

# ADMINISTRATIVE LAW SECTION NEWSLETTER

Vol. XXXI, No. 3

Amy W. Schrader, Editor

March 2010

## Area Agencies on Aging and the APA: The Saga Continues

by Karen D. Walker

The September 2007, December 2007 and June 2008 issues of the Administrative Law Section Newsletter each include an article discussing *Mae Volen Senior Center, Inc. v. Area Agency on Aging Palm Beach/Treasure Coast, Inc.*<sup>1</sup> The issue in that case was whether an area agency on aging (“AAA”), which conducts competitive procurements pursuant to statutory authority<sup>2</sup> and under contract with the Florida Department of Elder Affairs (“DOEA”) is an “agency” subject

to the bid protest procedures in the Administrative Procedure Act, Chapter 120, Florida Statutes (the “APA”). The *Mae Volen* case, however, is only part of the story. And, it is a story that continues to be written yet today – more than two years after the first article about the topic appeared in this Newsletter. It is also a story that involves many players and twists and turns, including chapters that have been written by the First, Third and Fourth District Courts of Appeal, the

Florida Legislature, the Division of Administrative Hearings (“DOAH”) and DOEA.

The first and more recent chapters in this saga actually involve neither *Mae Volen Senior Center, Inc.* (“*Mae Volen*”) nor the Area Agency on Aging Palm Beach/Treasure Coast, Inc. (the “Palm Beach AAA”). Instead, they involve First Quality Home Care, Inc. (“First Quality”) and the Alliance for Aging, Inc. (the “Alliance”).<sup>3</sup>

See “APA,” page 10

## From the Chair

by Seann M. Frazier

I am regularly amazed about how little I know. Perhaps I shouldn’t be. As my kids remind me, the world is a great big, beautiful place. Even though man’s tenure in it has been short thus far, the amount of writings and knowledge accumulated in that short time is astounding. More than 72 million books line the shelves of the Library of Congress. Placed side-by-side, they would measure 327 miles.

Even with Kindles in hand, we mortals can only do so much to keep up with all of this information. Most of us settle into a particular field

of expertise, taking comfort in the fact that at least we know a moderate amount about a particular area. Readers of this Newsletter are undoubtedly experts in the field of Florida administrative law. Even in that limited realm, there is a regular need to re-educate ourselves about annual tweaks to the APA, new agency rules and recent administrative decisional law. The Administrative Law Section is here to help.

For more than three decades, the Administrative Law Section’s core function has been to educate and inform its members about the evolu-

tion and current state of our APA. I’m happy to report that the Section is continuing in that mission. If you’ll allow me, I’d like to recount some of

See “Chair’s Message,” page 2

### INSIDE:

Appellate Case Notes.....	4
State & Federal Government & Administrative Practice (SFGAP) Certification Review Course Brochure.....	7
Agency Snapshot	
Florida Fish and Wildlife Conservation Commission.....	9

**CHAIR'S MESSAGE**

from page 1

the Section's recent CLEs and offer a preview of some upcoming events.

This past September, the Administrative Law Section joined with the Government Lawyers Section to present a one day seminar entitled, "The New Electronic Era in Public Records and Government in the Sunshine." The seminar included updates on Florida's

public records law and some interesting discussions about the delegation of governmental functions to non-governmental entities and how the public records law might apply to those private companies. Talks were also offered on how the public records law applies to electronic records and discussions of ethics and professionalism.

In October, the Section sponsored its regular "Practice Before DOAH" seminar. The event included both live lectures as well as an entertaining

mock trial with real Administrative Law Judges presiding over a court full of lawyers acting as witnesses. The seminar always provides a solid update on evidentiary issues and witness preparation, and its unique inclusion of a live trial offers a fun and practical means of learning about administrative litigation. If you missed the latest edition of the seminar, the Section offers audio recordings.

In April, the Section will work with the Bar's Young Lawyers Division to present an introductory level CLE on administrative law. The Section offered a similar CLE a few years ago and it was well-attended and well-received. Although basic in nature, with subjects like how to prepare a petition and the differences between formal and informal hearings, even very experienced administrative practitioners will walk away having learned something that they either forgot or never knew.

Also on April 8th and 9th, the Administrative Law Section will be working with the Government Lawyer Section and the Environmental and Land Use Law Section to co-sponsor the State and Federal Government and Administrative Practice (SFGAP) certification review course. This advanced level seminar is a great refresher in all aspects of the Florida APA. It has the added benefit of tackling the federal APA, as well as public records laws and government tort litigation. The review course can also be very helpful for those preparing to take the State and Federal Government and Administrative Practice board certification exam. For those already certified in SFGAP, it also offers a large block of advanced continuing education credits needed to maintain certification.

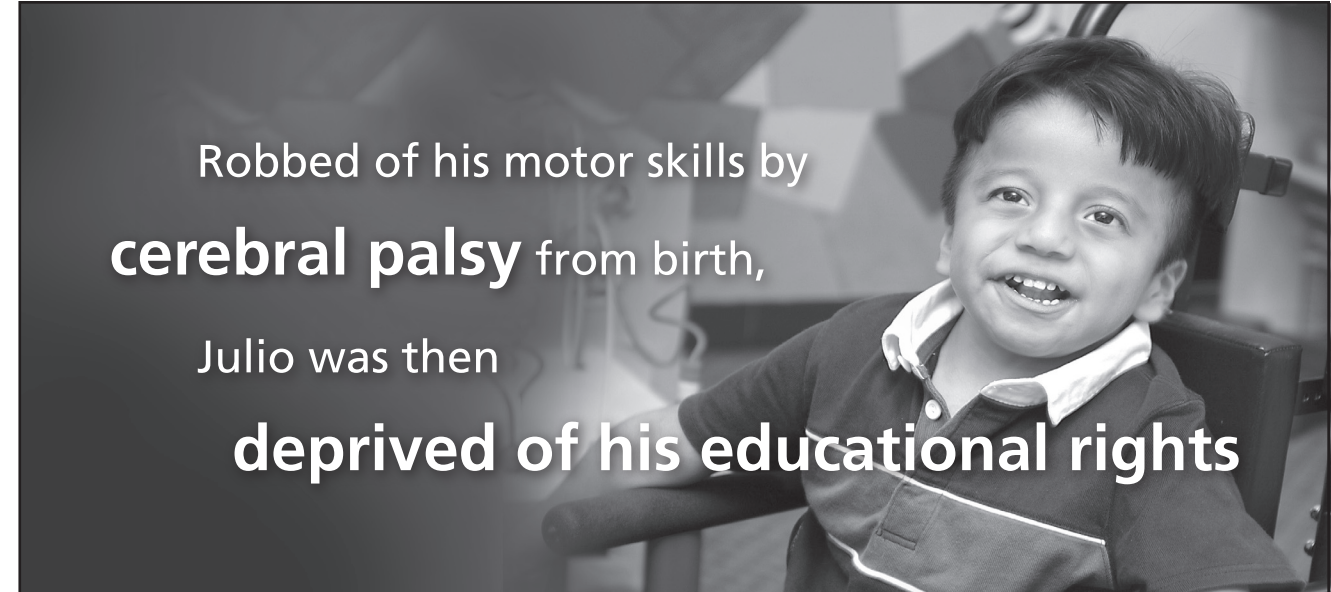
Plans are also in the works for another edition of the Section's hugely popular Pat Dore Conference. The Conference will take place in Tallahassee during October 2010 and regularly draws upwards of 200 lawyers and students for the live presentation.

I encourage you to make plans to attend these upcoming seminars. If you missed some of the Section's recent CLEs please allow me to offer a gentle reminder that recordings are available for sale and additional information may be obtained at: [www.floridabar.org/cle](http://www.floridabar.org/cle).

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

- Seann M. Frazier** ([fraziers@gtlaw.com](mailto:fraziers@gtlaw.com)) ..... **Chair**
- Cathy M. Sellers** ([csellers@broadandcassel.com](mailto:csellers@broadandcassel.com)) ..... **Chair-elect**
- Allen R. Grossman** ([a.grossmans@mgfblaw.com](mailto:a.grossmans@mgfblaw.com)) ..... **Secretary**
- F. Scott Boyd** ([boyd.scott@leg.state.fl.us](mailto:boyd.scott@leg.state.fl.us)) ..... **Treasurer**
- Amy W. Schrader** ([aschrader@gray-robinson.com](mailto:aschrader@gray-robinson.com)) ..... **Editor**
- Jackie Werndli, Tallahassee** ([jwerndli@flabar.org](mailto:jwerndli@flabar.org)) ..... **Program Administrator**
- Colleen P. Bellia, Tallahassee** ([cbellia@flabar.org](mailto:cbellia@flabar.org)) ..... **Layout**

Statements or expressions of opinion or comments appearing herein are those of the contributors and not of The Florida Bar or the Section.



Robbed of his motor skills by  
**cerebral palsy** from birth,  
Julio was then  
**deprived of his educational rights**

when his school told him it couldn't provide the  
**accommodations he needed**  
to function in the classroom.

**... Almost**

**Every day, in every city in Florida,**

we help Legal Aid help those least able to afford a lawyer.

**We are The Florida Bar Foundation,**

and we believe the system works best when it works for everyone.



Leadership and Funding for Justice in Florida

The Florida Bar Foundation is a 501(c)(3) public charity.  
For more information, visit [www.floridabarfoundation.org](http://www.floridabarfoundation.org)  
or contact Jane Curran, Executive Director, at (800) 541-2195 or [jcurran@flabarfdn.org](mailto:jcurran@flabarfdn.org).

[www.floridabarfoundation.org](http://www.floridabarfoundation.org)

# APPELLATE CASE NOTES

by Mary F. Smallwood

## Adjudicatory Proceedings

*Villa Capri Associates, Ltd. v. Florida Housing Finance Corporation*, 23 So. 3d 795 (Fla. 1st DCA 2009) (Opinion filed November 30 2009)

Villa Capri Associates sought funding from the Florida Housing Finance Corporation (“FHFC”) during the 2008 cycle to help finance the construction of an apartment complex under two different affordable housing programs. In evaluating the application for funding, FHFC awarded Villa Capri the maximum points available but found that Villa Capri had failed to meet threshold requirements in demonstrating the availability of electricity as an attached letter from Florida Power and Light referred to the City of Homestead rather than Miami. Villa Capri submitted documentation to cure the defect in the form of a letter from Florida Power and Light stating that power was available “at the present time.” FHFC rejected that documentation, however, on the grounds that it did not specifically state that power had been available on or before the application deadline.

FHFC took the position that the cure letter replaced the original letter and that the applicant had, therefore, failed to show power was available at the time of the original application deadline. Villa Capri requested an informal hearing. The hearing officer noted that the FHFC rules provided that the cure letter replaced the original letter and accepted FHFC’s position that it was unacceptable.

On appeal, Villa Capri argued that FHFC had interpreted the applicable rules differently in a prior case but had failed to properly index the final order in that case. FHFC did not dispute that it had failed to index the prior order in accordance with section 120.53(1)(a), Fla. Stat. The court held that such failure was an error in procedure that impaired the fairness of the proceeding. The court noted that

Villa Capri could have relied on the prior precedent of the agency had it known of the existence of the case. The case was reversed and remanded for the hearing officer to evaluate the applicability of the prior case.

*Diaz v. Department of Business and Professional Regulation*, 21 So. 3d 919 (Fla. 3d DCA 2009) (Opinion filed November 18, 2009)

The Department of Business and Professional Regulation, Division of Real Estate (the “Division”), issued a complaint to Diaz, a licensed real estate appraiser, alleging that he had improperly manipulated sales data inflating the value of a particular parcel. The complaint contained an Election of Rights form informing Diaz that he had 21 days to request a formal administrative hearing to challenge the complaint. Diaz failed to respond to the Election of Rights form within the time frame. The Division then requested and was granted an informal hearing before the Real Estate Appraisal Board. Diaz was notified of the date of the informal hearing. Several days before the scheduled hearing, counsel for Diaz filed an executed Election of Rights form and requested that the informal hearing be continued. The hearing was held as scheduled, but neither Diaz nor his counsel appeared. The Board denied the request for continuance and issued an order revoking Diaz’ license.

On appeal, Diaz argued that the Board abused its discretion in denying the continuance and improperly proceeded through an informal hearing. The Board did not object to a remand for a new informal hearing so the court addressed only the issue of whether Diaz was entitled to a formal proceeding. As Diaz did not dispute that he had received the Election of Rights form and had not filed a request for a formal hearing within the 21 days allowed, the court rejected his argument and remanded for an informal hearing.

*Gadsden Jai Alai, Inc. v. Department of Business and Professional Regulation*, 2010 WL 143763 (Fla. 1st DCA 2010) (Opinion filed January 15, 2010)

Gadsden Jai Alai and Washington County Kennel Club filed an administrative petition challenging the decision of the Department of Business and Professional Regulation allowing Gretna Racing, LLC to conduct quarter horse racing. The Department dismissed the petition with prejudice on the grounds that the challengers did not meet the test in *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981), since the underlying statute did not contemplate economic interests as a basis for standing. The petitioners appealed, arguing that the fact that they raised constitutional issues in their petitions regarding the statutory provisions governing quarter horse racing should provide standing.

The court affirmed the dismissal of the petitions. It held that raising a constitutional issue in an administrative proceeding did not provide an independent basis for standing. While the court recognized the benefit in terms of judicial economy of allowing the constitutional issues to be raised in an administrative proceeding, it concluded that that was outweighed by the dangers of opening the door to permit challenges purely on the basis of the assertion of a constitutional issue.

*Mas v. Miami-Dade County School Board*, 2010 WL 173613 (Fla. 3d DCA 2010) (Opinion filed January 20, 2010)

The Miami-Dade County School Board suspended Mas from employment and initiated proceedings to dismiss him alleging certain violations, including accepting funds from a school board vendor directly and improper use of his office computer. Mas sought an administrative hearing. In the proposed order filed by Mas with

the Division of Administrative Hearings, Mas requested reinstatement and back pay.

The administrative law judge issued a recommended order recommending that the charges against Mas be dismissed. The order did not address the request for reinstatement or back pay. Mas filed exceptions to the recommended order again seeking reinstatement and back pay. The School Board adopted the recommended order without addressing the exceptions.

On appeal, the court agreed with Mas that dismissal of the charges without providing for reinstatement and back pay was meaningless. The court remanded the matter to the School Board with directions to rule on the exceptions and to enter an order providing Mas a remedy for terminating him without just cause.

### Public Records/Government-in-the-Sunshine

*Grapski v. City of Alachua*, 2010 WL 183998 (Fla. 1st DCA 2010) (Opinion filed January 21, 2010)

In April 2006, the City of Alachua held a commission election. After the election, the Board of Canvassers met to canvass the election, and a city employee prepared minutes of that meeting. The Commission then noticed a regular meeting which included an agenda item for approval of the Board's minutes. Grapski and another citizen requested copies of the minutes several days before the scheduled Commission meeting but found them to be unavailable in any form. An oral public records request was made to the Deputy Clerk for the Commission who informed the citizens that the minutes would be available only after approved by the Commission.

The citizens filed suit under Chapters 119 and 286, Fla. Stat., alleging violations of the Public Records law and the Government-in-the-Sunshine act. The complaint alleged, inter alia, that the minutes of the Board's meeting were a public record. It also alleged that under the Government-in-the-Sunshine act, the Commission's approval of the minutes on a consent agenda item was null and void.

The circuit court held that the claim

involving the Public Records law was moot since the minutes had ultimately been provided to the plaintiffs before the suit was filed. It further held that the Commission's use of a consent agenda procedure to approve the minutes was not a violation of the Government-in-the-Sunshine act.

On appeal, the District Court reversed in part. It held that the minutes of the Board's meeting were clearly public records as they were the final work product of the Board which was required to be produced upon request. The court concluded that the delay of months before the minutes were actually provided to the plaintiffs violated the requirements of the Public Records law that such records must be produced in a reasonable time and under reasonable conditions. Later production of the records did not moot the issue since the plaintiffs had been deprived of access to them when they clearly needed such access before the Commission met to act on the minutes.

As to the Government-in-the-Sunshine allegations, the appellate court agreed with the circuit court that the use of a consent agenda to consider the minutes was not a violation. It noted that the Act required notice of any meeting at which official acts are to be taken; however, specific notice of individual items to be considered is not required. The court, however, found that there was a violation of section 286.011(2), which requires that minutes of meetings be taken and that they be made available to the public. On that basis, the court held that the Commission's action approving the minutes was invalid. The case was remanded to the circuit court for further proceedings on the plaintiffs' request for attorney's fees and costs.

### Bid Protests

*Keystone Peer Review Organization, Inc. v. Agency for Health Care Administration*, 2010 WL 255977 (Fla. 1st DCA 2010) (Opinion filed January 25, 2010)

In January 2009, the Agency for Health Care Administration ("AHCA") issued a Request for Information seeking information from potential vendors regarding provision

of inpatient medical and home health services under Medicaid. The Request stated that it would not result in the award of a contract. After receiving submissions from nine vendors, AHCA issued a Decision Memorandum awarding the contract to Louisiana Health Care. Keystone Peer Review Organization filed a protest challenging the award of the contract alleging that AHCA had failed to comply with the requirements of Chapter 287, Fla. Stat.

AHCA entered a final order dismissing Keystone's petition on the grounds that AHCA was not required to engage in competitive bidding and that Keystone, therefore, did not have standing to challenge the award of the contract. Keystone appealed, arguing that a factual dispute existed as to whether the contract was exempt from competitive bidding.

On appeal, the court reversed and remanded. The court found that affirming AHCA's position that it was exempt from Chapter 287 would require it to engage in fact finding. Further, the court noted that the allegations in the complaint related to Keystone's standing must be taken as true by the court.

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

## Is your E-MAIL address current?

Log on to The Florida Bar's web site ([www.FloridaBar.org](http://www.FloridaBar.org)) and go to the "Member Profile" link under "Member Tools."

**Join us for the  
2010 Annual  
Florida Bar Convention**  
**June 23 -26, Boca Raton Resort & Club**

**Administrative Law Section Convention Activities**

<b>Thursday, June 24</b> 6:30 p.m. - 7:30 p.m. Section Reception	<b>Friday, June 25</b> 10:00 a.m. - 12:30 p.m. Executive Council/Section Annual Meeting
--	--

## CLE Audio CDs and Online Programs Available

### **2008 Pat Dore Administrative Law Conference (0750)**

\$150 plus tax (section member) • \$175 plus tax (non-section member)

### **State and Federal Government and Administrative Practice (SFGAP) Certification Review Course (0630)**

\$250 plus tax (section member) • \$275 plus tax (non-section member)

### **The New Electronic Era in Public Records and Government in the Sunshine (0882)**

\$165 plus tax (section member) • \$190 plus tax (non-section member)

### **State Government and Administrative Practice (1049)**

\$145 plus tax (section member) • \$170 plus tax (non-section member)

### **Practice Before DOAH (0938)**

\$145 plus tax (section member) • \$170 plus tax (non-section member)

Additional information is available at [www.floridabar.org/cle](http://www.floridabar.org/cle). Audio CDs can be ordered by accessing the link for List and Order Form or Order Online under Audio/Video. If you have questions, call 850.561.5629. The complete catalog of online courses, including pricing, can be viewed by accessing the LegalSpan link under Online Courses.



The Florida Bar Continuing Legal Education Committee, the Administrative Law Section, the Environmental & Land Use Law Section, and the Government Lawyer Section present

# State & Federal Government & Administrative Practice (SFGAP) Certification Review Course



**COURSE CLASSIFICATION: ADVANCED LEVEL**

**Live Presentation and Webcast: Thursday, April 8, 2010 & Friday, April 9, 2010**  
**FSU Conference Center • 555 W. Pensacola Street • Tallahassee, FL 32306 • 850-644-3801**

Course No. 0999R

Those who have applied to take the certification exam may find this course a useful tool in preparing for the exam. It is developed and conducted without any involvement or endorsement by the BLSE and/or Certification committees. Those who have developed the program, however, have significant experience in their field and have tried to include topics the exam may cover. Candidates for certification who take this course should not assume that the course material will cover all topics on the examination.

## Thursday, April 8, 2010

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

8:30 a.m. – 8:35 a.m.

### Welcome and Introductions

*Francine M. Ffolkes, Florida Dept. of Env. Protection, Tallahassee*

8:35 a.m. – 9:30 a.m.

### Federal APA Adjudication (Formal and Informal)

*Francine M. Ffolkes, Florida Dept. of Env. Protection, Tallahassee*

9:30 a.m. – 10:20 a.m.

### Federal APA Rulemaking

*Robert A. Malinoski, Gunster, Attorneys at Law, Fort Lauderdale*

10:20 a.m. – 10:30 a.m. **Break**

10:30 a.m. – 11:20 a.m.

### Federal APA: Judicial Review of Agency Action (Part I – Scope of Judicial Review)

*Frederick L. Aschauer, Jr., Rose, Sundstrom & Bentley, Tallahassee*

11:20 a.m. – 12:30 p.m.

### Federal APA: Judicial Review of Agency Action (Part II – Availability of Judicial Review)

*Frederick L. Aschauer, Jr., Rose, Sundstrom & Bentley, Tallahassee*

12:30 p.m. - 1:30 p.m.

### Lunch (On Your Own)

1:30 p.m. – 2:20 p.m.

### 11th Amendment Immunity

*Stephanie A. Daniel, Office of the Attorney General, Tallahassee*

2:20 p.m. – 3:10 p.m.

### Civil Rights Action Under 42 U.S.C. Section 1983

*Stephanie A. Daniel, Office of the Attorney General, Tallahassee*

3:10 p.m. – 3:20 p.m. **Break**

3:20 p.m. – 5:00 p.m.

### FOIA, FACA, and Federal Government in the Sunshine

*Luna E. Phillips, Gunster, Attorneys at Law, Fort Lauderdale*

*James M. Crowley, Gunster, Attorneys at Law, Fort Lauderdale*

## Friday, April 9, 2010

8:00 a.m. – 8:10 a.m.

### Welcome and Introductions

*Francine M. Ffolkes, Florida Dept. of Env. Protection, Tallahassee*

8:10 a.m. – 9:00 a.m.

### Florida APA Adjudication

*Honorable John G. Van Laningham, Division of Administrative Hearings, Tallahassee*

9:00 a.m. – 9:50 a.m.

### Florida Ethics

*Virlindia A. Doss, Florida Commission on Ethics, Tallahassee*

9:50 a.m. – 10:00 a.m. **Break**

10:00 a.m. – 10:50 a.m.

### Florida APA Rulemaking (including Rule Challenges)

*Honorable John G. Van Laningham, Division of Administrative Hearings, Tallahassee*

10:50 a.m. – 11:40 a.m.

### Other Florida APA Remedies and Principles

*Seann M. Frazier, Greenberg Traurig, P.A., Tallahassee*

11:40 a.m. – 12:30 p.m.

### Judicial Review of Agency Action (Florida Administrative Appeals)

*David M. Caldevilla, de la Parte & Gilbert, P.A., Tampa*

12:30 p.m. - 1:30 p.m.

### Lunch (On Your Own)

1:30 p.m. – 2:20 p.m.

### Sovereign Immunity

*Barbara C. Wingo, University of Florida, Gainesville*

2:20 p.m. – 3:10 p.m.

### Government/Tort Litigation

*B. Cecilia Bradley, Office of the Attorney General, Tallahassee*

3:10 p.m. – 3:20 p.m. **Break**

3:20 p.m. – 4:10 p.m.

### Competitive Procurement Under Florida APA

*Martha H. Chumbler, Carlton Fields, P.A., Tallahassee*

4:10 p.m. – 5:00 p.m.

### Public Records Act and Sunshine Law

*Patricia R. Gleason, Executive Office of the Governor, Tallahassee*

## WEBCAST CONNECTION

Registrants will receive webcast connection instructions two days prior to the scheduled course date via e-mail. If The Florida Bar does not have your e-mail address, contact the Order Entry Department at 850-561-5831, two days prior to the event for the instructions.

## CLE CREDITS

### CLER PROGRAM

(Max. Credit: 17.5 hours)

General: 17.5 hours

Ethics: 1.0 hour

### CERTIFICATION PROGRAM

(Max. Credit: 17.5 hours)

Appellate Practice: 1.0 hour

City, County & Local Gov't Law: 5.0 hours

Civil Trial: 2.0 hours

State & Federal Gov't & Administrative

Practice: 17.5 hours

<b>TO REGISTER</b>	<b>ON-LINE:</b> <a href="http://www.floridabar.org/CLE">www.floridabar.org/CLE</a>	<b>MAIL:</b> Completed form with check	<b>FAX:</b> Completed form to 850/561-5816
--------------------	---	---	---

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

**Register me for the “State & Federal Government & Administrative Practice (SFGAP) Certification Review Course” Seminar**

**ONE LOCATION: (053) FSU CONFERENCE CENTER, TALLAHASSEE, FL (THURSDAY, APRIL 8, 2010 & FRIDAY, APRIL 9, 2010)**

TO REGISTER OR ORDER AUDIO CD / DVD OR COURSE BOOKS BY MAIL, SEND THIS FORM TO The Florida Bar, Order Entry Department: 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831. ON-SITE REGISTRATION, ADD \$25.00. **On-site registration is by check only.**

Name \_\_\_\_\_ Florida Bar # \_\_\_\_\_  
 Address \_\_\_\_\_  
 City/State/Zip \_\_\_\_\_ Phone # \_\_\_\_\_

**SLH: Course No. 0999R**

**LOCATION (CHECK ONE):**

**Tallahassee - April 8-9, 2010**  
(053) FSU Conference Center

**Live Webcast\***  
**April 8-9, 2010**  
(317) Online

**\*Registrants who participate in the live webcast will receive an e-mail with a web-link and log-in credentials two days prior to the seminar to include access to the course materials. Call The Florida Bar Order Entry Department at (800) 342-8060, ext. 5831 with any questions.**

**LIVE REGISTRATION (CHECK ONE)**

Member of the Administrative Law Section, Environmental and Land Use Law Section or Governmental Lawyer Section: \$175  \$250

Non-section member: \$200  \$275

Full-time law college faculty or full-time law student: \$100

Persons attending under the policy of fee waivers: \$0  
*Includes Supreme Court, DCA, Circuit and County Judges, Magistrates, Judges of Compensation Claims, Administrative Law Judges, and full-time legal aid attorneys if directly related to their client practice. (We reserve the right to verify employment.) Fee waivers are only applicable for in-person attendees.*

**WEBCAST**

\$250

\$275

Check here if you require special attention or services. Please attach a general description of your needs. We will contact you for further coordination.

**METHOD OF PAYMENT (CHECK ONE)**

Check enclosed made payable to The Florida Bar

Credit Card (Advance registration only. Fax to 850/561-5816.)  
 MASTERCARD  VISA  DISCOVER  AMEX

Signature: \_\_\_\_\_ Exp. Date: \_\_\_\_/\_\_\_\_ (MO./YR.)  
 Name on Card: \_\_\_\_\_  
 Billing Zip Code: \_\_\_\_\_  
 Card No. \_\_\_\_\_

**COURSE BOOK — AUDIO CD — DVD — ON-LINE**

Private taping of this program is not permitted. **Delivery time is 4 to 6 weeks after 4/9/10. TO ORDER AUDIO CD / DVD OR COURSE BOOKS**, fill out the order form above, including a street address for delivery. **Please add sales tax to the price of CD / DVD or books. Tax exempt entities must pay the non-section member price.**

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

<input type="checkbox"/> <b>COURSE BOOK ONLY (0999M)</b> Cost \$50 plus tax (Certification/CLER credit is not awarded for the purchase of the course book only.) <b>TOTAL \$ _____</b>	<input type="checkbox"/> <b>AUDIO CD (0999C)</b> (includes course book) \$175 plus tax (section member) \$200 plus tax (non-section member) <b>TOTAL \$ _____</b>	<input type="checkbox"/> <b>DVD (0999D)</b> (includes course book) \$250 plus tax (section member) \$275 plus tax (non-section member) <b>TOTAL \$ _____</b>
---	---	--





## Agency Snapshot

# Florida Fish and Wildlife Conservation Commission

by Melissa A. Mora

*Commission's Mission Statement: To manage fish and wildlife resources for their long-term well-being and the benefit of people.*

### **Background:**

The Florida Fish and Wildlife Conservation Commission (FWC) is charged with managing the state's fish and wildlife resources. FWC protects and manages more than 575 species of wildlife and 700 species of freshwater and saltwater fish.

FWC came into existence on July 1, 1999 as the result of a constitutional amendment approved in the 1998 General Election as part of the package proposed by the Constitution Revision Commission. More specifically, Article IV, Section 9, Florida Constitution, as amended by Constitution Revision Commission Revision 5, as adopted in 1998, created the FWC to exercise the state's regulatory and executive authority with respect to wild animal life and freshwater aquatic life and to exercise executive and regulatory authority with respect to marine life. In the implementation of the Constitutional Amendment, the Florida Legislature combined the staff and Commissioners of the former Marine Fisheries Commission, elements of the Divisions of Marine Resources and Law Enforcement of the Florida Department of Environmental Protection and all of the employees and Commissioners of the former Game and Fresh Water Fish Commission.

When acting pursuant to statutory authority derived from the Legislature, FWC is subject to Chapter 120, Florida Statutes. However, when acting pursuant to its constitutional authority, FWC, in compliance with the constitution and the merger bill, has adopted due process procedures which address and satisfy constitutional requirements and legislative

recommendations. A copy of FWC's Due Process Procedures can be found on-line at: [http://myfwc.com/docs/AboutFWC/About\\_Legal\\_DueProcessProc\\_May06.pdf](http://myfwc.com/docs/AboutFWC/About_Legal_DueProcessProc_May06.pdf).

### **Commissioners:**

Chairman Rodney Barreto (Appointed through August 2011, Current Chair)  
 Vice-Chairman Richard A. "Dick" Corbett (Appointed through January 6, 2013)  
 Commissioner Kathy Barco (Appointed through August 1, 2012)  
 Commissioner Ronald Bergeron (Appointed through August 1, 2012)  
 Commissioner Dwight Stephenson (Appointed through January 2011)  
 Commissioner Kenneth W. Wright (Appointed through August 1, 2012)  
 Commissioner Brian S. Yablonski (Appointed through January 2014)

### **Executive Director:**

Nick Wiley  
 Office of Executive Director  
 Farris Bryant Building  
 620 S. Meridian St.  
 Tallahassee, FL 32399-1600  
 (850) 488-4676

The executive director provides day-to-day administrative leadership for the 1,875+ full-time and 840+ OPS employees of FWC. The executive director serves at the pleasure of the Commissioners. The Florida Senate must also confirm any new appointee the Commissioners select. The executive director's duties include direct supervision over the Fish and Wildlife Research Institute, headquartered in St. Petersburg.

### **Agency Clerk:**

Jackie Uhler  
 620 S. Meridian St.  
 Tallahassee, FL 32399-1600

The Legal Office is directly under

the Executive Director's Office and provides a wide range of legal services to all divisions and offices of the Commission.

### **General Counsel:**

Harold G. "Bud" Vielhauer  
 Office of the General Counsel  
 620 S. Meridian St.  
 Tallahassee, FL 32399-1600

Mr. Vielhauer received his J.D. with honors from the University of Toledo and his M.S. from the University of Washington, Seattle, in environmental and marine affairs. He was admitted to the Florida Bar in 1986. Prior to serving as General Counsel for FWC, Mr. Vielhauer served as Deputy General Counsel for the Florida Department of Environmental Protection's Office of General Counsel, Public Lands Section.

### **Number of Lawyers on Staff: 7**

### **Kinds of Cases:**

Art. IV, Section 9 of the Florida Constitution mandates that FWC shall exercise the regulatory and executive power of the state with respect to wild animal life, fresh water aquatic life and marine life. To comply with this mandate, FWC has promulgated numerous administrative rules which are continually amended and subject to rule challenges. FWC also manages several licensing and permitting programs ranging from licensing the possession of captive wildlife to the licensing of commercial fishermen. Consequently, the agency defends challenges to license and permit denials, revocations, fines and suspensions. The agency also has over 700 sworn law enforcement officers enforcing FWC regulations as well as state and federal laws. State and federal prosecutors handle the criminal cases resulting from the enforcement activities of these officers.

*continued, next page*

**AGENCY SNAPSHOT***from page 9***How does Chapter 120 affect the mission of the agency?**

Chapter 120 provides FWC with guidance to ensure the agency complies with procedural due process requirements and meets the needs of its constituents.

**How does the rulemaking process affect the agency?**

The rulemaking process for FWC is more difficult than it is for most agencies because a collegial body which meets only five times per year governs FWC. FWC's very talented and dedicated staff, however, has managed to conduct rulemaking very effectively despite this difficulty.

## Update your CLE record in record time!

### CLE CREDIT POSTING

Discover the convenience of online posting at

[www.floridabar.org](http://www.floridabar.org)

Click "Member Profile" at top right

Click "CLE Activity Posting" link

Login and Post Credits

**REMINDER: FLORIDA BAR CLE ATTENDANCE CREDITS ARE POSTED AUTOMATICALLY**

**APA***from page 1***The First District Decision**

In 2005, First Quality submitted a proposal to serve as a lead agency under the Community Care for the Elderly ("CCE") program administered by the Alliance in response to the Alliance's request for proposals. When First Quality was not selected as a lead agency, it attempted to file a bid protest pursuant to the procedures set forth in section 120.57(3), Florida Statutes. The Alliance sent First Quality a letter indicating that First Quality was not entitled to pursue the bid protest remedies in section 120.57(3) because the Alliance is not an "agency" subject to the APA. Thereafter, First Quality filed a notice of appeal with the First District Court of Appeal (the "First District") claiming the Alliance's letter was final "agency" action subject to appeal under section 120.68, Florida Statutes.<sup>4</sup> The Alliance moved to dismiss the appeal on the basis that the Alliance is not an "agency" subject to the bid protest procedures in the APA. First Quality opposed the Alliance's motion arguing that the bid protest procedures in the APA apply to the Alliance. By Order dated September 6, 2006, and after all

of the issues had been fully briefed by the parties, the First District granted the Alliance's motion to dismiss First Quality's appeal as to the Alliance.<sup>5</sup>

First Quality also filed a bid protest petition with DOEA arising out of the Alliance's same CCE lead agency procurement. DOEA issued a final order dismissing First Quality's bid protest petition on the basis that there was no agency action that invoked rights under the bid protest procedures in the APA. First Quality appealed DOEA's final order pursuant to section 120.68, Florida Statutes. On the same day that the First District issued its order granting the Alliance's motion to dismiss, the First District issued a decision affirming, *per curiam*, the final order of DOEA.<sup>6</sup> Because the issue of whether the Alliance is an "agency" subject to the bid protest procedures in the APA was only addressed by the First District in an order granting a motion to dismiss and in a *per curiam* affirmed ("PCA") decision without any written opinion, the door was left open for this issue to be revisited by these parties in another forum. That is exactly what happened at the Third District Court of Appeal (the "Third District") during the next procurement cycle.

**The Fourth District Decision**

In the meantime, the *Mae Volen* case was winding its way first

through DOAH, and then through the Fourth District Court of Appeal (the "Fourth District"). Mae Volen, like First Quality, submitted an unsuccessful proposal to the AAA (in this case the Palm Beach AAA) to serve as a CCE lead agency. Unlike the facts in the *First Quality* case, when Mae Volen filed a bid protest petition with the Palm Beach AAA, that AAA referred the petition to DOAH. DOEA subsequently intervened in that proceeding and both DOEA and the Palm Beach AAA filed motions for the Administrative Law Judge ("ALJ") to dismiss the petition and relinquish jurisdiction due to lack of subject matter jurisdiction.<sup>7</sup> On July 21, 2006, the ALJ issued a Final Order of Dismissal for Lack of Subject Matter Jurisdiction finding that the Palm Beach AAA is not an "agency" for purposes of the APA.<sup>8</sup> Mae Volen appealed that Final Order to the Fourth District.

On August 8, 2007, the Fourth District issued an opinion concluding that the Palm Beach AAA is an "agency" for purposes of the APA and that DOAH did have jurisdiction over Mae Volen's bid protest.<sup>9</sup> However, on October 24, 2007, the court granted a motion for rehearing by DOEA and vacated its prior decision. Three months later, and following supplemental briefing by the parties, the court issued a new opin-

ion that reached the same conclusion as its previously vacated opinion.<sup>10</sup> The court reversed the ALJ's order dismissing Mae Volen's bid protest for lack of jurisdiction finding that DOAH does have jurisdiction to hear appeals involving AAAs.<sup>11</sup> The court focused on the reference to a "board" in the definition of "agency" in the APA and noted that the word "board" also appears in the legislation establishing the DOEA and describing its relationships with AAAs.<sup>12</sup> In its opinion, the court reasoned that:

Because the legislature designated the area agencies on aging as "boards" performing the programmatic and funding requirements of the DOEA, as well as the fact that they exercise multi-county authority and perform essentially government functions in authorizing the spending of public funds and contracting with lead agencies, we conclude that DOAH has authority to hear this bid protest.<sup>13</sup>

The Fourth District distinguished the facts before it from those in *Vey v. Bradford Union Guidance Clinic, Inc.*,<sup>14</sup> in which the First District held that a private entity that receives both state and private funds, and that contracts with an agency to provide services for the agency, is not itself an agency subject to the APA.<sup>15</sup> The *Mae Volen* court reasoned that the private entity in *Vey* was a service provider providing services under a contract as an independent contractor, whereas an AAA is not a service provider, but is a coordinator and administrator of DOEA's programs.<sup>16</sup>

The court also appeared concerned that if a bid protest at DOAH was not available, the disgruntled bidder's remedy would be limited to filing suit in circuit court.<sup>17</sup> The court stated: "If there is no appeal, then an important right required under both state and federal law is lost."<sup>18</sup>

The Fourth District was careful to explain that its ruling is very narrow. Moreover, the court acknowledged that if it was wrong in its analysis and the legislature did not intend to confer jurisdiction on DOAH to hear bid protests from AAA procurements, legislation could be passed to clarify the issue.<sup>19</sup> The legislature did just that, but not before the issue of

whether an AAA is an "agency" was raised again in the Third District.<sup>20</sup>

### **The Third District Decision**

While the *Mae Volen* case was working its way through DOAH and the Fourth District, three years passed since First Quality had last submitted a proposal to the Alliance. Thus, as required by statute, the Alliance issued a new request for proposals for CCE lead agencies in 2008.<sup>21</sup> Following the Alliance's issuance of a notice of intent to award CCE lead agency contracts to other providers, First Quality filed a Petition for Writ of Mandamus in the Third District contending that it was entitled to a bid protest hearing under the APA. Of course, First Quality cited to the Fourth District's *Mae Volen*<sup>22</sup> decision in support of its petition. The Third District, however, expressly declined to follow the Fourth District's *Mae Volen* decision,<sup>23</sup> and instead concluded that the Alliance is not a state agency subject to the APA.<sup>24</sup>

The court noted that First Quality is only entitled to a formal administrative hearing at DOAH if the Alliance is an "agency" as defined in sections 120.52(1)<sup>25</sup> and 287.012(1),<sup>26</sup> Florida Statutes. The Third District concluded that the Alliance does not fall within the enumerated types of entities in the definition of "agency" as provided in subsections (a), (b) or (c) of section 120.52(1).<sup>27</sup> The court also determined that the Alliance is not an "agency" as that term is defined in section 287.012(1), because the Alliance is not one of the entities listed in that definition and because it is not a unit of the State's executive branch.<sup>28</sup>

The Third District explicitly noted its disagreement with the Fourth District's conclusion that the reference to "board" in section 20.41(7), Florida Statutes, the statutory provision referencing the contractual relationship between AAAs and DOEA, means the AAA fell within section 120.52(1)(b)(3), which lists a "board" as a state agency.<sup>29</sup> The Third District reasoned that the use of the word "board" in section 20.41(7) refers to the "board of directors" as the governing body of the AAA, rather than to an official state board.<sup>30</sup>

Unlike the Fourth District, the Third District stated that it was fol-

lowing *Vey* and the First District's conclusion in that case that the definition of "agency" in the APA does not encompass a private entity that contractually agrees to provide services for a state agency.<sup>31</sup> The Third District rejected the *Mae Volen* court's attempt to distinguish *Vey* on the grounds that *Vey* involved a provider of direct services while an AAA provides coordination and administration of services.<sup>32</sup> The Third District recognized that "[a]t bottom, both entities are private, non-profit corporations that provide services pursuant to contracts with state agencies – contracts that describe the entities as independent contractors."<sup>33</sup> The court noted that it could "discern no legislative intent to include private, non-profit corporations, such as the Alliance, within the purview of the APA."<sup>34</sup> The court also concluded that had the legislature intended to include private corporations, such as AAAs, within the bid protest procedures in the APA, the legislature would have done so.<sup>35</sup>

The Third District denied First Quality's petition.<sup>36</sup> The court also certified conflict to the Florida Supreme Court to the extent its decision conflicts with *Mae Volen*.<sup>37</sup>

### **Legislative Action**

Notwithstanding the Third District's certification of conflict, it is highly unlikely that the Florida Supreme Court will ever address whether an AAA is an "agency" for purposes of the APA or resolve the conflict between *First Quality* and *Mae Volen*. This is because the legislature intervened and clarified its intent with respect to AAAs during the 2009 Regular Legislative Session.<sup>38</sup>

Specifically, through the passage of House Bill 935, the legislature amended section 20.41, Florida Statutes, to remove all references to a "board" when referring to an AAA, and to specify that an AAA is a "non-governmental, independent, not-for-profit corporation."<sup>39</sup> The bill also amended section 430.203(9), Florida Statutes, relating to designation of CCE lead agencies by AAAs, to: (a) extend the length of CCE lead agency contracts from three to six years; (b) note that the request for proposal process must be a competitive pro-

*continued, next page*

**APA**

from page 11

curement; (c) remove the requirement that the AAA consult with DOEA in developing the request for proposal; (d) remove a statutory exemption by AAAs, in consultation with DOEA, for certain providers from the competitive procurement process; and (d) require DOEA to adopt a rule creating a dispute resolution mechanism for CCE lead agency procurements.<sup>40</sup> House Bill 935 became law on May 20, 2009.<sup>41</sup>

The effect of these changes was to remove the statutory language on which the Fourth District relied in *Mae Volen*, thereby confirming that an AAA is not an “agency” subject to the APA. The legislation also means that AAAs will now create their own request for proposal procedures without input from DOEA, with the exception of bid protest procedures which will be prescribed by DOEA rule.

The language added by the legislature to section 430.209(9)(a), Florida Statutes, in 2009, while delegating rulemaking authority to DOEA, dictates in some detail what DOEA’s rule establishing the dispute resolution

mechanism for AAA lead agency procurements must contain.<sup>42</sup> The statute states that a “qualified, impartial decisionmaker” must preside over the hearing to “determine whether the area agency’s proposed action is contrary to the area agency’s governing statutes or rules or to the solicitation specifications.”<sup>43</sup> The standard of proof is whether the AAA’s action was “clearly erroneous, contrary to competition, arbitrary or capricious.”<sup>44</sup> The decisionmaker’s decision is subject to review by a “qualified and impartial reviewer,” if requested.<sup>45</sup> Further, the standards for bid protest procedures must include: (a) notice and a clear point of entry to substantially affected entities; (b) an automatic stay of the proposed contract award while the protest is pending;<sup>46</sup> (c) an opportunity for discovery and an evidentiary hearing; and (d) provisions for a hearing to be conducted within 30 days, unless waived by all parties.<sup>47</sup> In short, section 430.203(9)(a) describes a bid protest procedure that is quite similar to that in section 120.57(3), except that the decisionmaker is not a DOAH ALJ, and the appeal is heard by a “reviewer” instead of a district court of appeal.

The legislature directed DOEA to adopt the AAA bid protest rule by August 1, 2009. However, at the time

this article is being written, the rule has yet to be adopted.

**DOEA Rulemaking**

DOEA’s efforts to adopt the rule required by section 430.203(9)(a), Florida Statutes, as amended by the 2009 Legislature, began before the bill was even signed into law by the Governor. On May 8, 2009, DOEA published a Notice of Development of Rulemaking.<sup>48</sup> Following a rule development workshop on May 26, 2009, DOEA published its initial Proposed Rule 58C-1.0031, Florida Administrative Code, in the June 12, 2009 edition of *Florida Administrative Weekly*.<sup>49</sup> The proposed rule set forth a procedure that mimicked, in large part, the bid protest proceedings in section 120.57(3), Florida Statutes, including the requirement for filing a notice of intent to protest within 72 hours of the posting of a notice of intent to award, with a formal written protest due 10 days later. Again, one major difference between the process set forth in the proposed rule and a state agency bid protest was that an AAA protest would be heard by a “decisionmaker” instead of an ALJ. The required qualifications for the “decisionmaker” were a point of contention among interested parties and, as a result, on July 16, 2009, First Quality

## Legal Community Can Assist in Haiti Relief

As Florida’s legal community, we have an opportunity to assist the people of Haiti in their recovery and rebuilding efforts. The American Red Cross has set up an account to receive donations from all members of The Florida Bar directed to relief and development efforts in Haiti. Assistance provided by the American Red Cross may include sending relief supplies, mobilizing relief workers and providing financial resources.

The Florida Bar **International Law Section** is leading this effort and is seeking the help and support of every Florida Bar member, section and voluntary bar association.

To donate, please visit: <http://american.redcross.org/floridabar-emp>

Any donation amount will help make a difference. The International Law Section is encouraging its members to donate the equivalent of one billable hour. Given our numbers, this effort by Florida’s legal profession can raise millions of dollars. Together, we have that power!

filed a petition with DOAH seeking an administrative determination of the invalidity of Proposed Rule 58C-1.0031.<sup>50</sup>

In the meantime, DOEA continued to work on the rule and published another Notice of Development of Rulemaking on July 24, 2009, this time including an amended version of the previously published text of the proposed rule.<sup>51</sup> The amendments included changes to the required qualifications for the decisionmaker, as well as language that would require the non-prevailing party to bear all costs and attorneys fees. These changes, however, were not enough to save the proposed rule, and on September 4, 2009, DOEA withdrew it.<sup>52</sup> Ten days later, First Quality voluntarily dismissed its rule challenge.

DOEA went back to the drawing board and on October 16, 2009 published a new Notice of Proposed Rule.<sup>53</sup> This proposed rule is essentially the same as that published on July 24, 2009, except that DOEA removed the language requiring payment of costs and attorneys fees by the non-prevailing party. DOEA held a hearing on the proposed rule on December 17, 2009, following which the Florida Association of Area Agencies on Aging, Inc. ("F4A") filed a petition with DOAH seeking an administrative determination of the invalidity of Proposed Rule 58C-1.0031, as published on October 16, 2009.<sup>54</sup> DOEA published a Notice of Change to the proposed rule on January 15, 2010, which revises paragraph (7) of the rule to require the parties to mutually agree on the reviewer who reviews the decision of the decisionmaker.<sup>55</sup> The Notice of Change, however, does not address the other issues raised by F4A in its petition and F4A's challenge to the proposed rule remains pending.<sup>56</sup>

### Conclusion

The final chapter in the saga of AAAs and the APA has yet to be written. However, after more than four years of courts, the legislature, DOAH and DOEA struggling with issues relating to CCE lead agency procurements by AAAs, a few things are now clear. An AAA is not an "agency" subject to the APA, but an AAA will

be required to follow a bid protest process to be established by DOEA rule for procurements to designate CCE lead agencies. Just what that rule will ultimately look like when adopted remains to be seen. When the rulemaking issues are resolved, this story should finally come to an end.

*Karen D. Walker is Executive Partner of the Tallahassee office of Holland & Knight LLP. She graduated from the University of Florida College of Law with high honors and practices in the area of Florida administrative law with an emphasis on state and local procurement matters.*

### **Endnotes:**

<sup>1</sup> 978 So. 2d 191 (Fla. 4th DCA 2008), *review denied*, 1 So. 3d 172 (Fla. 2009). The September 2007 issue of the Newsletter discusses a prior decision of the court in the *Mae Volen* case which was withdrawn on rehearing. See *Mae Volen Senior Ctr., Inc. v. Area Agency on Aging Palm Beach / Treasure Coast, Inc.*, Case No. 4D06-2992, 2007 WL 2254578 (Fla. 4th DCA Aug. 8, 2007)(*vacated on grant of reh'g*).

<sup>2</sup> §430.203(9), Fla. Stat. (2008)(defining a "lead agency" under the community care for the elderly program as "an agency designated at least once every 3 years by an area agency on aging as a result of a competitive procurement conducted through a request for proposal").

This statute was amended by the Florida Legislature in 2009 to provide for competitive procurements every six years instead of every three years. See §430.203(9), Fla. Stat. (2009).

<sup>3</sup> There are 11 AAAs in Florida. DOEA has designated the Alliance as the AAA for Planning and Service Area ("PSA") 11, which encompasses all of Miami-Dade and Monroe Counties. DOEA has designated the Palm Beach AAA as the AAA for PSA 9, which includes Palm Beach, Martin, St. Lucie, Indian River and Okeechobee Counties.

<sup>4</sup> *First Quality Home Care, Inc. v. Fla. Dep't of Elder Affairs*, Case No. 1D05-4969 (Fla. 1st DCA).

<sup>5</sup> *Id.*

<sup>6</sup> *First Quality Home Care, Inc. v. Fla. Dep't of Elder Affairs*, 937 So. 2d 125 (Fla. 1st DCA 2006) (*per curiam aff'd*).

<sup>7</sup> An intervenor, Ruth Rales Jewish Family Service of South Palm Beach County, Inc., which had been awarded a CCE lead agency contract, joined in the Palm Beach AAA's motion.

<sup>8</sup> *Mae Volen Senior Ctr., Inc. v. Area Agency on Aging Palm Beach / Treasure Coast, Inc.*, DOAH Case No. 06-2291BID (Fla. Div. Admin. Hrgs., Final Order, July 21, 2006), *rev'd*, 978 So. 2d 191 (Fla. 4th DCA 2008).

<sup>9</sup> *Mae Volen Senior Ctr., Inc. v. Area Agency on Aging Palm Beach / Treasure Coast, Inc.*, Case No. 4D06-2992, 2007 WL 2254578 (Fla. 4th DCA Aug. 8, 2007)(*vacated on grant of reh'g*).

<sup>10</sup> *Mae Volen Senior Ctr., Inc. v. Area Agency on Aging Palm Beach / Treasure Coast, Inc.*, 978 So. 2d 191 (Fla. 4th DCA 2008).

<sup>11</sup> *Id.* at 192.

<sup>12</sup> Compare §120.57(3), Fla. Stat. (2008) (an

*continued, next page*

# LRS

## JOIN THE FLORIDA BAR'S LAWYER REFERRAL SERVICE!

Every year, The Florida Bar Lawyer Referral Staff makes thousands of referrals to people seeking legal assistance. Lawyer Referral Service attorneys annually collect millions of dollars in fees from Lawyer Referral Service clients.

The Florida Bar Lawyer Referral Service:

- Provides statewide advertising
- Provides a toll-free telephone number
- Matches attorneys with prospective clients
- Screens clients by geographical area and legal problem
- Allows the attorney to negotiate fees
- Provides a good source for new clients

CONTACT THE FLORIDA BAR TODAY FOR MORE INFORMATION.

The Florida Bar Lawyer Referral Service, 651 E. Jefferson Street, Tallahassee, FL 32399-2300, phone: 850/561-5810 or 800/342-8060, ext. 5810.  
Or download an application from The Florida Bar's web site at [www.FloridaBar.org](http://www.FloridaBar.org).

## APA

from page 13

“agency” under the APA includes each “[b]oard, including the Board of Governors of the State University System and a state university board of trustees when acting pursuant to statutory authority derived from the Legislature.”), with §20.41(7), Fla. Stat. (2008) (“The department shall contract with the governing body, hereafter referred to as the ‘board,’ of an area agency on aging to fulfill programmatic and funding requirements.”).

<sup>13</sup> *Mae Volen*, 978 So. 2d at 194. The court also cited to *Orlando-Orange County Expressway Auth. v. Hubbard Constr. Co.*, 682 So. 2d 566, 567-68 (Fla. 5th DCA 1996) for the proposition that the APA confers jurisdiction over entities authorized to exercise governmental powers in multi-county areas. *Mae Volen*, 978 So. 2d at 195.

<sup>14</sup> 399 So. 2d 1137 (Fla. 1st DCA 1981).

<sup>15</sup> *Id.* at 1139.

<sup>16</sup> *Mae Volen*, 978 So. 2d at 195.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* The court pointed out the inconsistency created by DOE’s suggestion that the remedy would be a petition for writ of certiorari which is only available to challenge agency action or local government action, while DOE was arguing that the Palm Beach AAA was not an agency. *Id.* at 195, n.1.

<sup>19</sup> *Id.* (“All we decide is that the administrative hearing officer has jurisdiction to hear this bid protest for a lead agency contract.”).

<sup>20</sup> DOE sought Florida Supreme Court discretionary review of the Fourth District’s decision. The Palm Beach AAA joined in the petition as did the entity that won the CCE lead agency contract. On January 5, 2009, the Florida Supreme Court denied the petition for review. *Florida Dep’t of Elder Affairs v. Mae Volen Senior Ctr., Inc.*, 1 So. 3d 172 (Fla. Jan. 5, 2009). Meanwhile, the DOAH case was reopened on June 2, 2008, discovery ensued, and on June 12, 2008, Mae Volen filed a notice of voluntary dismissal with prejudice. See *Mae Volen Senior Ctr., Inc. v. Area Agency on Aging Palm Beach / Treasure Coast, Inc.*, Case No. 06-2291BID, Order Closing File (Fla. Div. Admin. Hrgs. June 18, 2008).

<sup>21</sup> See §430.203(9), Fla. Stat. (2008) (requiring CCE lead agencies to be designated by an AAA pursuant to an RFP process at least once every 3 years).

<sup>22</sup> *Mae Volen*, 978 So. 2d 191 (Fla. 4th DCA 2008).

<sup>23</sup> Judge Schwartz dissented stating that he agrees with *Mae Volen*. *First Quality Home Care, Inc. v. Alliance for Aging, Inc.*, 14 So. 3d 1149, 1154 (Schwartz, J., dissenting).

<sup>24</sup> *First Quality Home Care, Inc. v. Alliance for Aging, Inc.*, 14 So. 3d 1149, 1151 (Fla. 3d DCA 2009).

<sup>25</sup> At the time the *First Quality* case was decided by the Third District, section 120.52(1), Florida Statutes, defined an “agency” as:

a) The Governor in the exercise of all executive powers other than those derived

from the constitution.

b) Each:

1. State officer and state department, and each departmental unit described in s. 20.04.

2. Authority, including a regional water supply authority.

3. Board, including the Board of Governors of the State University System and a state university board of trustees when acting pursuant to statutory authority derived from the Legislature.

4. Commission, including the Commission on Ethics and the Fish and Wildlife Conservation Commission when acting pursuant to statutory authority derived from the Legislature.

5. Regional planning agency.

6. Multicounty special district with a majority of its governing board comprised of non-elected persons.

7. Educational units.

8. Entity described in Chapters 163, 373, 380, and 582 and s. 186.504.

c) Each other unit of government in the state, including counties and municipalities, to the extent they are expressly made subject to this act by general or special law or existing judicial decisions.

§120.52(1), Fla. Stat. (2008). The definition of “agency” in section 120.52(1), however, was subsequently amended by the Florida Legislature in 2009. See Ch. 2009-187, § 1 at 1887-88, Laws of Fla.

<sup>26</sup> Part I of Chapter 287, Florida Statutes, governs procurements by Florida executive branch agencies. The bid protest provisions in the APA at section 120.57(3), Florida Statutes, expressly state that the definitions in section 287.012 apply to that specific portion of the APA. §120.57(3)(g), Fla. Stat. (2008). The Third District specifically noted that the Fourth District’s *Mae Volen* decision did not address the statutory definition of “agency” in section 287.012(1). *First Quality*, 14 So. 3d at 1152. Section 287.012(1), Florida Statutes, defines an “agency” as “any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government. . . .” §287.012(1), Fla. Stat. (2008).

<sup>27</sup> *First Quality*, 14 So. 3d at 1152.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 1152-53.

<sup>30</sup> *Id.* The court cited *Coastal Fuels Mktg., Inc. v. Canaveral Port Auth.*, 962 So. 2d 942, 944 (Fla. 5th DCA 2007), which held that the definition of “agency” in the APA which includes “each Authority” does not apply to a port authority which is an independent taxing district. The court also relied on *Fla. Dep’t of Ins. v. Fla. Ass’n of Ins. Agents*, 813 So. 2d 981, 983 (Fla. 1st DCA 2002), in which the First District held that an unincorporated association was not a “board” or “authority” as those terms were used in section 120.52(1).

<sup>31</sup> *First Quality*, 14 So. 3d at 1153 (citing *Vey*, 399 So. 2d at 1139).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* (citing *Fla. Ass’n of Ins. Agents*, 813 So. 2d at 984).

<sup>35</sup> *Id.* at 1153-54.

<sup>36</sup> *Id.* at 1154.

<sup>37</sup> *Id.*

<sup>38</sup> See Ch. 2009-46, §§ 1-3 at 364-366, Laws of Fla.

<sup>39</sup> Ch. 2009-46, § 1 at 364, Laws of Fla.

<sup>40</sup> Ch. 2009-46, § 2 at 365-66, Laws of Fla.

<sup>41</sup> Ch. 2009-46, § 4 at 366, Laws of Fla.

<sup>42</sup> §430.203(9)(a), Fla. Stat. (2009).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* Unlike state agency bid protests, the statute does not provide for a different standard of review for AAA decisions to reject all proposals. See §120.57(3)(f), Fla. Stat. (2009) (standard of review of agency’s rejection of all bids or proposals is whether the agency’s rejection is illegal, arbitrary, dishonest or fraudulent).

<sup>45</sup> §430.203(9)(a), Fla. Stat. (2009). The statute does not provide any guidance regarding how this review is to be conducted or the standard of review to be applied during any review of the decision maker’s decision.

<sup>46</sup> Unlike with state agencies, there does not appear to be any exception to this stay requirement even where there is danger to the health, safety or welfare. See §287.057(5)(a), Fla. Stat. (2009) (providing for an emergency contract without competitive bidding where the agency head determines that emergency action is necessary due to an immediate danger to the public health, safety, or welfare). In addition, because AAAs award contracts in multiple counties, the application of this statute is unclear as it applies to a CCE lead agency designation in a county where no protest has been filed if one RFP is issued for all counties, but not all counties are the subject of a protest.

<sup>47</sup> §430.203(9)(a), Fla. Stat. (2009). The statute also includes a grandfathering provision for CCE lead agency designations conducted prior to the effective date of the 2009 amendments to section 430.203(9)(a), that were the subject of litigation on the date such amendments became law. §430.203(9)(b), Fla. Stat. (2009).

<sup>48</sup> 35 Fla. Admin. Weekly 18 (May 8, 2009).

<sup>49</sup> 35 Fla. Admin. Weekly 23 (June 12, 2009).

<sup>50</sup> *First Quality Home Care, Inc. v. Dep’t of Elder Affairs*, DOAH Case No. 09-003802.

<sup>51</sup> 35 Fla. Admin. Weekly 29 (July 24, 2009).

<sup>52</sup> 35 Fla. Admin. Weekly 35 (Sept. 4, 2009).

<sup>53</sup> 35 Fla. Admin. Weekly 41 (Oct. 16, 2009).

Interestingly, in its October 16, 2009 Notice of Proposed Rule, DOE identified the Notice of Development of Rulemaking published on July 24, 2009, which amended the initial, and subsequently withdrawn, proposed rule as the notice of proposed rule development for the new proposed rule.

<sup>54</sup> *Florida Ass’n of Area Agencies on Aging, Inc. v. Dep’t of Elder Affairs*, DOAH Case No. 09-007017.

<sup>55</sup> 35 Fla. Admin. Weekly 02 (Jan. 15, 2010). The proposed rule, as published in October 16, 2009, would have allowed the party seeking review to unilaterally select the reviewer.

<sup>56</sup> The rule challenge was initially set for hearing on January 28, 2010, but was continued at the request of the parties. At the time this article is being written, the parties have now requested that the Administrative Law Judge again set the rule challenge for hearing.



[www.FloridaBar.org](http://www.FloridaBar.org)

Visit the  
Career Center  
today!

## job seeker

### Advance Your Career

It's fast, easy and free! Register today and explore the opportunities that will take your career to the next level.

### Post your Resume Anonymously

Simply post your resume or create an anonymous career profile and employers will contact you directly with new opportunities.

### Search Through Premier Job Postings

Search the many jobs in your field and are not widely available on other career sites.

### Receive Job Alerts

Create job alerts based on various criteria and new opportunities will be emailed directly to you.

# CAREER CENTER

## Searching for a job or looking to fill a position?

With easy to use search tools, The Florida Bar Career Center is the #1 source for job seekers to find opportunities to help advance their careers. Employers will also find that the Career Center provides the resources needed to make recruitment

more efficient and successful.



## employer

### Hire qualified job seekers

Reach qualified candidates who have the experience and expertise to fill your positions.

### Save time and money

Single out candidates who specialize in your field and advertise positions to them at a fraction of what it costs on other job boards.

### Post multiple positions

From one posting package to unlimited access, there are many options available to assist you in your recruitment.

### Receive resume alerts

Create resume alerts based on various criteria and you will be notified of qualified candidates directly via email.

**For more information, visit us online at [www.FloridaBar.org](http://www.FloridaBar.org)**



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

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