is used to commence the discretionary review of non-final agency orders. Appeals from agency orders are subject to the Florida Rules of Appellate Procedure. Section 120.68(3) states that "[t]he filing of the petition does not itself stay enforcement of the agency decision…" (emphasis added). Rule 9.310(b)(2) states, "The timely filing of a notice shall automatically operate as a stay pending review." (emphasis added). The conclusion reached, therefore, was that Rule 9.310(b)(2) is only triggered when a governmental entity files a "notice" and does not apply when a governmental entity files a "petition" for discretionary review of a non-final order.[19] In substance, the opponents to the amendment stated that section 120.68(3) applied only when a petition was filed (petition does not stay enforcement of the agency decision), and Rule 9.310(b)(2) applied when a notice of appeal was filed (notice provides automatic stay pending review for governmental entities).

The Florida Legislature Has Always Had the Power to Repeal the Automatic Stay Provision of Rule 9.310(b)(2)

The opponents also insisted that the Florida Legislature has always had the power to repeal the automatic stay provision of Rule 9.310(b)(2) "by general law enacted by a two-thirds vote of the membership of each house of the legislature."[20] Yet, the Legislature has not attempted to do so. The First District Court of Appeal held that to the extent Section 120.68(3) and Rule 9.310(b)(2) conflict, "the rule must prevail" and Section 120.68(3) violates the Florida Supreme Court's exclusive rulemaking authority under the Florida Constitution and violates the constitutional separation of powers doctrine.[21] The inaction of the Legislature and Florida Supreme Court, according to those that opposed the amendment, demonstrated the presumption that each agree with the interpretations given Section 120.68(3) and Rule 9.310(b)(2).

Governmental Entities are Charged with Protecting the Public Health, Safety and Welfare of Citizens and the Automatic Stay Allows the Status Quo to be Maintained Until an Appellate Court is Satisfied that an Agency Order Appealed by a Governmental Entity Should Be Affirmed

Opponents also noted that the automatic stay in favor of public bodies is in place because "any adverse consequences realized from proceeding under an erroneous judgment harm the public generally."[22] In interpreting the propriety of mandating a requirement that governmental bodies must obtain a supersedeas bond for appellate review of legislative planning-level determinations, the Florida Supreme Court had determined that such a requirement would "clearly chill the right of a governmental body to appeal an adverse trial court decision declaring invalid a legislative act."[23]

The opponents to the amendment argued that the effect of the proposed amendment would be to eliminate the stay in situations where an ap-

pellee would otherwise be unable to demonstrate the existence of any "compelling circumstances" to modify or vacate the stay. The opponents argued that the proposed amendment would require local governments to expend scarce financial resources on attorneys' fees and costs and supersedeas bonds in order to convince a state agency to enter a stay of its own order, pending the outcome of an appeal of that agency's order. The opponents advocated that maintaining the status quo in situations where no compelling circumstances exist to modify or lift the stay remained the best result.

The Proposed Amendment Will Create a Direct Inconsistency Between Rule 9.190(e)(1) and Rule 9.310(b)(2)

The opponents additionally argued that the proposed amendment to Rule 9.310(b)(2) would be "in bitter conflict" with Rule 9.190(e)(1). They asserted that the Florida Supreme Court's implementation of Rule 9.190(e)(1) in 2000 reinforced its intention to grant automatic stays to governmental bodies appealing state agency orders. In Rule 9.190(e)(1), the Florida Supreme Court expressly recognized in the context of judicial review of administrative decisions, that there was a difference between a "notice of appeal" and a "petition for review." Appeals from final agency orders are invoked by filing a notice of appeal.[24] Appellate review of "non-final" agency orders are commenced by filing a petition for review.[25] The opponents attempted to draw this distinction again in the context of Rule 9.190(e)(1) to show consistency between the APA and the Florida Rules of Appellate Procedure, to no avail.

Section 120.56(4) is Not Inconsistent with Rule 9.310(b)(2)

Section 120.56 governs APA proceedings to challenge the validity of a state agency's rules. The opponents argued that Section 120.56(4)(d) does not address what happens if the final order in a rule challenge case is appealed and is silent as to whether a stay will arise from such an appeal. This is because Section 120.56 only governs rule challenge proceedings at the DOAH level, while Section 120.68 expressly governs "judicial review." The opponents to the amendment asserted that the proposed amendment will raise numerous issues in the rule challenge process. The opponents cautioned the Florida Supreme Court about finding Section 120.56(4)(d) and Rule 9.310(b)(2) inconsistent given the silence in Section 120.56(4)(d) regarding appeals and stays.

Proposed New Rule Would Give Non-Lawyer Agency Heads Greater Deference than that which is Afforded to County Court and Circuit Court Judges

The opponents to the amendment argued that under the proposed amendment, an order issued by a county court or circuit court judge would be automatically stayed by a governmental entity's appeal, but an order issued by a politically-appointed, non-attorney agency head would not be stayed. Additionally, they argued that the proposed amendment will force government entity appellants to incur attorneys' fees and costs to request politically-appointed, non-attorney agency heads to suspend enforcement of their own orders during the appeal process, and if a stay is granted, the governmental appellant will undoubtedly be forced to pay for bond premiums with much greater frequency than currently occurs, at the public's expense.

REBUTTAL ARGUMENTS OF ACRC

The ACRC provided the following comments in response to the opponents' arguments.

The Plain Language of the Statute Indicates that "Agency Decisions" are "Final Agency Decisions" and the Argument that Section 120.68(3) Only Applies When "Petitions for Review" are Filed is Substantively Incorrect

The ACRC advanced two basic points in rebuttal to the opponents' assertion that Section 120.68(3) and Rule 9.310(b)(2) were consistent. First, the "agency decision" language in the statute indicates that the decision was a final agency decision, and, therefore limiting the term to only petitions for review was not appropriate. Second, when Section 120.68(3) was implemented in 1974, the term "petition" was used for review of final administrative orders.

Section 120.56(4)(d) Would Be Ineffective if an Appeal of the Final Order Was Not Available

Section 120.56(4)(d) governs cases in which the Administrative Law Judge is the final administrative decision-maker and declares an agency statement that constitutes a "rule" violates Section 120.54(1)(a) because it has not been adopted by the required rulemaking procedure (an "unadopted rule").[26] Once the ALJ declares the statement to be an unadopted rule, Section 120.56(4)(d) requires the agency to "immediately" discontinue all reliance on the statement. If the automatic stay were allowed, there could be no "immediate" effect.

EFFECT OF RULE AS AMENDED

The Florida Supreme Court rejected the opponents' position and amended Rule 9.310 to exclude the automatic stay for orders arising from Chapter 120 proceedings. Recognizing that the Legislature may choose to amend Chapter 120 in the future, the Court also added qualifying language to Rule 9.310 that did not appear in the ACRC's proposal: "or as otherwise provided by chapter 120, Florida Statutes." As noted, Rule 9.190 was likewise amended.

Although some might argue that the additional language leaves intact the ambiguity that existed before the rule was amended, the Court specifically stated that the changes were meant "to exclude from the automatic stay administrative actions under the Administrative Procedure Act."[27] Indeed, in dissenting from the change to Rule 9.310, Chief Justice Peggy Quince stated: "The change espoused by the majority will eliminate the automatic stay in cases involving the Administrative Procedure Act. I do not believe that the committee has advanced a good reason for treating public entities involved in administrative cases differently from other public entities. Therefore, I would leave the rule as it presently stands."[28] Rather than creating ambiguity, the goal of the qualifying language is to ensure that Rules 9.310(b)(2) and

continued...

9.190(e)(1) will always be consistent with both the current and any future versions of the APA. As the Supreme Court stated in its opinion, the qualifying language is meant "to give the rule flexibility in case the Legislature amends the Act."

CONCLUSION

Effective January 1, 2009, the automatic stay pending review was amended to exclude proceedings to review administrative actions under the APA. The amendment was made after years of study and input by the Florida Bar ACRC. While the procedural effects are difficult to measure at this time, for now, the rules of appellate procedure and the APA appear to be consistent regarding automatic stays for public entities and officers appealing adverse orders arising from Chapter 120 proceedings.

[1] In re Amendments to The Fla. Rules of Appellate Procedure, 2008 WL 4876766 (Fla. Nov. 13, 2008).
[2] Fla. R. App. P. 9.310(a).
[3] *Id.*
[4] Fla. R. App. P. 9.310(b)(2).
[5] *Id.*
[6] Fla. R. App. P. 9.190(e)(1).
[7] Fla. R. App. P. 9.190(e)(2)(A).
[8] *Id.*
[9] *Id.*
[10] Fla. R. App. P. 9.190(e)(2)(B), (C).
[11] The ACRC supported the Amendment by advancing the arguments contained in this summary. *See* Triennial Cycle Report of the Appellate Ct. Rules Committee, at 14, Feb. 1, 2008 and ACRC's Response to Written Comments Concerning Proposed Amendments to Rule 9.310(b)(2), submitted Apr. 21, 2008.
[12] *See City of Jacksonville v. PERC*, 359 So. 2d 578 (Fla. 1st DCA 1978) (holding that because the stay pending review is a procedural issue, the rule is controlling, implying the statute is an unconstitutional interference with the Supreme Court's rulemaking power).
[13] *See St. Lucie County v. North Palm Dev. Corp.*, 444 So. 2d 1133 (Fla. 4th DCA 1984) (holding that an automatic stay can only be overturned on a showing of "compelling circumstances").
[14] Art. V, § 1; Art. V, § 4(b)(2), Fla. Const.
[15] Written Comments in Opposition to Proposed Amendments to Rule 9.310(b)(2), jointly submitted on behalf of: Charlotte County, Florida; City of Plant City, Florida; City of Coral Gables, Florida; City of Tampa, Florida; City of North Miami, Florida; City of Gainesville, Florida; City of Kissimmee, Florida; Hillsborough County, Florida; City, County and Local Government Section of The Florida Bar; Florida League of Cities, Inc.; Florida Association of Counties, Inc.; and Florida Association of County Attorneys, Inc.
[16] *Lewis v. Career Serv. Comm'n*, 332 So. 2d 371 (Fla. 1st DCA 1976)(interpreting the interplay between Section 120.68(3), which was similar to the present statute, and Rule 5.12(1), which granted the automatic stay to public entities).
[17] *In re Proposed Fla. Appellate Rules*, 351 So. 2d 891 (Fla. 1977).
[18] *City of Jacksonville Beach v. PERC*, 359 So. 2d 578 (Fla. 1st DCA 1978).
[19] *State Dep't of Health & Rehab. Servs. v. E.D.S. Fed. Corp.*, 622 So. 2d 90 (Fla. 1st DCA 1993).
[20] Art. V, § 2(a), Fla. Const.
[21] *City of Jacksonville Beach v. PERC*, 359 So. 2d 578 (Fla. 1st DCA 1978); *See also, Wait v. Florida Power & Light Co.,* 372 So. 2d 420 (Fla. 1979).
[22] *St. Lucie County v. North Palm Dev. Corp.*, 444 So. 2d 1133 (Fla. 4th DCA 1984).
[23] *City of Lauderdale Lakes v. Corn*, 415 So. 2d 1270 (Fla. 1982).
[24] Fla. R. App. P. 9.190(b)(1), referencing Fla. R. App. P. 9.110(c).
[25] Fla. R. App. P. 9.190(b)(2).
[26] § 120.56(4), Fla. Stat. (2008).
[27] *In re Amendments to The Florida Rules of Appellate Procedure*, 2008 WL 4876766 (Fla. Nov. 13, 2008).
[28] *Id.*, Quince, C.J. (concurring in part and dissenting in part).

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