Administrative Law Section Newsletter

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Emergency Suspension Orders of Professional Licenses - A Problem or Two

by William Furlow

A license to practice a profession is a valuable property right. The United States and Florida Constitutions prohibit the government from taking property without providing due process. Florida is considered to have a generally thoughtful and fair system of administrative procedures, but it is not without problems. The purpose of this article is to highlight a couple of these problems with respect to emergency suspensions of professional licenses. The scenario described is hypothetical; the facts have been adapted from a blend of parts of several actual cases, with the goal to create a scenario that highlights the problems and allows for discussion of possible solutions.

Let's say you are a physician, a board-certified pediatrician. One day, while you are examining a hyperactive five-year old, the patient starts screaming for no apparent reason that you or your nurse, who is standing beside you, can figure out. The patient's mother then comes into the room and comforts the child who is soon calmed down enough so that you can finish your examination. As the mother and child are leaving through the reception area, the receptionist, who you are going to fire that afternoon for spending too much time on Facebook, asks the child what happened back there to make her scream.

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From the Chair

by Amy W. Schrader

For those of you who like to "keep things interesting," this legislative session may prove to be a nail-biter, as there are wide-ranging proposals for changes to our beloved Chapter 120, Florida Statutes. As part of the Administrative Law Section's mission, we maintain Florida Bar-approved legislative positions which allow us to advocate for the interests of our members as we seek to protect the valuable rights afforded to participants in the administrative process. Our legislative committee will be reviewing, analyzing, and commenting on proposed changes that affect the integrity of Chapter 120, consistent with these adopted positions. Of course, as always we will provide you with a post-session analysis of any major changes that may affect you and your practice. The approved legislative positions for the 2012-2014 biennium are as follows:

1. Opposes any amendment to Chapter 120, Florida Statutes, or other legislation to deny,

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limit or restrict points of entry to administrative proceedings under Chapter 120, Florida Statutes, by substantially affected persons.

2. Opposes exemptions or exceptions to the Administrative Procedure Act, but supports requiring that any exemption or exception that is enacted be included within Chapter 120, Florida Statutes.

3. Supports voluntary use of mediation to resolve matters in administrative proceedings under Chapter 120, Florida Statutes, and supports confidentiality of discussions in mediation; but opposes mandatory mediation and opposes imposition of involuntary penalties associated with mediation.

4. Opposes amendments to Chapter 120, Florida Statutes, or other legislation that limit, restrict, or penalize full participation in the administrative process without compelling justification.

5. Supports adequate funding of the Division of Administrative Hearings and other existing state administrative dispute resolution forums in order to ensure efficient resolution of administrative disputes.

6. Opposes any amendment to Chapter 120, Florida Statutes, or other legislation, that undermines the rule-making requirements of the Administrative Procedure Act.

7. Supports uniformity of procedures in administrative proceedings under Chapter 120, Florida Statutes.

8. Opposes legislation which undermines generally-accepted principles of Florida administrative law by altering the balance between the rights of citizens to participate in the administrative process and the responsibility of an agency to implement and enforce the agency's statutory responsibilities.

9. Opposes legislation which deviates from generally-accepted principles of Florida administrative law by hindering an agency from promulgating otherwise-authorized rules to interpret statutes within the agency's area of responsibility or to efficiently administer its statutory responsibilities.

In addition to our legislative committee, our CLE committee has been busy, too. Section members have been busy conducting a three-part webcast, "Ethics for Constitutional Officers," which is now available from the Bar in its entirety on audio CD. Preparations are also underway for our upcoming Pat Dore Conference this fall. If members have suggestions for topics they would like to see addressed at this year's conference, we would love to hear from you.

Finally, I would like to thank Larry Sellers and Gigi Rollini for stepping up to take over as our Appellate Case Notes crew. We sincerely appreciate Mary Smallwood's fourteen years of selfless service preparing our Appellate Case Notes column and wish her all the best!

Administrative Law Section Young Lawyers Committee Created

by Deborah K. Tyson

The Administrative Law Section of The Florida Bar is pleased to announce the establishment of the young lawyers committee for the 2013-2014 year. The young lawyers committee has numerous goals for the upcoming year, including providing support to the executive council, providing outreach activities and support to the law school liaison committee, and establishing educational events and networking opportunities throughout the state for current section members and young lawyers interested in administrative law. The young lawyers committee also seeks to encourage membership in the Administrative Law Section and to work with young lawyers who are members of the section on networking, mentoring, and career development opportunities.

The young lawyers committee is working on several exciting projects, including a mentoring program that pairs newer section members with more experienced section members, and promoting the section to law schools.

Please contact any of the young lawyers committee co-chairs with any ideas or comments you have on activities and goals for the group or to get involved in opportunities for mentoring and career development. We look forward to an active year.

The young lawyers committee co-chairs are: Christina Arzillo (christina.arzillo@myfloridalicense.com), Vilma Martinez (vmartinez@mdlegal.net), Daniel Russell (drussell@joneswalker.com), and Debbie Tyson (dtyson@gunster.com).

APPELLATE CASE NOTES

by Larry Sellers and Gigi Rollini

Agency Authority as to Recommended Orders

Bridlewood Group Home v. Agency for Persons with Disabilities, 39 Fla. L. Weekly D15 (Fla. 2d DCA 2013) (Opinion filed Dec. 20, 2013)

Bridlewood Group Home sought review of an APD final order revoking its license to operate after a Bridlewood employee sexually battered a patient. The ALJ recommended that no action be taken against Bridlewood because allegations concerning negligent supervision were not proven. However, the APD filed exceptions to the ALJ's recommended order and based upon one of the exceptions, found that the revocation was warranted.

On appeal, Bridlewood argued that APD improperly rejected the ALJ's findings and substituted them with its own. Specifically, Bridlewood argued that APD relied on its exceptions, rather than proof, on the basis that "the ALJ lacked the expertise to evaluate the credibility of a witness . . . with a developmental disability," whereas APD had "special expertise and experience" in doing so. In rejecting the ALJ's recommended order, APD concluded that questions as to the weight to assign to the testimony of a witness with a developmental disability as to whether an environment is safe for its residents and should continue to be licensed "is a policy-infused opinion on a matter squarely and exclusively within the authority assigned to APD."

The Second District reversed the final order, concluding that APD: was required to prove its allegations by clear and convincing evidence; failed to do so; and erroneously relied instead on its exceptions to the recommended order. The court reasoned that APD failed to abide by the standard of review required when an agency reviews an ALJ's recommended order. The court opined that APD could not avoid the standard on the basis that it "has a superior capacity to make a credibility determination of a developmentally disabled individual," even when the issue is preventing exploitation of the developmentally disabled.

The court went on to explain that it found no authority holding that an agency can make a credibility determination based on the characteristics of a witness. The court concluded that APD's findings merely reflected disagreement with the ALJ's assessment of the evidence, not a finding on a factual matter infused with policy considerations. Thus, the court determined, such a disagreement cannot form the basis to reverse an ALJ's factual determinations.

Agency Head Subpoenas

University of West Florida Board of Trustees v. Habegger, 125 So. 3d 323 (Fla. 1st DCA 2013) (Opinion filed Oct. 16, 2013)

A lawsuit for discriminatory termination and tortious interference was brought by a former UWF professor. In the suit, the plaintiff alleged that another defendant communicated disparaging information about the plaintiff to the public and to UWF, specifically to UWF President Judith Bense. The plaintiff sought to depose President Bense and UWF sought a protective order. The trial court denied UWF's motion for protective order and compelled the deposition of President Bense.

In response, UWF sought a writ of certiorari from the First District Court of Appeal to quash the order. UWF argued that, while President Bense had one conversation with the defendant who allegedly communicated disparaging information about the plaintiff, the conversation was not relevant to the plaintiff's claim, it had no bearing upon the decision to terminate the plaintiff, and President Bense was not involved in the decision to terminate the plaintiff. UWF also argued there were less intrusive, alternative discovery methods for the plaintiff to obtain the same information, and that forcing President Bense to testify at a deposition was unnecessary and unduly burdensome.

The First District granted the petition and quashed the portion of the trial court's order compelling the deposition of President Bense. Starting with the irreparable, material injury prong of the certiorari test, the court concluded that "wrongfully compelling the deposition of President Bense would result

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in a harm that cannot be undone," and that "compelling the deposition of President Bense in this context could have future widespread ramifications and subject her to depositions in numerous other employment disputes." As for whether the trial court departed from the essential requirements of law, the appellate court concluded that the plaintiff "was required to satisfy two requirements: (1) exhaust other discovery tools and (2) show that the agency head was uniquely able to provide relevant information which could not be obtained from other sources," citing *Dep't of Agric. & Consumer Servs. v. Broward Cnty.*, 810 So. 2d 1056, 1058 (Fla. 1st DCA 2002) (finding that an agency head should not be subject to deposition over objection "unless and until the opposing parties have exhausted other discovery and can demonstrate that the agency head is uniquely able to provide relevant information which cannot be obtained from other sources"). Having admittedly failed to meet this burden, the court found that the plaintiff was not entitled to depose President Bense.

Applicability of the APA

A.L. by his parent P.L.B., et al. v. Jackson County School Board, 38 Fla. L. Weekly D2466 (Fla. 1st DCA 2013) (Opinion filed Nov. 26, 2013)

The ALJ dismissed A.L. and P.L.B.'s second request for a due process hearing for an exceptional student, which was filed while proceedings for the same student were already ongoing. The ALJ also concluded that the second request was frivolous, and granted the Jackson County School Board's motion for attorney's fees under section 57.105(5), Florida Statutes, as a prevailing party in a proceeding brought under section 1003.57, Florida Statutes. A.L., his mother P.L.B., and their attorney appealed.

The court reversed, noting that section 57.105(5), by its own terms, applies in "administrative proceedings under chapter 120." The proceeding at issue was not an "administrative proceeding under chapter 120," but instead was controlled by the procedures outlined in section 1003.57(1)(b), which expressly provides that due process hearings "are exempt from sections 120.569, 120.57, and 286.011, except to the extent that the State Board of Education adopts rules establishing other procedures."

Judge Benton filed a concurring opinion in which he agreed that the proceedings are not "administrative proceedings under chapter 120," but noted that the statute seems to confer upon the State Board of Education the authority to reverse or disavow the exemption from sections 120.569, 120.57 and 286.011, Florida Statutes.

Attorney's Fees

Viering v. Florida Commission on Human Relations on behalf of Bahiyyih Watson, 39 Fla. L. Weekly D59 (Fla. 1st DCA 2013) (Opinion filed Dec. 31, 2013)

Viering prevailed in her appeal from a final order entered in proceedings the Florida Commission on Human Relations had instituted against her. Agreeing that the Commission had overstepped its authority by substituting its own view of the facts for the ALJ's findings, the court reversed. *See* 109 So. 3d 296 (Fla. 1st DCA 2013). The court also granted Viering's motion for attorney's fees pursuant to section 120.595(5), Florida Statutes, and remanded to the Division of Administrative Hearings for determination of the amount. On remand, the ALJ conducted a hearing and entered an order awarding appellate attorney's fees and costs to Viering. The Commission sought review of that order, arguing that Viering failed to comply with the notice provisions in section 284.30, Florida Statutes, and that section 760.35(3)(c), Florida Statutes, provides that "costs or fees may not be assessed against the Commission in any appeal from a final order issued by the Commission under this subsection."

The court affirmed the ALJ's order awarding fees and costs against the Commission. The court held that section 284.30 does not apply to fee motions in administrative proceedings, as that statute plainly limits applicability of its provisions to a "party to a suit in any court." The court also concluded that the later-enacted section 120.595(5), Florida Statutes, abrogates section 760.35(3)(c), Florida Statutes, to the extent that section 760.35(3)(c) prohibits the assessment of costs and fees even when the Commission erroneously rejected or modified an ALJ's findings of fact.

Licensing

Summer Jai Alai Partners v. Department of Business and Professional Regulation, 125 So. 3d 304 (Fla. 3d DCA 2013) (Opinion filed Oct. 9, 2013)

Summer Jai Alai Partners acquired a greyhound racing permit in 1980 from Miami Kennel Club. Shortly thereafter, the Division of Pari-Mutuel Wagering granted Summer's request to convert the greyhound racing permit to a summer jai alai permit. Summer then leased an existing jai alai facility at Miami Jai Alai and operated from that facility for almost 35 years.

Relying on section 550.0745(2), Summer then sought to relocate its summer jai alai permit from Miami Jai Alai to Magic City Casino in Miami-Dade County, while continuing to seasonally operate live jai alai performances at Miami Jai Alai. Section 550.0745(2), provides:

> Such permittee is entitled to the issuance of a license for the operation of a jai alai fronton during the summer season as fixed in this section. A permittee granted a license under this section may not conduct pari-mutuel pools during the summer season except at a jai alai fronton as provided in this section. Such license authorizes the permittee to operate at any jai alai permittee's plant it may lease or build within such county.

The Division denied the request, explaining that upon conversion of the greyhound racing permit to a jai alai permit, the statute authorizes the permittee to operate from any jai alai plant the permittee leases or builds in the county without approval of the electorate. But once the relocation of the summer jai alai permit has occurred and the permit and license has been issued for that location, the

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permitholder must comply with section 550.054, Florida Statutes, if it seeks to relocate the converted summer jai alai permit to another location. That section only allows for a change in location if approved by the Division and the electorate. At Summer's request, the Division entered a final order to this effect and Summer appealed.

On appeal, the court affirmed the denial, concluding that the Division's interpretation of statutes relating to pari-mutuel wagering is entitled to great deference and its interpretation is not clearly erroneous, contrary to legislative intent, or in conflict with the plain and ordinary meaning of the relevant statutes.

Standing

CBS Outdoor Advertising, Inc. and SLG Investments, LLC v. Florida Department of Transportation, 124 So. 3d 383 (Fla. 1st DCA 2013) (Opinion filed Oct. 23, 2013)

CBS Outdoor, Inc., owns three "nonconforming" signs (billboards) erected in 1967 along what is now I-95 in Jacksonville. CBS and SLG Investments, LLC, both own land upon which the billboards are erected. Adjacent to these signs, FDOT erected a sound wall on its own property along I-95 that will screen or obstruct the view of the signs from I-95.

Under section 479.25, Florida Statutes, when signs become screened or blocked due to the construction of a sound barrier, the owners of some types of signs may raise the height of their signs or receive other statutorily provided remedies. Appellants requested the process and remedies available under this law. However, FDOT denied their request, concluding that the process provided in section 479.25 did not apply to Appellants' signs because they do not conform to certain state and federal sign requirements. Appellants filed a petition for an administrative hearing pursuant to section 120.57, Florida Statutes, to review FDOT's denial of their request for agency action under section 479.25. FDOT dismissed the petition on standing grounds because of its view that nonconforming signs are not subject to section 479.25.

On appeal, the court affirmed FDOT's order of dismissal, holding that Appellants' nonconforming signs are not entitled to redress under section 479.25, Florida Statutes. The court agreed that a sign must fall within the class of signs "lawfully erected," "conform[ing] to state and federal requirements," and "lawfully permitted" in order to qualify for the process and benefits available under this statute.

The court also rejected Appellants' alternative constitutional arguments that the exclusion of the nonconforming signs from section 479.25 violates their due process, equal protection, and private property rights. The court found that Appellants' due process and equal protection arguments must fail because FDOT offered a rational, non-arbitrary reason for excluding nonconforming signs from redress under section 479.25, Florida Statutes—allowing modifications to nonconforming signs could put the state's federal highway funding at risk. Under federal rules, FDOT could lose federal funding if it allowed nonconforming signs to be raised. In addition, the court found that the record does not support Appellants' takings claim at this juncture. The sound barrier in this case was constructed on FDOT's own right of way, not on Appellants' property, and FDOT has not "removed" the nonconforming signs, but only affected their visibility.

Florida Industrial Power Users Group v. Graham, 126 So. 3d 1056 (Fla. 2013) (Order filed Oct. 8, 2013)

Florida Power and Light Company (FPL) petitioned the Public Service Commission for an affirmative determination of need for the proposed Port Everglades New Generation Clean Energy Center (PEEC). The Florida Industrial Power Users Group (FIPUG), an ad hoc association of industrial users of electricity in Florida, intervened in the proceeding. The PSC entered a final order granting the determination of need for the PEEC. FIPUG appealed.

FPL argued that FIPUG lacked standing to appeal because it is not "adversely affected" by the final order, citing the Court's decision in *Legal Envtl. Assistance Fund, Inc. v. Clark*, 668 So. 2d 987 (Fla. 1996). The Court agreed, and dismissed the case for lack of standing with this brief order:

> We hereby dismiss the case for lack of standing, because the Appellant did not demonstrate that it is adversely affected by the Appellee's decision and does not cite to competent, substantial evidence in the record supporting this position. See Martin Cnty. Conservation Alliance v. Martin Cnty., 73 So. 3d 856, 862-64 (Fla. 1st DCA 2011) (explaining that to have standing to appeal an organization must demonstrate that it is adversely affected by the decision and acknowledging that mere speculation regarding future adverse impacts is insufficient).

Careful readers may recall that the Court previously accepted jurisdiction to review the cited decision in *Martin County Conservation Alliance,* 90 So. 3d 272 (Fla. 2012), but then dismissed the case after determining that jurisdiction was improvidently granted. *See* 122 So. 3d 243 (Fla. 2013).

Office of Insurance Regulation and Financial Services Commission v. Secure Enterprises, LLC, 124 So. 3d 332 (Fla. 1st DCA 2013) (Opinion filed Oct. 11, 2013)

Secure Enterprises, LLC, is the manufacturer of the Secure Door residential garage door bracing system. Secure Enterprises challenged two agency rules and their accompanying forms as arbitrary and capricious because, while they permit a windstorm loss reduction credit to be given to homeowners who upgrade their windows or glazed openings, they do not permit a separate credit to be given to homeowners who upgrade their non-glazed garage doors.

OIR defended the rule challenge by arguing, among other things, that Secure Enterprises lacked standing. In response, Secure Enterprises argued that it had been substantially and negatively affected because it

manufactures a product that would entitle homeowners to a discount on their home insurance policies if OIR, in implementing section 627.0629(1), Florida Statutes, had permitted a credit to be given to homeowners who upgrade their non-glazed garage doors. According to Secure Enterprises, it had experienced a significant loss of sales over the last few years, as homeowners and companies who previously used the Secure Door were opting either to purchase a much more expensive door that did qualify for the credit, or make no upgrades at all. Secure Enterprises submitted financial information which reflected $37,700 in 2004 revenue, to a high of $1,036,300 in 2007, and then down to $307,300 in 2011. It was undisputed that Florida homeowners have never received a separate or additional insurance credit for upgrading or strengthening their garage doors.

The ALJ concluded that Secure Enterprises had standing because "injury-in-fact may be inferred from the likelihood that an annual premium discount for the one-time purchase and installation of [Secure Enterprises'] product, given its low cost, would mean increased sales; therefore, the absence of such a discount would likely cause [it] economic injury." With respect to whether such interests are within the zone of interest protected or regulated by section 627.0629(1), Florida Statutes, the ALJ reasoned that this financial interest was "collaterally" within the zone of interest, based upon *Abbott Laboratories v. Mylan Pharmaceuticals, Inc.*, 15 So. 3d 642 (Fla. 1st DCA 2009), and similar cases. The ALJ concluded that the statute collaterally protected or regulated those segments of the construction industry, including Secure Enterprises, directly providing mitigative goods and services.

The First District reversed, concluding that Secure Enterprises lacked standing to bring the rule challenge, and that reliance on *Abbott Laboratories* and similar cases was misplaced. There, the appellate court explained, standing was satisfied because there was a direct injury caused by the act of removing a pre-existing regulatory benefit or changing an existing regulatory scheme. In Secure Enterprises' case, however, Secure Enterprises was seeking to gain an economic benefit it never had before, rather than trying to prevent the loss of a pre-existing benefit.

The court reiterated that economic injury may satisfy the injury in fact element of the standing test, but that such a claim cannot succeed where it rests on the absence of a regulation that has never before been provided. If Secure Enterprises had challenged the elimination of an existing insurance credit for garage doors, the court explained, its claim for standing would have been "much stronger." But with "no protected economic right that has been impaired by the rules and forms at issue," Secure Enterprises lacked standing to challenge those rules and forms.

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Gigi Rollini *is an appellate and administrative lawyer with Messer Caparello, P.A., in Tallahassee, Florida.*

DOAH CASE NOTES

Substantial Interest Hearings

In Re: Fla. Power & Light Co. Turkey Point Units 6 & 7 Power Plant Siting Application No. PA 03-45A3, DOAH Case No. 09-3575EPP (Recommended Order Dec. 5, 2013).

FACTS: Florida Power & Light ("FPL") provides electric service to approximately nine million customers in 35 Florida counties. FPL proposes to construct a 2,200 megawatt nuclear electrical generating facility and supporting facilities on a 300-acre site in an unincorporated section of Miami-Dade County, east of Florida City and bordered by Biscayne Bay. The proposal also includes off-site facilities and approximately 88.7 miles of transmission line corridors. Pursuant to section 403.509, Florida Statutes, the Governor and Cabinet (acting as the Siting Board) will determine the ultimate fate of FPL's application. If the Siting Board certifies the application, this would be FPL's largest project in 40 years.

Several governmental entities and other interested parties participated to varying degrees in the formal proceedings held over numerous days in July, August, September, and October of 2013 in Miami. Except for the City of Miami, which opposed all aspects of the project, the parties' primary focus concerned the location of the proposed transmission line corridors and the conditions of certification.

OUTCOME: The ALJ concluded that FPL met its burden of demonstrating its entitlement to site certification. With regard to the construction and subsequent operation of the plant and non-transmission line associated facilities, the ALJ found there would be no adverse impact on the public health, safety, or welfare. The ALJ also found the proposal "effects a reasonable balance between the need for the facility and the impacts upon air and water quality, fish and wildlife, water resources, and other natural resources of the state . . ." As for the transmission lines, the ALJ largely rejected conditions proposed

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by Miami-Dade County and various cities. Accordingly, the ALJ recommended that the Siting Board grant final certification for the proposed facility, supporting facilities, and the transmission lines.

Amerisure Mutual Ins. Co. vs. Dep't of Fin. Servs., Div. of Workers Comp., DOAH Case No. 13-0865 (Recommended Order Nov. 15, 2013).

FACTS: The Special Disability Trust Fund ("SDTF") and the Workers' Compensation Administration Trust Fund ("WCATF") are funded largely by annual assessments paid on a quarterly basis by workers' compensation insurers, based on the premiums the insurers receive. At the inception of a workers' compensation insurance policy, the premium paid is an estimate, with the actual premium amount dependent on the number and classification of workers covered during the policy term, as determined by an audit. If the actual premium is lower, the insurer returns the excess. For purposes of SDTF and WCTF assessments, insurers report "net" premiums, deducting premium refunds from estimated premium receipts. If an insurer returns more premium than it receives for a particular quarter, it has a negative net premium and owes no assessments for that quarter. In addition, the insurer receives a credit carried over to offset future assessments. Amerisure, a workers compensation insurer, received a quarterly report from the Department of Financial Services ("DFS") that showed Amerisure's accumulated carry-over credit against SDTF assessments was $379,235.27, and its accumulated carry-over credit against WCATF assessments was $19,399.95 as of December 31, 2009. However, in the next DFS report as of March 31, 2010, the vast majority of those carry-over credits were deleted without explanation. No point of entry was offered to challenge the deletion of credits. Amerisure paid assessments under protest from late 2010 through July 2012 that would have been offset by the carried-over credits had they not been deleted by DFS. Amerisure applied for a refund on September 26, 2012. DFS issued a Notice of Intent to Deny Applications for Refund, and Amerisure timely filed a petition for administrative hearing.

OUTCOME: The ALJ found that the elimination of carry-over credits was based on an unadopted rule, by which DFS determined as of the end of 2009 that it would no longer carry over credits from year to year, and credits reflected in the last quarter of 2009 were simply deleted by DFS in the first quarter of 2010 premium reports. The ALJ concluded that Amerisure was entitled to challenge DFS's March 2010 deletion of credits because DFS did not offer Amerisure a point of entry to challenge DFS' decision. Accordingly, the ALJ recommended that the Department enter a final order reinstating the deleted carry-over credits to offset against future assessments. Furthermore, the ALJ determined Amerisure is entitled to fees and costs under section 120.595(4)(a), Florida Statutes, because DFS relied on unadopted rules.

Catalina Williams v. Dep't of Fin. Servs., Div. of State Fire Marshal, DOAH Case No. 13-1643 (Recommended Order Nov. 19, 2013).

FACTS: The Department of Financial Services, Division of State Fire Marshal ("DFS"), is the agency tasked with certifying firefighters. The state firefighter certification exam comprises four segments, one being a ladder search and rescue evolution (the "ladder evolution"). During the ladder evolution, the candidate must ascend a ladder to the second floor of a building, test the integrity of the floor inside, enter the building through a window, find a "victim" on the lower floor, secure the victim in an approved manner, exit the building, safely deposit the victim on the ground, and provide notice by way of radio contact that he/she and the victim are outside the building. The entire ladder evolution sequence must be done within four minutes and 30 seconds. Catalina Williams and many other candidates took the certification exam on February 7, 2013. The instructions read to the candidates contained the following language regarding the ladder evolution: "Time starts when you touch anything. Time ends when the candidate and victim fully exit the building." The proctors, however, scored the ladder evolution by a different standard: time stops when the candidate exits the building with the victim, places the victim on the ground in an appropriate manner, and issues a verbal statement into the radio indicating that the firefighter and victim are out of the building. The Department notified Ms. Williams that she had failed the certification exam because her time on the ladder evolution exceeded the allowable time limit by five seconds. In addition to requesting a formal hearing to challenge the DFS determination, Ms. Williams filed a rule challenge petition alleging that DFS relied on an unadopted rule in grading her certification exam.

OUTCOME: The ALJ determined that DFS has no promulgated rule governing when an examiner should stop the clock during a ladder evolution. As a result, the ALJ determined that the examiners utilized an unadopted rule by stopping the clock for the ladder evolution when the firefighter deposited the victim on the ground and made radio contact. That unwritten rule was contrary to the instructions read to the candidates. Finding that the most persuasive evidence indicated that Ms. Williams completed the ladder evolution by exiting the building in less than the required time limit, the ALJ recommended that DFS enter a final order rescinding her failing score on the certification exam and certifying her as a firefighter.

Rule Challenges

Guardian Interlock, Inc. v. Dep't of Highway Safety & Motor Vehicles and Smart Start, Inc., DOAH Case No. 13-3685RX (Final Order Jan. 10, 2014).

FACTS: An ignition interlock device ("IID") prevents a motor vehicle from starting if the driver's breath alcohol concentration exceeds the IID's fail point. Section 316.193, Florida Statutes, requires that anyone convicted of a second and third DUI have an IID approved by the Department of Highway Safety and Motor Vehicles ("DHSMV") installed on their motor vehicle. Section 316.1937 authorizes a court to order installation of an IID under circumstances other than those described in section 316.193. Rule 15A-9.006 requires IID manufacturers to contract with DHSMV for services and commodities required to implement sections 316.193 and 316.1937. Because its current contract with IID providers will expire on March 31, 2014, DHSMV issued a Request for Proposals on July 2, 2013, and chose Smart Start, Inc. ("Smart Start") to be the sole vendor for the State of Florida. In addition to protesting the DHSMV award to Smart Start, Guardian Interlock, Inc. ("Guardian") filed a rule challenge petition, alleging rule 15A-9.006 is an invalid exercise of delegated legislative authority because Guardian is prohibited from marketing its IIDs in Florida without having a contract with DHSMV. Other existing providers of IIDs to Florida ("the Intervenors") intervened in support of Guardian.

OUTCOME: Before addressing the validity of rule 15A-9.006, the ALJ concluded Guardian and the Intervenors were substantially affected by rule 15A-9.006 and thus had standing to challenge it. According to the ALJ, there was no doubt Guardian "would be selling and Intervenors would be continuing to sell their IID goods and services in Florida for use by convicted persons, but for the Rule." Therefore, Guardian and the Intervenors satisfied the injury-in-fact portion of the substantially affected test. As for the zone of interest portion, the ALJ noted Guardian and the Intervenors are seeking to market their IIDs to convicted persons. Because rule 15A-9.006 provides the means by which IID manufacturers market their goods to such persons, the ALJ concluded Guardian and the Intervenors also satisfied the zone of interest test. In the course of reaching that conclusion, the ALJ engaged in an extensive analysis of the case law concerning the zone of interest test. The ALJ then concluded rule 15A-9.006 was invalid on all three grounds asserted by Guardian. For instance, the statute cited as rulemaking authority only pertains to the use of IIDs by convicted persons and does not empower DHSMV to control the purchase and sale of IIDs. Also, rule 15A-9.006 "implements no law authorizing or directing [DHSMV] to franchise IIDs and IID services in Florida. It is axiomatic that the power to grant franchises rests with the legislature, not the executive branch." The ALJ then concluded that "[t]he franchising powers that [DHSMV] has seized by means of the Rule vest unbridled discretion in the agency to pick one or more IID manufacturers to operate IID programs in Florida for an indefinite period of time."

Fla. Cmty. Health Action & Info. Network, Inc., et al. v. Fin. Serv. Comm'n, DOAH Case No. 13-3116RP (Final Order Nov. 4, 2013).

FACTS: Section 627.410(9), Florida

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Statutes, enacted during the 2013 legislative session, requires insurers to provide a one-time notice to certain policyholders of the estimated impact of the federal Patient Protection and Affordable Care Act on their health plan costs. The Office of Insurance Regulation initiated rulemaking to amend rule 69O-149.022 to incorporate by reference Form OIR-B2-2112 ("Form 2112") for use by insurers to provide the required notice. Florida Community Health Action and Information Network, Inc. ("CHAIN") provides services to low- and moderate-income individuals who lack sufficient health insurance and CHAIN provides health insurance to its full-time employees. CHAIN challenged the proposed amendment to rule 69O-149.022 as an invalid exercise of delegated legislative authority.

OUTCOME: The ALJ ruled that CHAIN lacked standing to challenge the rule and form. After evaluating case law on the "injury-in-fact" prong of the standing test, the ALJ concluded that CHAIN failed to demonstrate it had a protected right not to receive a notice illustrating the estimated impact of the Affordable Care Act on monthly insurance premiums. In doing so, the ALJ observed it is the Affordable Care Act that will impact the premiums paid by Petitioners, while Form 2112 will merely describe that impact. "Nothing contained in the notice could possibly make a health plan cost (or cover) more or less than it would have cost (or covered) in the absence of the notice." The ALJ also rejected CHAIN's alternative argument that Form 2112 would deprive it of the information required to be provided under section 627.410(9)(b). According to the ALJ, CHAIN could not suffer a real and immediate injury in fact: (a) if it did not receive something that had never been previously provided; and (b) if the "thing at issue is essentially a free gift which can be accepted or ignored without obligation or penalty." As for the "zone of interest" prong of the standing test, the ALJ concluded that "[n]othing in the statute indicates that the purpose behind it was to assist recipients of the notice in making decisions about the purchase of insurance." Instead, the statute was designed to educate Floridians about the Affordable Care Act.

Bid Protests

Care Access PSN, LLC, v. AHCA and Prestige Health Choices, LLC, DOAH Case No. 13-4113BID (Recommended Order Jan. 2, 2014).

FACTS: In December 2012, the Agency for Health Care Administration ("AHCA") issued an Invitation to Negotiate seeking proposals for the provision of managed medical assistance services to Medicaid recipients in Miami-Dade and Monroe Counties. The ITN stated that AHCA would contract with five to ten providers, with at least one contract being awarded to a provider service network ("PSN"). The ITN required that a PSN be majority-owned by a provider or a group of affiliated providers. Several months later, AHCA noticed its intent to award contracts to ten providers, including Prestige Health Choices, LLC ("Prestige"), which was selected as the only PSN. Care Access PSN, LLC ("Care Access") challenged the award by asserting Prestige is not majority-owned by a group of affiliated health care providers. Health Choice Network ("HCNF") owns 13.333% of Prestige, and Care Access asserted HCNF is not a health care provider. If HCN's interest were to be subtracted from the sum of Prestige's provider ownership, then Prestige would not be majority-owned by a group of health care providers.

OUTCOME: After examining the descriptions of a PSN in the ITN and sections 409.912(4) and 409.962(13), Florida Statutes, the ALJ concluded that a "provider" must be an entity that delivers medical services directly to Medicaid recipients. HCNF is a fiscal intermediary services organization and a health center controlled network that provides no health care services. Instead, HCNF provides financial, information technology, billing, and centralized referral services to its members, each of whom is a health care provider. In rejecting AHCA's argument that HCNF can be considered a "provider," the ALJ concluded: "HCNF cannot assimilate the attributes of its members, as if by osmosis, and thereby acquire sufficient provider-like properties to be deemed a 'provider owner,' any more than a sports bar being purchased by a group of providers would turn into a quasi-provider upon the transaction's closing due to the attributes of its new owners." Accordingly, the ALJ recommended that AHCA enter a final order rescinding the proposed award to Prestige because Prestige (being minority owned by a group of affiliated health care providers) is not a PSN for the purpose of this procurement.

Global Tel Link Corp., and Securus Technologies, Inc., v. Dept't of Corrections and Embarq Payphone Services, Inc., d/b/a Centurylink, DOAH Case Nos. 13-3028BID, 13-3029BID, 13-3030BID, and 13-3041BID (Recommended Order Nov. 1, 2013); FDOC Case Nos. 13-81, 13-82, 13-87, and 13-93 (Final Order Dec. 11, 2013).

FACTS: On April 15, 2013, the Department of Corrections ("DOC") issued an Invitation to Negotiate ("ITN") to solicit bids for a contract to provide statewide inmate telephone services. DOC announced on June 25, 2013, its intent to award the contract to Embarq. However, after considering the formal protests filed by Global Tel Link and Securus, DOC concluded that the wording and structure of the ITN and the Request for Best and Final Offers ("RBAFO") were confusing and susceptible to different interpretations. In DOC's judgment, the misleading language and structure of the ITN and RBAFO might have materially influenced vendor pricing. Accordingly, DOC announced on July 23, 2013, its intent to withdraw the provisional award to Embarq, to reject all bids, and to re-issue the ITN. Four bid protests filed over the course of the procurement were referred to DOAH and consolidated for hearing.

OUTCOME: The ALJ issued an Order recommending that all four protests be dismissed due to Petitioners' failure to carry their burden of demonstrating DOC's decision to reject all replies was arbitrary, illegal, dishonest, or fraudulent. The ALJ concluded that "[w]hile reasonable persons might disagree with [DOC]'s conclusion that Securus and Global Tel Link were misled by [DOC] documents, and that this affected their replies and the fairness of the solicitation, there is evidence to support it, and there is no reason to conclude that the [DOC]'s determination was not made in good faith." DOC's Final Order adopted the Recommended Order.

Attorney's Fees

Amer. Amateur Mixed Martial Arts, Inc. a/k/a U.S. Amateur Mixed Martial Arts, Inc. v. Dep't of Bus. & Prof'l Regulation, State Boxing Comm'n, DOAH Case No. 13-2780F (Final Order Dec. 20, 2013).

FACTS: The Department of Business and Professional Regulation ("DBPR") filed a 3-count Administrative Complaint against American Amateur Mixed Martial Arts, Inc. ("AAMMA") on December 1, 2011. Counts I and II alleged that AAMMA, an amateur mixed martial arts sanctioning organization, violated Florida Administrative Code Rule 61K1-1.0031 by failing to enforce the health and safety standards in the International Sport Kickboxing Association Amateur Rules Overview ("the IKSA Overview") by: (1) permitting minors to compete in mixed martial arts matches; and (2) allowing fighters to engage in such matches outside the appropriate weight class. Count III alleged that AAMMA misled American Legion Post #75, causing American Legion to sign a letter incorrectly stating that it was the sole sponsor of AAMMA's May 6, 2011, amateur event. That action was significant because sole sponsorship by the American Legion would have exempted the May 6, 2011, event from state regulation. In DOAH Case No. 12-0142, the ALJ recommended that Counts I and II be dismissed because it was unclear whether the provisions at issue in the IKSA Overview were health and safety standards. As for Count III, the ALJ found that the evidence did not establish that AAMMA issued or composed the American Legion letter. The Florida State Boxing Commission rendered a Final Order dismissing the Administrative Complaint, and AAMMA filed a motion on July 19, 2013, seeking attorney's fees pursuant to section 57.111, Florida Statutes.

OUTCOME: DOAH determined that AAMMA was not entitled to attorney's fees because DBPR's prosecution was substantially justified. With regard to Counts I and II, there was no dispute that the allegations therein were accurate. While the rule DBPR sought to enforce was "vague," the ALJ concluded the Department reasonably interpreted the rule as prohibiting the conduct at issue, even though that interpretation was not accepted at hearing. The ALJ also concluded that DBPR had a reasonable basis in fact for pursuing Count III because the facts before DBPR indicated AAMMA had misled American Legion Post #75.

Agency Snapshot

The Board of Trustees of the Internal Improvement Trust Fund

by Deborah K. Tyson

The Governor and Cabinet serve as the Board of Trustees of the Internal Improvement Trust Fund (Board of Trustees). Effective January 7, 2003, the Florida Cabinet was reduced from six to three members and currently consists of the Attorney General, the Chief Financial Officer and the Commissioner of Agriculture. Currently, the Trustees are Governor Rick Scott, and the Cabinet members are Attorney General Pam Bondi, Commissioner of Agriculture Adam Putnam, and Chief Financial Officer Jeff Atwater. The Governor and Cabinet, when sitting as the Board of Trustees, handle matters related to the acquisition, administration, management, sale, and disposition of state-owned lands, as governed by chapter 253, Florida Statutes. The Board of Trustees' powers and duties are enumerated in section 253.02, Florida Statutes. A vote of three out of four of the Board of Trustees is required for the sale of state lands.

The Board of Trustees holds state lands in trust for the benefit of the public. The Legislature established the Board of Trustees of the Internal Improvement Trust Fund to hold state lands and administer the Internal Improvement Trust Fund. On March 3, 1845, at the time of admission to the Union, Florida was granted title to sovereignty submerged lands, subject to the public trust doctrine. The public trust doctrine protects traditional uses of these lands and subjects them to public interest analysis in the case of a sale or private use. Florida was also granted 500,000 acres of lands by the federal government upon admission to the Union, and obtained land through other means, including the Swamp and Overflowed Lands Act of 1850. These lands (and any proceeds from the lands) became part of the Internal Improvement Trust Fund. The Board of Trustees is the oldest state agency.

A significant part of the Board of Trustees' duties is to administer lands that are held by the state by virtue of its sovereignty, known as sovereignty submerged lands. These lands are identified in the Florida Constitution, Article X, Section 11, which provides: "Title to land under navigable waters within the boundaries of the state which have not been alienated, including beaches below mean high water lines, is held by the state by virtue of its sovereignty in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private uses of portions of such lands may be authorized by law, but only when not contrary to the public interest." The Board of Trustees is entrusted with the express constitutional duty to protect the public's interest in sovereignty submerged lands.

The Florida Department of Environmental Protection ("DEP") Division of State Lands serves as staff to the Board of Trustees. In 1995, the State's water management districts also became staff to the Board of Trustees concerning the review of applications to use sovereign submerged lands. As staff, DEP presents projects and provides expert assistance and technical support to the Board of Trustees in consideration of state lands matters.

Currently, DEP staff who handle Board of Trustees matters are:

- Katy Fenton, Deputy Secretary of Land and Recreation
- Stephanie Leeds, Cabinet Affairs
- Susan Grandin, Director of the Division of State Lands
- Thomas Sawyer, Acting DEP Counsel for Public Lands

The Governor and the Cabinet members have aides who work directly for them and who assist on Cabinet affairs. Each member of the Board of Trustees has at least one aide and some have more than one. The aides may cover specific issues and agenda items and provide research and briefing to the Board of Trustees. The Cabinet aides meet regularly, usually one week before the Cabinet meeting to discuss agenda items and ask questions of staff.

The Board of Trustees serves the entire state, and is seated in Tallahassee, Florida. Recently, Board of Trustees meetings have been held throughout the state, including meetings in Miami-Dade County, Tampa, and St. Augustine. Meetings in Tallahassee are held in the Cabinet Meeting Room Lower Level, The Capitol Tallahassee, Florida.

The Governor and Cabinet meet at least once per month; however, not every Cabinet meeting includes Board of Trustees issues. Meetings are noticed in the Florida Administrative Register and agendas and upcoming meeting dates are available at the following link: http://www.myflorida.com/myflorida/cabinet/mart.html

The Board of Trustees is an "agency" as that term is defined in section 120.52(1), Florida Statutes. The Board of Trustees is an administrative body that is not specifically created by the Florida Constitution. Therefore, the Board of Trustees is a statutory entity that derives only those powers specified in statute. Board of Trustees' decisions are challengeable under chapter 120, Florida Statutes. The Public Records Act, chapter 119, Florida Statutes, also applies to the Board of Trustees since it is a board created by the Legislature with powers that are prescribed by the Legislature.

Board of Trustees rules are found under Title 18 of the Florida Administrative Code, with the majority of the rules governing state lands in chapters 18-1 and 18-21, F.A.C.

The Board of Trustees has delegated authority to the Secretary of DEP and the water management districts for certain state lands issues. As such, routine state land matters and approvals, as specified in the delegations, can be handled by DEP and water management district staff, and do not need be presented to the Board of Trustees for consideration.

Law School Liaison

An Update from the Florida State University College of Law

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

The Florida State University College of Law has a busy schedule planned for the spring. We hope Section members will join us for one or more events.

Spring 2014 Events

Spring 2014 Environmental Forum on the Apalachicola-Chattahoochee-Flint (ACF) River System (**April 2, 2014**). The Spring 2014 Environmental Forum will focus on the ACF river system, including the State's recent court filing with the U.S. Supreme Court. Featured participants include: Ted Hoehn of the Fish and Wildlife Conservation Commission; Matt Leopold, General Counsel, Florida Department of Environmental Protection; and Jonathan Glogau, Special Counsel and Chief, Complex Litigation Office, Office of the Florida Attorney General and Adjunct Professor, Florida State University College of Law. David Markell, Steven M. Goldstein Professor of Law and Associate Dean for Environmental Programs, Florida State University College of Law, will moderate the Forum.

Environmental Law without Congress (February 28, 2014). This conference featured leading national experts in law, policy and the social sciences who discussed possible future directions for environmental law. Participants included: Richard J. Lazarus, Howard and Katherine Aibel Professor of Law, Harvard Law School; Todd Aagaard, Associate Professor of Law, Villanova University School of Law; Dallas Burtraw, Darius Gaskins Senior Fellow, Resources for the Future; Daniel A. Farber, Sho Sato Professor of Law, University of California-Berkeley School of Law; William Funk, Robert E. Jones Professor of Advocacy and Ethics, Lewis & Clark Law School; Alexandra B. Klass, Professor of Law, University of Minnesota Law School; Nathan Richardson, Resident Scholar, Resources for the Future; J.B. Ruhl, David Daniels Allen Distinguished Chair in Law, Vanderbilt Law School; Theda Skocpol, Victor S. Thomas Professor of Government and Sociology, Harvard University; Janet Swim, Professor of Psychology, The Pennsylvania State University; and Sandra Zellmer, Robert B. Daugherty Professor of Law, University of Nebraska College of Law. Shi-Ling Hsu, Larson Professor, Florida State University College of Law moderated the program.

DOAH Enforcement and Rule Challenge Hearing (February 6 and 7). The College of Law hosted a DOAH enforcement and rule challenge hearing in the main courtroom in the Advocacy Center. Presiding Judge Bram Canter met with College of Law students in Professor Markell's Environmental Law and Administrative Law courses beforehand to discuss the Division of Administrative Hearings and its hearings process.

Student Activities

Andrew Missel, Curtis Filaroski, and Sarah Spacht will compete in the National Environmental Law Moot Court Competition at Pace Law School in White Plains, NY. Lawyers with the firm of Oertel, Fernandez, Bryant & Atkinson, P.A. are serving as coaches for the team.

Several of our students are participating in externships this semester, including: Ryan McCarville and Heather McLellan (Department of Environmental Protection); Beverly Halloran (NextEra Energy); Davis George Moye (Governor's Office-Environmental Policy); and James Flynn (LL.M.) (Division of Administrative Hearings).

This year's Environmental Law Society has launched an innovative mentoring program to help our students connect with environmental and administrative legal professionals.

For more information about our programs this semester, please consult our web site at: *http://www.law.fsu.edu*, or please feel free to contact Professor David Markell at dmarkell@law.fsu.edu.

THE FLORIDA BAR CLE

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

Advanced Administrative and Government Practice Seminar 2014

• Live
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COURSE CLASSIFICATION: ADVANCED LEVEL

Live Presentation and Webcast: Thursday, April 10, 2014
FSU University Center Club • Stadium Drive • Tallahassee, FL 32306
(850) 644-8528

Course No. 1686R

8:30 a.m. – 8:45 a.m.
Introduction
Timothy Dennis, Bureau Chief, Florida Attorney General's Office
Hon. Suzanne Van Wyk, Division of Administrative Hearings

8:45 a.m. – 9:30 a.m.
Administrative Hearings: Preparing Your Case
Hon. Lisa Nelson, Division of Administrative Hearings

9:30 a.m. – 10:15 a.m.
Fine Tuning: Chapter 120 and Florida Administrative Rules Update
Fred Dudley, Dudley, Sellers & Healey, P.L.

10:15 a.m. – 10:30 a.m. **Break**

10:30 a.m. – 11:15 a.m.
Changing Times: Evidentiary Issues in Administrative Proceedings
Russell Kent, Florida Attorney General's Office

11:15 a.m. – 12:00 p.m.
Sue and Settle: Hot Topics in Federal Administrative Rulemaking
Winston Borkowski, Hopping, Green & Sams, P.A.

12:00 p.m. – 1:30 p.m.
Lunch (included in registration)

1:30 p.m. – 2:15 p.m.
A Second Look: Appellate Review of Administrative Orders
Hon. Kent Wetherell, First District Court of Appeal

2:15 p.m. – 3:00 p.m.
It's Right Under Your Nose: Public Records in Administrative Proceedings
Sean Frazier, Parker, Hudson, Rainer & Dobbs

3:00 p.m. – 3:15 p.m. **Break**

3:15 p.m. – 4:00 p.m.
You Can't Do That to Me: Agency Rule Challenges
Hon. John Van Laningham, Division of Administrative Hearings

4:00 p.m. – 4:45 p.m.
Ethical Considerations in Government Law Practice
Chistopher Anderson, Florida Commission on Ethics

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Amy Wilmot Schrader, Tallahassee — Chair
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(Max. Credit: 7.0 hours)
General: 7.0 hours
Ethics: 1.0 hour

CERTIFICATION PROGRAM

(Max. Credit: 7.0 hours)
Appellate Practice: 1.0 hour
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Seminar credit may be applied to satisfy CLER / Certification requirements in the amounts specified above, not to exceed the maximum credit. See the CLE link at www.floridabar.org for more information.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar News or available in your CLE record on-line) you will be sent a Reporting Affidavit if you have not completed your required hours (must be returned by your CLER reporting date).

TO REGISTER | **ON-LINE:** www.floridabar.org/CLE | **MAIL:** Completed form with check | **FAX:** Completed form to 850/561-9413

REFUND POLICY: A $25 service fee applies to all requests for refunds. Requests must be in writing and postmarked no later than two business days following the live course presentation or receipt of product. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid. Registrants who do not notify The Florida Bar by 5:00 p.m., April 3, 2014 that they will be unable to attend the seminar, will have an additional $30 retained. Persons attending under the policy of fee waivers will be required to pay $30.

Register me for the "Advanced Administrative and Government Practice Seminar 2014" Seminar

ONE LOCATION: (005) FSU UNIVERSITY CENTER CLUB, TALLAHASSEE (THURSDAY, APRIL 10, 2014)

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.**

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LOCATION (CHECK ONE):

- ❑ **Tallahassee, Thursday, April 10, 2014**
  (005) FSU University Center Club
- ❑ **Live Webcast / Virtual Seminar* Thursday, April 10, 2014**
  (317) Online

***Webcast registrants receive an email two days prior to the seminar, with log-in credentials to access course materials and the webcast link. Call The Florida Bar Order Entry Department at (800) 342-8060, ext. 5831 with any questions.**

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Member of the Administrative Law Section or the Government Lawyer Section	❑ $185	❑ $285
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Full-time law college faculty/full-time law student	❑ $123	
Attending under the policy of fee waivers	❑ $30	

Members of The Florida Bar who are Supreme Court, Federal, DCA, circuit judges, county judges, magistrates, judges of compensation claims, full-time administrative law judges, and court appointed hearing officers, or full-time legal aid attorneys for programs directly related to their client practice are eligible upon written request and personal use only, complimentary admission to any live CLE Committee sponsored course. Not applicable to webcast. (We reserve the right to verify employment.)

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- ❑ Enclosed is my separate check in the amount of $25 to join the Administrative Law Section. Membership expires June 30, 2014.
- ❑ Enclosed is my separate check in the amount of $30 to join the Government Lawyer Section. Membership expires June 30, 2014.

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SUSPENSION ORDERS
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The child tells the receptionist that you hit her. The receptionist happens to notice that the child's right cheek looks reddened, probably because she was lying on her right side on the examination table while you were talking to the mother after you completed the exam.

Two months later, while you are taking your first day off in months, a Department of Health ("DOH") investigator comes to your office while the office is open for normal business hours.[1] He tells your new receptionist and your nurse that you are going to be put in jail, and they will be too if they do not cooperate and immediately hand over copies of the medical records for the patient described in the preceding paragraph. After they dutifully comply, the investigator instructs your nurse and receptionist not to tell you that he has a copy of the records. Later that night, you get a phone call from your bookkeeper, who was at the office but not in the room when the DOH investigator was there. Your bookkeeper tells you that a DOH investigator was at your office earlier that day, inquiring about the "screaming patient" incident. You happen to remember the name of that patient, so you remotely access her records. You observe that you failed to write anything in the records about the unexplained screaming incident. In order to make the record more accurate, you add that during the examination the child had screamed, for no apparent reason. You fail to note this update was a "late entry."

A few days later, the DOH investigator shows up at your office to talk with you about the incident. He produces a subpoena and you provide him with a copy of the "altered" records.

Fast forward two months. The same DOH investigator shows up at your office and serves you with an Emergency Suspension Order ("ESO"), which immediately suspends your license to practice medicine.[2] The main allegation in the ESO is that you present a danger to the public because you battered a child you were examining. The ESO also alleges that you falsified medical records. You are devastated, but have your wits about you enough to call an attorney who specializes in defending physicians in license disciplinary cases. She explains to you that you have a right to challenge the ESO in the District Court of Appeal ("DCA"), but the court can decide only if the ESO contains all of the essential legal requirements. According to your attorney, the appellate court cannot consider evidence outside of the four corners of the ESO. Your attorney tells you that the ESO seems to meet all of the legal requirements, even though it may contain falsehoods provided to DOH by your former receptionist. She tells you that soon you will receive an Administrative Complaint ("AC") and you can request an expedited hearing on it. Unfortunately, the entire process will probably take months, and during that time, your license will be suspended and you cannot practice.

Your attorney obtains affidavits from you and your nurse that you did not hit the patient. You also take a polygraph test, which opines that you are telling the truth. Your attorney submits all of that to the DOH along with the information that their star witness is now a disgruntled former employee.

Three weeks later, you receive from the DOH an AC only charging you with having falsified medical records. You are not charged with striking the patient. Your attorney prepares two petitions for immediate administrative hearings--one contesting the charge in the AC, and the other contesting the ESO, particularly with regard to the allegations that were not charged in the AC. Your attorney files the two petitions with the DOH. The DOH forwards the request for immediate hearing on the AC to the Division of Administrative Hearings ("DOAH"), which assigns the case to an Administrative Law Judge ("ALJ"). The ALJ promptly schedules a hearing with expedited discovery on the AC. The DOH does not forward the request for immediate hearing on the ESO to DOAH, nor does DOH enter an order denying the request for hearing.

You complain to your attorney that your license is still suspended pursuant to the ESO, even though the DOH seems to understand that you did not hit the patient. Your attorney, who has been unsuccessful in persuading the DOH to withdraw the ESO, files a motion with the ALJ asking that the administrative hearing also determine whether or not there are facts which support the emergency suspension of your license. The DOH objects and the motion is denied. The reason for the denial is that only an agency may refer a matter to DOAH per section 120.569(2)(a), Florida Statutes, and the ALJ cannot assume jurisdiction over something that was not referred.

Your attorney explains to you how the system works in license disciplinary proceedings involving ESOs in Florida. After the ESO is filed, an AC is prepared, and the draft AC must go through a probable cause panel determination before a probable cause panel.[3] After that, the AC is filed and served on the licensee. You can respond immediately upon receipt of the AC and request an expedited administrative hearing.[4] ALJs do their best to accommodate hearings in cases involving ESOs but the process still takes time. It normally takes a month before the hearing can be held. After the hearing, a transcript of the hearing has to be prepared if requested by either party (DOH always requests transcripts). Even when expedited, a transcript for a one- or two-day hearing may take a week to prepare. After the transcript is filed, both parties have to be given an opportunity to submit proposed recommended orders ("PROs"). The parties can agree on a short turnaround for submittal of their PROs, but usually this period is at least ten days. After receiving the PROs, the ALJ will try to expedite the decision, but usually will need a week or two before issuing her Recommended Order ("RO") – still less than the standard of at least 20 days.

After the parties receive copies of the RO, each party has 15 days by statute within which to file exceptions to the RO, and ten days thereafter, by rule, within which to file responses to each other's exceptions.

continued...

SUSPENSION ORDERS
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After all of this has taken place, the case still has to go to the professional licensing board for rulings on the exceptions and entry of a final order. Professional licensing boards usually meet only four to six times per year; under the current system, there is no expedited or special process for board action in matters implicating pending license suspensions. It takes time for board staff to receive, process, and distribute board agenda materials to board members. Additionally, board members need some time to review the voluminous board materials. Accordingly, boards have established "cut-off" periods, beyond which materials for the next board meeting will not be placed on the next meeting agenda, but will be placed on the agenda for the meeting after the next meeting. For some boards, this cut-off period is six weeks. As a result, the quickest your case can be heard is six weeks after exceptions and responses are filed, if the next meeting fortuitously happens to be scheduled six weeks beyond the due date for responses to exceptions, which hardly ever happens. A more realistic time period is at least two months. By the time all of the above steps occur and a licensee finally obtains a decision from the board, roughly five months will have passed since the initial suspension of the license.

Going back to our hypothetical, at the point when the AC has just been set for administrative hearing, your license already has been suspended for more than a month, and it looks like if everything goes your way, you may be suspended for another three or four months before the board meets, your license is restored, and you can return to practice. Now your attorney tells you the DOH has offered to settle the case, and if you accept the settlement within the next eight hours, the case can get placed on the agenda for the board meeting next month. The terms of the settlement are to pay a fine of $10,000, pay the DOH's costs of $5,000, receive a reprimand, and take a course in medical record-keeping. You now have a choice: you can accept the settlement offer, get your license back, and resume your practice in a little over a month, or go to a formal administrative hearing, probably lose on the issue of altered records, but probably get your license back and return to practice in four months. In addition to the extra time involved going to a formal administrative hearing, you will also be required to pay for the DOH's litigation expenses as well as your own attorney's fees. The choice is obvious.

Is there a problem here? Actually, there are two problems. First, in every case in which an ESO is issued and the licensee wants to contest the factual allegations in an administrative hearing, there is a problem of constitutional proportions because of the length of time it takes to obtain a final decision. Even more troubling in this hypothetical, however, is the fact that awful allegations have been made in the ESO, and there does not appear to be an obvious mechanism through which a licensee can clear his or her name. Not only does our hypothetical physician not get a prompt hearing on the allegation that he struck a child, but his hearing request has been stymied by DOH's refusal to forward the matter to DOAH for a hearing. As soon as the ESO is issued, it is published on the DOH website, where it will forever remain on "the record," yet there is no process in place at DOH to clear this record when DOH's own probable cause proceeding does not authorize issuance of an AC on the serious charge that gave rise to the ESO.

The right of an administrative agency to take action prior to providing the affected person a hearing is well established in Florida. Garcia v. DPR, 581 So. 2d 963 (Fla. 3d DCA 1991). One of the cases cited in Garcia is Grantham v. Gunter, 498 So. 2d 1328 (Fla. 4th DCA 1987), which holds that when an agency takes emergency action like an ESO (a suspension prior to a hearing) then by implication the procedures set forth in the Administrative Procedure Act ("APA"), chapter 120, Florida Statutes, apply. In other words, when an agency suspends a professional license prior to a hearing, there is no denial of due process if the agency promptly affords the licensee an administrative hearing pursuant to the APA. Grantham at 1333.

The leading federal case on the issue of pre-hearing suspensions is Barry v. Barchi, 443 U.S. 55, 99 S. Ct. 2642, 61 L.Ed.2d 365 (1979). In Barchi, a New York licensed harness racing trainer was accused of drugging a horse. His license was emergently suspended without a hearing by the New York licensing authority. The U.S. Supreme Court held that a pre-hearing suspension does not violate the Constitution, as long as there is speedy resolution of the charges, meaning a hearing "at a meaningful time and in a meaningful manner." The procedure used in New York at the time failed to provide for a "prompt proceeding and prompt disposition."

> In these circumstances, it was necessary that Barchi be assured a prompt postsuspension hearing, one that would proceed and be concluded without appreciable delay. Because the statute as applied in this case was deficient in this respect, Barchi's suspension was constitutionally infirm under the Due Process Clause of the Fourteenth Amendment.

443 U.S. at 66, 99 S. Ct. at 2650, 61 L.Ed.2d at 376 (emphasis added).

Due process requires an immediate hearing and disposition in cases involving a pre-hearing suspension of a professional license. The question is, does the current Florida procedure in ESO cases comply with the constitutional mandate of a "prompt proceeding and prompt disposition?" Florida cases suggest that when that question is presented to an appellate court in a context such as the hypothetical posed here, the answer will be an emphatic "no."

In Aurora Enterprises, Inc. v. Department of Business Regulation, 395 So. 2d 604, 606-607 (Fla. 3d DCA 1981), a case involving a beverage license, the court relied on Barchi and held that a fifty-day period after suspension before a hearing was too

long of a delay. In contrast, in cases in which a board must make the final decision, disposition within fifty days of the pre-hearing suspension would be impossible under the current procedure.

One option to alter the current procedure so that it would comport with due process would be to amend the APA to allow licensees to challenge ESOs in administrative hearings that proceed like rule challenges. Like rule challenge petitions, the petitions challenging ESOs could be filed directly with DOAH. As in rule challenges, DOAH ALJs could be given final order authority in ESO cases. This would not impact the requirement for an agency to promptly institute disciplinary action after issuing an ESO. There would be two proceedings: one on the ESO and the other on the AC. Upon agreement of the parties, the two hearings could be combined. The ALJ's final order in the ESO case would be limited to a decision to quash, modify, or uphold the ESO.

Without such a statutory change, it will be difficult to solve the delay problem inherent in the current process. Although some of the time periods currently involved can be tweaked, it seems impossible, with all of the steps that are required, to shorten the entire process to a reasonable span.

The second problem raised by our hypothetical involves cases in which the agency initially issues an ESO containing allegations that are not included in the subsequent AC. In our hypothetical case, the physician is initially accused of striking a child. DOH specifically relies on those serious allegations as creating the immediate danger that led DOH to issue an ESO. Yet, by the time the AC is filed, the DOH has received information which reduces DOH's prospects for a successful child battery prosecution. Under the current system, the uncharged ESO allegations will follow the licensee without ever being resolved. The licensee is not provided with a hearing, much less a prompt hearing, on the merits of the ESO.

A simple change in agency internal operating policy could easily fix this problem. Any time credible evidence is obtained by the agency which materially alters the allegations, the ESO should be reviewed, and changed as appropriate. It might be that the new information undermines the need for an ESO. If the agency is going to issue an AC, the AC charges must substantially mirror the allegations in the ESO. Otherwise, the agency is depriving the licensee of his or her constitutional right to due process, by not offering any hearing – much less a promptly initiated and resolved hearing – with regard to any allegations in the ESO that are not charged in the AC. Particularly where, as here, the ESO was issued on the basis of allegations of an "immediate danger" that the agency subsequently abandoned by not charging in the AC, an internal process to review whether the ESO has any continuing vitality is in order.

Without an internal process in place, under our hypothetical, an option for the licensee is to file a petition for writ of mandamus with the DCA, to address DOH's refusal to forward the request for hearing on the ESO to DOAH. In this action, the licensee could invoke Barchi and Aurora to assert his right to an administrative hearing on the ESO allegations that were not included in the AC. The licensee would be asking the DCA to order DOH to perform its ministerial duty of forwarding the hearing request on the ESO to DOAH for the prompt post-suspension hearing on the merits of the allegations, as required by Barchi, et al., or alternatively, to rescind the ESO based on the failure to allow a post-suspension hearing on the critical allegations that the agency used to justify emergency action in the first instance.

Although the facts set forth herein are hypothetical, it is no secret that agencies have issued ESOs that include severe allegations that are not included in the subsequent ACs. The fact that the suspended licensees are unable to practice for prolonged periods of time under these circumstances raises serious concerns of deprivation of the licensees' constitutional rights to due process. As case law dictates, due process requires that a professional licensee whose license is suspended on an emergency basis prior to a hearing be afforded a prompt post-suspension hearing to contest the factual allegations relied on to take emergency action, and prompt disposition of that hearing.

Endnotes:

1 Section 456.073(1), Florida Statutes, authorizes DOH to investigate complaints against healthcare professionals. DOH's jurisdiction does not include criminal prosecution of healthcare professionals in state or federal court.

2 Section 120.60(6), Florida Statutes, authorizes DOH to suspend or restrict healthcare professionals' licenses without notice if the State Surgeon General finds the healthcare professional poses an immediate serious danger to the public health, safety, or welfare, if procedural protections given by statutes and by the Florida and U.S. Constitutions are provided, and if DOH states the facts and reasons for finding an immediate danger and the reasons for concluding that the procedure used is fair under the circumstances.

3 § 456.073, Fla. Stat.

4 §§ 120.57(1); 120.60(6)(c); 456.073(5), Fla. Stat.

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