ADMINISTRATIVE LAW SECTION
Newsletter
Vol. XXXVI, No. 3 Jowanna N. Oates and Elizabeth W. McArthur, Co-Editors March 2015

The Move Toward a Single Repository for Agency Final Orders: An Update from the Ad Hoc Orders Access Committee

by Richard J. Shoop

During the 2012-2013 term of the Administrative Law Section's executive council, the council voted to create the ad hoc orders access committee (committee) in order to gather information on how agencies indexed final orders and where their final orders could be accessed by the public, as well as to seek out possible solutions for providing the public with better access to agency final orders that are required to be indexed by section 120.53, Florida Statutes. The committee began its work by utilizing a survey that was completed by nearly every state agency, detailing how they complied with the provisions of section 120.53, Florida Statutes, and how the public could access their final orders. The results of the survey were published in the June 2013 edition of the Administrative Law Section's Newsletter.

These survey results are a visual representation of a problem that most administrative lawyers have known about for a long time: there is very little uniformity in how agencies index final orders and make them available to the general public, and the indexing systems that are in place are very antiquated. Some agencies use third parties such as the Florida Administrative Law Reports (FALR) to index their final

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From the Chair

by Daniel E. Nordby

The arrival of March in Tallahassee marks the beginning of the annual legislative session. For the first time in many years, last year's session closed without the enactment of any major bills affecting the Administrative Procedure Act. As the Legislature convenes, the Administrative Law Section's legislative committee will be tracking proposals to amend chapter 120 of the Florida Statutes and other bills that may affect the practice of government and administrative law.

On the topic of legislative proposals, I would direct your attention to Richard Shoop's article in this newsletter regarding a plan to improve public access to agency final orders. This article summarizes the work of the Section's ad hoc orders access committee over the past two years after then-Chair (and ALJ) Scott Boyd challenged the Section to look for ways to increase access to these agency records. The Section's legislative committee is actively seeking

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House and Senate sponsors for this proposal in the 2015 legislative session and will continue to advance the important work performed by the orders access committee.

As a reminder, the Section's Bar-approved legislative positions for the current cycle are:

1. Opposes any amendment to Chapter 120, Florida Statutes, or other legislation to deny, 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 its legislative activity, the Section is concluding its three-part Administrative Law Webcast Series on DOAH Proceedings. If members have suggestions for topics that they would like to have addressed in future CLE events, we would love to hear from you.

Finally, I would be remiss if I did not thank the Section's hard-working newsletter editors Jowanna Oates and Judge Elizabeth McArthur. Quarter after quarter, the Administrative Law Section Newsletter provides relevant and topical articles on the key issues in our practice area. The good work of our newsletter editors is most appreciated.

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

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APPELLATE CASE NOTES

by Larry Sellers and Gigi Rollini

Constitutional Officers: Budget Approval

Bd. of County Comm'rs of Broward County v. Parrish, 154 So. 3d 412 (Fla. 4th DCA 2014).

The Broward County Board of Commissioners (county) challenged a writ of mandamus issued on the petition of Lori Parrish, the county property appraiser (property appraiser), which limited the county's authority over the property appraiser's budget.

Section 195.087, F.S., requires the Department of Revenue (DOR) to determine the budget for each Florida county's property appraiser. Property appraisers must submit an operating budget to DOR by June 1 of each year, and DOR has until July 15 to notify the property appraiser and local commission of its tentative budget amendments and changes. Thereafter, additional information may be submitted to DOR until August 15, at which time budgetary amendments are finalized. At this point, the matter may be appealed to the Administration Commission, within 15 days after the county concludes its public hearing to finalize the county's budget. However, this appeal is not a matter of right. If an appeal is granted, the Commission may amend the budget if the Commission finds any aspect of it "unreasonable in light of the workload of the office of the property appraiser in the county under review."

The property appraiser submitted to DOR a budget in excess of the projected budget provided to her by the county. The DOR reviewed her budget request, and reached a budget of $18,712,207.00—very close to the budget requested by the property appraiser.

Consistent with its rights, the county submitted additional information to the DOR. When the statutory deadline arrived, however, no further changes had been made based upon this information. The county proceeded to appropriate only $15,855,000.00 for the property appraiser notwithstanding DOR's decision. In conjunction with this decision, the county appealed the matter to the Commission.

The property appraiser subsequently filed a request for a quarterly draw to make up the deficit between her DOR approved budget and that appropriated by the county. The county countered with a lower offer, and the property appraiser thereafter filed a petition for writ of mandamus against the county in circuit court. The circuit court entered a final order granting the property appraiser's mandamus petition, and compelling immediate disbursement of the funds to comply with DOR's budget decision. The circuit court agreed with the property appraiser that the act of funding the budget as approved and subsequently amended by DOR is "ministerial." It was careful to note, however, that in reaching this conclusion, it was not intending to usurp budgetary authority from the county or DOR.

The Fourth District Court of Appeal held that mandamus relief was proper. Central to mandamus relief is the ministerial character of the compelled action, i.e., where there is no room for the exercise of discretion and the performance being required is directed by law. The court accorded heavy weight to the purposes behind enactment of chapter 195, F.S., and DOR's role with respect to uniformity of assessments among properties within each county. DOR acts as an "overseer" of sorts to prevent imbalance. The appellate court emphasized that the county does not have a similar role to that of DOR.

Constitutionality of Statute: Separation of Powers

Brandt Robinson, et al. v. Pam Stewart, 40 Fla. L. Weekly D273a (Fla. 1st DCA Jan. 23, 2015).

Teachers appealed from the trial court's order determining that the "Student Success Act" passed by the 2011 Legislature does not violate Article II, section 3, of the Florida Constitution by invalidly delegating legislative powers to the executive branch.

Under the Student Success Act, the Legislature revised certain requirements for evaluating classroom teachers and other personnel, requiring in part, that at least fifty percent

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of a teacher's evaluation be based on "student learning growth." The teachers challenged the law, arguing that it delegated to the State Board of Education (Board) "unbridled discretion" in implementing the statute due to its abject lack of guidance. The trial court rejected this claim, finding that *Florida Teaching Profession-National Education Association v. Turlington,* 490 So. 2d 142, 146 (Fla. 1st DCA 1986), had already addressed this issue of whether proper delegation existed. The trial court then held that the Legislature provided sufficient guidelines to avoid an unconstitutional delegation of legislative authority to the executive branch.

Sitting en banc, the First District affirmed. The majority opinion, written by Judge Thomas, found that the teachers had not established that the Legislature delegated core legislative authority to the Board in violation of the separation of powers requirement of the Florida Constitution. The court applied the precedent in *Turlington*, and concluded that the challenged statute confers permissible discretion to allow the Board to implement a highly technical matter regarding the evaluation of teachers, not a fundamental policy decision. The statute provides the Board with sufficient direction to implement the technical aspects of the law in accordance with the Legislature's express policy goals.

In a concurring opinion, Judge Makar observed that the sufficiency of adequate standards depends on the complexity of the subject matter and the degree of difficulty involved in articulating finite standards. He agreed that the Legislature did not confer unbridled discretion on the Board to define student learning growth, but had specified factors or tools the Board must and may utilize to define this critical component of the statutory plan. Thus, he thought that the Legislature had made the fundamental policy decision and properly allowed the Board to implement the technical aspects of that policy decision.

Judge Benton wrote a dissenting opinion, in which Judge Wolf and Judge Clark concurred. He concluded that the Legislature abandoned its responsibility to set public policy in this important area, and that it delegated legislative authority it should have exercised itself to the Board, an executive branch agency. He noted that the challenged statute had been in place since 2011, yet efforts to adopt an implementing rule had stalled while the agency "seemed to be searching for answers to key questions the Legislature neglected to address." He also noted that the decision in *Turlington*—which was released in 1986, well before the significant changes to the APA enacted in 1996—relied in large part on rules promulgated by the Board to "'adequately protect candidates . . . from the arbitrary exercise of discretion,'" saying that Department of Education officials were "'responsible for fleshing out these programs'" by rulemaking and predicting that even "'[m]ore fine tuning [would] be required.'" Judge Benton thought this decision was now of questionable value, as "[i]t is now crystal clear, if there were ever any doubt, that executive branch rulemaking cannot save a statute that impermissibly delegates legislative authority."

Due Process

Seiden v. Adams, 150 So. 3d 1215 (Fla. 4th DCA 2014).

Alan Seiden (Seiden) appealed a final order of the School Board of Indian River County (School Board) terminating his employment as a teacher. The School Board did so following a hearing before the School Board which Seiden asserted violated his due process rights.

The School Board charged Seiden with misconduct relating to his response to the behavior of a special needs student. Seiden requested a hearing in response. Pursuant to section 1012.33(6)(a)i., F.S., the School Board elected to hold the hearing itself, rather than refer it to DOAH. Seiden moved to disqualify the School Board from hearing the matter, which the School Board denied.

On appeal, Seiden asserted that comments made by School Board members "fatally infected" the hearing. Specifically, several members of the School Board had personal ties indicating the possibility of an impartial decision-making (one had a special needs child, one had personal experience with ESE, etc.).

The Fourth District Court of Appeal held that the hearing accorded Seiden adequate due process safeguards.

The appellate court held that recusal was not necessary because the egregious conduct contemplated by section 120.665, F.S., simply was not present — there was no prejudgment, personal, or pecuniary bias.

The court also held that the School Board was not required to rigidly adhere to Florida's Rules of Evidence or Civil Procedure; thus, that the hearing may have been "somewhat disorganized" was immaterial. In the circumstances of a quasi-judicial hearing, all that is required to comport with due process is that the hearing provide the party a fair chance to challenge the reasons for termination.

Exhaustion of Administrative Remedies

Montero v. Duval County School Board, 153 So. 3d 407 (Fla. 1st DCA 2014).

On behalf of their son W.P.M., Daniel and Cheryl Montero appealed the trial court's judgment entered after orders dismissing complaints they filed against the Duval County School Board (Board) in circuit court.

W.P.M. is eligible for exceptional student education (ESE) services, which the school district proposed to furnish in accordance with an individual education plan (IEP) created by a team that consisted of teachers, district personnel, specialists, and W.P.M.'s parents. An eligible ESE student with an IEP may receive a John M. McKay Scholarship payable from public funds to a private school the parents choose. The school district evaluates the student's matrix of services level, then notifies the Department of Education, which informs the private school of the amount of the scholarship. The school district may change a matrix of services only if the change is to correct a technical, typographical, or calculation error.

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District personnel transferred information from W.P.M.'s IEP to a form "matrix of services," documenting the services he was to receive as an ESE student, assigned a numerical score, and then transmitted the score to the Department.

In their amended complaint, the parents alleged the Board understated their child's matrix of services score to reduce the McKay Scholarship funds available to them, and sought a declaration of their rights and duties under the McKay Scholarship program and rescoring of W.P.M.'s matrix of services.

The Board moved to dismiss because the parents failed to exhaust administrative remedies. The Individuals with Disabilities Education Act requires, and Florida has implemented, a process that includes the right to request a due process hearing before an administrative law judge regarding the identification, evaluation, or educational placement of a child. By statute, no court action is permitted until these administrative remedies are exhausted. Because W.P.M.'s parents never objected to the IEP they helped formulate by requesting a due process hearing, the circuit court granted the Board's motion.

On appeal, the appellate court affirmed, concluding that the circuit court correctly dismissed for failure to exhaust administrative remedies.

Fees
Reznek v. Chase Home Finance, LLC, 152 So. 3d 793 (Fla. 3d DCA 2014).

In an appeal of a circuit court order denying a fee motion in a mortgage foreclosure action, Dorit Reznek (Reznek) served Chase Home Finance, LLC (Chase) with a motion for appellate attorney's fees, citing section 57.105, F.S. Included in the motion was the following clause: "If appellee [Chase] does not file a confession of error within 21 days of the service of this motion, Appellant will file this motion with the Court." Chase did not confess error. When Reznek filed the motion, Chase filed a motion to strike.

The Third District Court of Appeal granted Chase's motion to strike. At the time Reznek moved for sanctions, Chase had neither filed a paper nor asserted a defense or claim. In construing section 57.105, F.S., and Rule 9.410(b), the appellate court noted that both sections contemplate a sanctions motion will be directed to a specific filing or assertion. In the present appeal, however, Chase had yet to file anything.

In so holding, the appellate court impliedly concluded that a non-moving party's refusal to confess error, without more, does not qualify as the necessary filing or assertion, and struck Reznek's appellate fee motion without prejudice.

Jurisdiction
Palm Constr. Co. of W. Fla. v. Dep't of Financial Servs. Div. of Workers' Comp., 153 So. 3d 948 (Fla. 1st DCA 2014).

Palm Construction Company of West Florida (Palm Construction) appealed a final order entered by the Department of Financial Services, Division of Workers' Compensation (Department), issuing a stop-work order and levying a $32,983.04 penalty for failing to have workers' compensation coverage required under chapter 440, F.S.

Palm Construction sought and received an evidentiary administrative hearing at DOAH. However, after failing to timely respond to discovery requests, the Department filed a Motion to Deem Matters Admitted and to Relinquish Jurisdiction, which the presiding ALJ granted, closing DOAH's file and relinquishing jurisdiction to the Department. Later that same day, Palm Construction filed an emergency motion to reopen the DOAH case on the basis that the Department's discovery requests had been answered. The ALJ denied the motion. The final order was subsequently entered, and appealed.

The First District Court of Appeal affirmed the ALJ's decision to deny the motion to reopen. It found that no abuse of discretion occurred where Palm Construction did not timely file a response to discovery requests, and filed no response to the motion to have matters admitted. Without remaining disputed facts, the ALJ properly relinquished jurisdiction to the Department. The court held that the emergency motion was filed in a tribunal without jurisdiction to consider it.

Palm Construction also raised issues concerning the sufficiency of the underlying allegations that led to the stop-work order and penalty. On these issues, the appellate court held that Palm Construction failed to request that the Department return the matter to DOAH for an evidentiary hearing, or request further informal hearing proceedings before the Department. As a result, the issues had been raised for the first time on appeal, which the court declined to review.

Public Records Act
Consumer Rights, LLC v. Bradford County, 153 So. 3d 394 (Fla. 1st DCA 2014).

Consumer Rights, LLC, appealed from a trial court order granting Bradford County's motion to dismiss appellant's complaint for enforcement of the Public Records Act.

Consumer Rights emailed a public records request to Bradford County, requesting "a complete list of all the work email addresses of all the employees that work for your county that have email addresses." Two and a half months later, after receiving no response to the request, Consumer Rights filed a complaint for enforcement of the Public Records Act and a request for a hearing, which included requests for a writ of mandamus and an injunction. The complaint alleged, among other things, that Bradford County received the records request; the request asked for "public records"; the records requested existed at the time the request was received; and as of the time of the filing of the lawsuit, Bradford County had not acknowledged the records request, had not responded to the records request, had not produced any of the requested public records, and had not provided any response to the plaintiff that stated whether or not Bradford County will produce the requested records.

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Three months after the records request was received, and two weeks after Consumer Rights filed its action, Bradford County sent a list of email addresses for all employees, explaining that the county created the requested list even though chapter 119, F.S., does not require an agency to create a public record if such a record does not already exist. Consumer Rights acknowledged receiving the list of email addresses. On the same date, Bradford County filed a motion to dismiss Consumer Rights' complaint, asserting in part that, at the time of the public records request, it was not in possession of any such public records, and it now had created and provided the list.

Following a hearing, the trial court issued an "Order Requiring Submission of Supplemental Materials Regarding Defendant's Motion to Dismiss." In response to the order, both parties submitted affidavits to support their positions. Thereafter, without a hearing, the trial court entered an order dismissing Consumer Rights' complaint based upon its findings that "there were no public records in the possession of the Defendant to respond to Plaintiff's request," and "Defendant ultimately created a document in order to respond to the request." The trial court then denied the request for mandamus as moot because the records have been provided.

The appellate court found that the complaint properly stated a cause of action for mandamus relief, and there was a dispute as to at least one of the allegations in the complaint: whether the requested records existed at the time of the request. As such, the trial court erred in dismissing the complaint without a hearing to resolve the dispute and to determine whether the delay in producing the records violated chapter 119, F.S. The appellate court reversed and remanded for further proceedings.

Judge Benton dissented, in part, regarding the claim for an injunction. He noted that merely furnishing the public records requested more than two months after they were requested does not render the case moot.

Orange County v. Susan Hewlings, 152 So. 3d 812 (Fla. 5th DCA 2014).

Orange County appealed from a trial court order—issued on remand from a prior appeal—determining that the county was required to pay attorney's fees because of unreasonable delay in providing public records requested by Susan Hewlings.

Ms. Hewlings sought records in connection with the investigation of her dog by the county's animal control division. After numerous exchanges of communications, the county said that it would arrange a time within 14 days for her to inspect the records and designate those for copying, and outlined a procedure under which she was to do so. By facsimile delivered the next day, she made clear that she did not want to inspect the records; she wanted the county to provide copies of all of them. As she had previously done, she offered to pay the costs for the copies and asked for an invoice for the costs. After two weeks without a response, she filed a mandamus petition. In it, she claimed that the county had failed to comply with the public records law by not responding to her request for copies with either cost information or the copies themselves. She requested an order directing the county to "produce copies of the requested records."

The trial court granted the petition, ordering the county to produce the records within forty-eight hours. The county complied with the order and did not challenge the order on appeal. However, the county objected to an award of attorney's fees, arguing that it was not statutorily obligated to pay fees, even though it had violated the public records law. The trial court agreed and denied the request for fees. Ms. Hewlings appealed that order. The appellate court held that the trial court erred in denying attorney's fees to Ms. Hewlings for the services of her attorney in the prior trial court proceeding, and the appellate court remanded the case for further proceedings. *Hewlings v. Orange Cnty.,* 87 So. 3d 839, 841 (Fla. 5th DCA 2012). In a separate order, the appellate court conditionally granted appellate fees, contingent on the trial court finding unreasonable delay in complying with the document request. The trial court made this finding on remand, concluding that the county had, in fact, "unreasonably delayed" complying with the request.

In this second appeal, the county did not challenge that finding. Instead, it asserted that the finding was of no significance, because the statute does not authorize an award of fees absent a "refusal" by the agency to comply with the public records law. The appellate court rejected this argument. The appellate court then imposed sanctions on the county for filing a frivolous appeal, noting that "[t]his case provides a textbook example of why the legislature authorized an award of fees against obstinate public entities such as Appellant."

Rule Challenge

Vuong v. Florida Department of Law Enforcement, 149 So. 3d 174 (Fla. 1st DCA 2014).

Hoa Vuong and the other appellants sought judicial review of a final order rejecting their administrative challenge to the rules governing the Florida Department of Law Enforcement's (FDLE) approval and oversight of breath test instruments.

Appellants had all been charged with DUI after submitting to a breath test on the Intoxilyzer 8000 breath instrument. Appellants submitted to a breath test pursuant to Florida's implied consent law. The implied consent law requires that drivers submit to an "approved" test. FDLE is responsible for approving and regulating breath test instruments under the DUI statutes and for promulgating rules necessary to implement its responsibilities. Pursuant to this authority, FDLE amended a rule approving the Intoxilyzer 8000 for evidentiary use.

Appellants challenged the rule amendment, and related FDLE rules regarding inspection of breath test instruments. The challengers

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presenting evidence that, after the amendment of the FDLE rule approving the Intoxilyzer 8000 but before the Intoxilyzer 8000 was actually put into use in Florida, difficulties during testing prompted the manufacturer to determine it was necessary to drill a hole in the instrument's exhaust purge valve. Appellants also presented evidence that there were documented problems with the calibration of the flow sensor on some instruments.

Appellants claimed that the challenged FDLE rules are vague, do not provide sufficient guidelines or standards, or vest unbridled discretion in FDLE. Appellants complained that the rules do not require breath instrument manufacturers to provide FDLE notice of modifications to an already approved model of breath instrument; do not require FDLE to re-test or re-approve breath instruments modified by the manufacturer; and do not set forth criteria or guidelines addressing the re-testing or re-approval of modified instruments. Appellants also claimed that the rules fail to specifically require or address inspection and/or calibration of the flow sensor on the breath instrument.

The ALJ concluded that the challengers failed to meet their burden of proving the invalidity of a challenged rule. With regard to the drilling of the hole in the exhaust purge valve, the ALJ found the evidence failed to establish the drilling of the hole affected breath test results in any manner or rendered the results unreliable. The ALJ similarly concluded the evidence was insufficient to establish that "the scientific reliability of reported breath test results is related to the function of an instrument's flow sensor" as "[t]he evidence establishes that the instrument will not report results of a breath alcohol test if the quantity of air provided by a test subject is insufficient."

The appellate court affirmed, finding the ALJ's factual findings to be supported by competent, substantial evidence and no error was made in his legal conclusions.

Retroactivity
Persis v. Dep't of Mgmt. Servs., 39 Fla. L. Weekly D2226 (Fla. 5th DCA Oct. 24, 2014)

Carl Persis (Persis) challenged final agency action of the Department of Management Services, Division of Retirement (Division), denying his request to be paid his retirement benefits from a non-elected position while still serving as an elected official.

Persis was employed with the Volusia County School Board (Board), a Florida Retirement System (FRS) employer. While still serving on the Board, Persis was elected to serve on the Volusia City Council (Council), also a participating FRS employer. After completing thirty years of service with the Board, Persis entered the FRS Deferred Retirement Option Program (DROP), choosing a termination date of November 30, 2011. Persis was subsequently reelected to serve another term on the Council.

Prior to resigning from the Board, and in response to an inquiry, the Division informed Persis that 2009 amendments to chapter 121, F.S., required him to terminate employment with both the Board *and* the Council before he could receive retirement benefits. The matter was referred to an informal hearing, where Persis argued that his rights had vested prior to the amendment. The hearing officer did not agree, concluding that the statute did not afford the Division discretion to determine whether Persis had acquired such a right.

The Fifth District Court of Appeal reversed. The court noted clear case authority supporting Persis' position. Because Persis had attained his normal retirement date and applied to enter DROP prior to the statutory amendment, his rights had vested prior to the effective date of the amendment. This precluded the retroactive application of subsequent statutory changes to him after his rights vested.

Statutory Construction
Amanda Pope and Anastasia, Inc. v. Dep't of Envtl. Prot., et al., 151 So. 3d 523 (Fla. 1st DCA 2014).

Amanda Pope and Anastasia, Inc., sought review of a final order of the Department of Environmental Protection (DEP), which held that repairs to the foundation of a dune walkover structure could be made without a permit.

Various property owners initially applied for a permit to repair the dune walkover, but DEP subsequently determined that the repair work qualified for an exemption pursuant to section 161.053(11), F.S., because the work was not expected to cause a measurable interference with the natural functioning of the coastal system. Ms. Pope and Anastasia, Inc., filed petitions for an administrative hearing to contest that determination.

Following a hearing, the ALJ issued a recommended order concluding that, under section 161.053(11)(b), F.S., the proposed project would not cause measurable interference with the natural functioning of the coastal system, and that the criteria for the grant of an exemption from the permitting requirements were met. Nonetheless, the ALJ concluded that DEP could not rely on section 161.053(11)(b), F.S.; instead, only the "existing structures" exemption in section 161.053(11)(a), F.S., was deemed relevant. The ALJ concluded that section 161.053(11)(a), F.S., is a specific statutory provision dealing with "existing structures" that controls over the more general provision in section 161.053(11)(b), F.S., dealing with "activities." As such, the ALJ concluded that the property owners were not entitled to an exemption.

DEP entered a final order rejecting the ALJ's legal interpretation of section 161.053(11). DEP concluded that the foundation repair work on an existing structure such as a dune walkover, while not exempt under section 161.053(11)(a), F.S., nonetheless could be exempt if the foundation repair "activities" met the requirements of section 161.053(11)(b), F.S., i.e., they cause no measureable interference with the natural functioning of the coastal system. In rejecting the ALJ's interpretation, DEP noted the

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absence of any statutory language that excluded "activities" related to "existing structures" from the exemption in section 161.053(11)(b), F.S. DEP also ruled that the ALJ's interpretation was incorrect because applying both paragraphs (a) and (b) of section 161.053(11), F.S., to the type of activity in this case would not render either provision meaningless. Indeed, the proposed activity in this case could qualify for an exemption under either provision if the activity meets the requirements of each exemption.

The appellate court affirmed, agreeing with DEP's interpretation that the two exemptions could be read harmoniously, and holding that the interpretation that the proposed work is exempt was reasonable and not clearly erroneous.

Fla. Hospital Orlando v. State of Fla., Agency for Health Care Admin., 149 So. 3d 1205 (Fla. 1st DCA 2014).

Florida Hospital Orlando (Hospital) appealed a final order by the Agency for Health Care Administration (AHCA), in which it concluded that the Hospital must repay certain overpayments for services submitted to Medicaid that were determined not to be medically necessary.

On appeal, the Hospital asserted that AHCA and its auditor unlawfully reviewed entire patient files to determine "medical necessity," including those not available to the Hospital at the time the patient was admitted.

The First District Court of Appeal held that the Hospital's statutory interpretation was correct—determinations of medical necessity must be based on information available at the time the goods or services are provided. With respect to the patients at issue in the appeal, however, the Hospital had not shown that the AHCA had actually relied on any post-hoc information. Rather, the record supported the ALJ's finding that only medical documentation available at the time the patients were admitted was relied upon, and that finding must be accorded deference absent exceptional circumstances.

Sunshine Law

Brown, et al. v. Denton, 152 So. 3d 8 (Fla. 1st DCA 2014).

Mayor Alvin Brown (Mayor), the City of Jacksonville (City), and the Jacksonville Police and Fire Pension Fund Board of Trustees (Board), appealed an order granting summary final judgment in favor of Frank Denton (Denton) finding a violation of the Sunshine Law.

The fire district chief, who also served as the chief negotiator for the local Firefighters' Union, along with other plaintiffs, filed suit against the City and Board in federal court. The City, Board, and plaintiffs then voluntarily sought mediation. Several closed-door mediation sessions with a mediator ensued, during which time no party informed the federal court that the negotiations would entail collective bargaining, or that such collective bargaining might be legally required to be conducted in public. There was no public notice of the mediation sessions, nor was any transcript made of the proceedings. Local court rules made the mediation sessions privileged. A Mediation Settlement Agreement (MSA) resulted. An ordinance was subsequently introduced to the City Council seeking its approval of the MSA, which the City Council voted down.

Denton, an editor of the Florida Times-Union newspaper in Jacksonville, filed a verified amended complaint for declaratory and injunctive relief in state court against the Mayor, City, and Board alleging the closed-door mediation sessions were collective bargaining negotiations held in violation of Florida's Sunshine Law. The complaint sought to void the MSA, and to have declared that a Sunshine Law violation occurred and would continue if the mediation sessions continued. The complaint also sought to enjoin the defendants from adopting, performing, or implementing the MSA, and from engaging in future mediation.

The circuit court granted Denton summary final judgment, concluding that in negotiating the MSA, the City and the Board made changes to employee pension benefit terms (a mandatory subject of collective bargaining) and, absent a clear waiver, were required to be conducted in the sunshine. The circuit court held that the federal mediation sessions violated the Sunshine Law, and the court voided the MSA *ab initio* and enjoined "the parties from conducting further proceedings entailing collective bargaining of the police officer and firefighter pension funds in private outside of the sunshine." The court also concluded that the parties must inform the federal court where a court proceeding would hinder Sunshine Law compliance, notwithstanding any local court rules to the contrary (e.g., the local rule making medications privileged), to allow the federal court to fashion the remedy to which the parties would then be bound.

The appellants appealed, challenging the circuit court's jurisdiction, its determination that collective bargaining occurred, its determination that the entities present at the mediation sessions had the ability to collectively bargain pension benefits, and its determination that the Board acted as the unions' bargaining agent. They also argued that the circuit court's order violated the rule of confidentiality of mediation sessions, principles of comity, and the Supremacy Clause.

The appellate court affirmed. The court agreed that chapter 447, part II, F.S. (PERA), governs collective bargaining of public employees, and expressly provides that the collective bargaining negotiations between a chief executive officer, or his or her representative, and a bargaining agent shall comply with the provisions of the Sunshine Law. Moreover, the parties negotiated pension benefits, an undisputed mandatory subject of collective bargaining, the Sunshine. Once the collective bargaining process begins, if one side or its representative meets with the other side or its representative to discuss anything relevant to the terms and conditions of the employer-employee relationship, the meeting is subject to the Sunshine Law. That the MSA was conditioned

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upon further approval did not cure any prior violation, given the Sunshine Law's purpose to "prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance."

The appellate court also agreed that the circuit court had jurisdiction to address such matters that involved Sunshine Law violations, and that the circuit court took appropriate care in recognizing the federal court's supremacy by narrowly crafting its remedy to respect the interplay between Sunshine Law principles and federal mediation.

Unadopted Rule

Amerisure Mutual Ins. Co. v. Fla. Dep't of Financial Servs., 40 Fla. L. Weekly D113 (Fla. 1st DCA Jan. 2, 2015).

Amerisure Mutual Insurance Company (Amerisure) appealed a final order of the Florida Department of Financial Services, Division of Workers' Compensation (Department), that rejected the ALJ's legal conclusion that Amerisure was entitled to receive tax credits applied against subsequent years' assessments as a result of a negative net premium in a previous year. Amerisure argued on appeal that the Department ignored findings and improperly substituted its conclusions of law for those of the ALJ.

Amerisure, as an insurance carrier authorized to transact workers' compensation business in the state of Florida, is subject to assessments for both the Special Disability Trust Fund (SDTF) and the Workers' Compensation Administration Trust Fund (WCATF). Section 624.5094, F.S., provides that any offsets for dividends or premium refunds paid or credited for the current year must be applied against the current year's net premium for that year's assessment.

Because of the quarterly assessment system, it is possible for an insurer to overpay an annual assessment if early positive premiums are exceeded by later negative premiums; this is what happened to Amerisure. Thereafter, Amerisure submitted an application for cash refunds of assessments paid to the SDTF and WCATF. The Department issued a Notice of Intent to Deny Applications for Refund, asserting that Amerisure had already received credits for its 2008 SDTF and WCATF overpayments. The Department argued that to allow Amerisure to obtain cash refunds, in addition to the credits received, would be contrary to sections 440.49(9) and 440.51(1), F.S. The Department concluded that Amerisure was not entitled to either money or credits based on negative net premiums during the year 2009 because it paid no assessments in that year.

Amerisure requested a formal administrative hearing, in which it (1) challenged the notice of intent to deny its applications for refund, and (2) challenged as unadopted rules the basis the Department gave for the denials. The ALJ rejected the Department's statutory arguments, finding that credits based on negative net premiums did have legal significance. Specifically, the ALJ determined that a "credit" was created by Amerisure's overpayment, and recommended that the Department enter a final order reinstating Amerisure's 2009 credits as credits toward future assessments. The ALJ also determined the Department erroneously interpreted section 624.5094, F.S., which does not mandate that credits be eliminated should a carrier have four quarters in a year where negative premiums are reported. The ALJ also concluded the Department's refund denial was based on an unadopted rule—that any credits accruing in a calendar year in which net premiums are negative for each quarter are excess credits that are eliminated at year end and cannot be carried over to the next calendar year—and found that no circumstances to excuse rulemaking were demonstrated. The ALJ granted fees and costs under section 120.595(4)(a), F.S.

In the Department's final order, it rejected the ALJ's conclusion that Amerisure accrued credits against subsequent assessments as a result of a negative net premium in the year 2009. It found there was no statutory or constitutional authority for the Department to create tax credits for the benefit of a private insurance carrier that paid no assessments in a given year.

The First District Court of Appeal affirmed the Department's final order, concluding the Department's application of section 624.5094, F.S., was required by statute. Moreover, sections 440.49(9) and 440.51(1), F.S., call for calculating assessments one year at a time, and section 624.5094, F.S., speaks only to the current year. Thus, there is no statutory authority for carrying one year's negative net premium forward to offset a later, positive year's premium to permit the Department to allow it.

The court also agreed with the final order that the Department did not use unadopted rules to eliminate Amerisure's excess credits from the year 2009. The Court held that the Department correctly concluded in its final order that section 624.5094, F.S., by operation of law, foreclosed the application of excess credits to reduce assessments in future years.

Larry Sellers *is a partner with Holland & Knight LLP, practicing in the firm's Tallahassee office.*

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

DOAH CASE NOTES

Substantial Interest Hearings
Volusia County v. Dep't of Juvenile Justice, DOAH Case No. 13-2957 (Recommended Order Oct. 29, 2014)

FACTS: Section 985.686, Florida Statutes, requires the State and counties to jointly finance the cost of providing secure juvenile detention. In the course of administering that cost-sharing arrangement, the Department of Juvenile Justice ("DJJ") reconciles any difference between a county's estimated and actual costs at the end of each fiscal year. In December 2009, DJJ issued the annual reconciliation for fiscal year 2008-2009 and assigned Volusia County a credit of $111,040.17. Litigation between DJJ and other counties led to a reassessment of the actual costs of detention for fiscal year 2008-2009. The reassessment indicated Volusia County was owed an additional credit of $1,711,874.93. However, Volusia County was not a party to the litigation which led to the reassessment. On April 16, 2013, Volusia County filed a petition challenging the fiscal year 2008-2009 annual reconciliation. DJJ argued Volusia County's challenge was untimely. Nevertheless, DJJ admitted during discovery that Volusia County had not been provided a point of entry to challenge the fiscal year 2008-2009 annual reconciliation.

OUTCOME: The ALJ recommended that DJJ enter a final order concluding Volusia County is owed an additional credit of $1,711,874.93. With regard to DJJ's argument that Volusia County's challenge was untimely, the ALJ concluded that DJJ's fiscal year 2008-2009 reconciliation was only preliminary agency action because Volusia County never received a point of entry to challenge DJJ's calculation. The ALJ also concluded that administrative finality and res judicata did not apply because Volusia County was challenging the fiscal year 2008-2009 reconciliation for the first time.

Joseph Fuller v. Bd. of Trustees of the City of Jacksonville Retirement System, DOAH Case No. 14-3094 (Recommended Order Nov. 19, 2014).

FACTS: Joseph Fuller worked for the Jacksonville Electric Authority ("JEA") as a senior vehicle coordinator. During the course of an investigation initiated by reports that he had been stealing gasoline from JEA fleet pumps, Mr. Fuller admitted to taking and reselling JEA copper wire and other recyclable items, but he maintained that the items in question had been discarded by JEA. Mr. Fuller and JEA reached an agreement calling for Mr. Fuller to resign and make full restitution to JEA. In return, JEA agreed to notify the state attorney that it did not wish to prosecute. After agreeing to the conditions, Mr. Fuller admitted to the thefts and offered advice on how JEA could prevent such thefts in the future. Following Mr. Fuller's resignation, the Board of Pension Trustees of the City of Jacksonville Retirement System ("the Board") notified Mr. Fuller of its intent to terminate his pension benefits. Section 112.3173(3), Florida Statutes, provides for the forfeiture of a pubic employee's pension benefits if the employee's employment is "terminated by reason of his or her admitted commission, aid, or abetment of a specified offense." According to the Board, Mr. Fuller admitted to committing the specified offense of theft and was effectively terminated because of that admission.

OUTCOME: The ALJ rejected the Board's argument, because section 112.3173(3) specifies that pension benefits are forfeited if employment is "terminated." Rather than being terminated by JEA, Mr. Fuller was allowed to resign as a result of his agreement with JEA. The ALJ also rejected the Board's argument that "terminated" is synonymous with "concluded" and that Mr. Fuller's resignation "concluded" his employment with JEA. The ALJ deemed this argument to be "disingenuous" and declined to "adopt the Board's strained attempt to treat Mr. Fuller's resignation as a termination." Accordingly, the ALJ concluded Mr. Fuller was not subject to the forfeiture provisions of section 112.3173, Florida Statutes.

Plastic Tubing Indus., Inc. v. Advanced Drainage Sys., Inc., and Dep't of Health, DOAH Case No. 14-3960 (Recommended Order Dec. 19, 2014).

FACTS: In the mid-1990s, Plastic Tubing Industries, Inc. ("PTI") developed a drainfield system to serve as an alternative to the standard mineral-aggregate drainfield. Because the PTI system was an "innovative system" within the meaning of Florida Administrative Code Rule 64E-6.009(7), the Department of Health ("DOH") required PTI to conduct more than two years' of innovative system testing prior to DOH's approval of the PTI system. PTI then entered into a licensing agreement with Advanced Drainage Systems, Inc. ("ADS") for ADS to produce and market the PTI system in Florida. Between 2001 and 2011, ADS sold at least 10,000 of the PTI systems before the license agreement ended. After PTI's patent on its drainfield system expired in 2014, ADS sought DOH's approval to market its own functionally equivalent version of the PTI system. ADS also filed a variance requesting DOH to allow ADS to sell its system in Florida without incurring the substantial costs associated with innovative system testing. DOH granted the variance after concluding that such costs would amount to a substantial hardship for ADS. PTI sought a formal hearing to challenge the proposed variance.

OUTCOME: The ALJ recommended that DOH enter a final order determining that ADS is entitled to a partial

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variance from Rule 64E-6.009(7). In the course of doing so, the ALJ rejected the argument that DOAH's role in this proceeding was limited to merely determining whether DOH's decision to grant the requested variance was supported by competent, substantial evidence. As stated by the ALJ, a problem "in limiting fact finding to the review standard of competent substantial evidence is that the Administrative Law Judge would be limited to an examination of the evidence supporting the Variance Order, but not any evidence opposing the Variance Order. If the Administrative Law Judge were to find any competent substantial evidence supporting the agency's determination, the inquiry would end, and he would have to sustain the agency's determination without any examination of opposing evidence or weighing (or reweighing) of conflicting evidence. In view of the limitations of the typical free-form agency proceeding, in which evidence may not be under oath, witnesses may not be examined or cross-examined, and the formal participation of nonagency parties may be nonexistent, such severe limitations on the robustness of the formal administrative proceeding at DOAH would raise due process issues." RO at 33, endnote 11 (citations omitted).

Charles Bullock v. State Bd. of Admin., DOAH Case No. 14-2616 (Recommended Order Sept. 30, 2014); SBA Case No. 2010-1774 (Final Order Dec. 15, 2014).

FACTS: Charles Bullock worked as a law enforcement officer for the Collier County Sheriff's Office from 1994 through 2010. He and some of his co-workers routinely met for afternoon coffee at a local mall to discuss business. On at least two occasions between November of 2009 and February of 2010, Mr. Bullock (while on duty) went to the food court bathroom after the meetings and sexually molested underage males. On March 10, 2014, Mr. Bullock entered a plea of no contest to two counts of abusing a child in violation of section 827.03, Florida Statutes, a third-degree felony. On March 20, 2014, the State Board of Administration ("the SBA") notified Mr. Bullock that his benefits under the Florida Retirement System ("FRS") were forfeited as a result of his plea, and Mr. Bullock requested a hearing.

OUTCOME: The ALJ recommended that the SBA enter a final order concluding Mr. Bullock had not forfeited his benefits under the FRS. In the course of doing so, the ALJ noted the forfeiture statute (section 112.3173, Florida Statutes) requires that a "specified offense" be committed by use of the power, rights, privileges, duties, or position of the employment position. According to the ALJ, "[t]he weight of the evidence does not prove that the 'use of the power, rights, privileges, duties, or position of' Mr. Bullock's position played any part in the commission of the offenses. He did not identify himself as a law enforcement officer. He did not exercise the power of a law enforcement officer. The victim did not know Mr. Bullock was a law enforcement officer."

The SBA disagreed, concluding in its Final Order that Mr. Bullock's offenses had been effectuated through the use of his power, rights, privileges and employment with the Collier County Sheriff's Office. "The public paid for his transportation [to the local mall], paid for the time he spent at the meetings, and paid him for the time he used the restroom facilities to commit acts for which he was criminally charged." In short, Mr. Bullock "used his position to have the public subsidize his felonious conduct." Accordingly, the SBA's Final Order rejected the ALJ's recommendation and ordered the forfeiture of Mr. Bullock's retirement benefits.

Mr. Bullock appealed to the First District Court of Appeal where it has been assigned case number 1D14-2616.

Disciplinary/Enforcement Actions
Dep't of Health, Bd. of Massage Therapy v. Hong Tang Long Life Therapy Massage and Hong Tang, L.M.T., DOAH Case Nos. 14-2551 and 14-2552PL (Recommended Order Dec. 31, 2014).

FACTS: Respondent Tang is a Florida-licensed massage therapist who owns Hong Tang Long Life Therapy Massage ("Long Life"). In August 2013, a deputy sheriff from the Palm Beach County Sheriff's Office entered Long Life posing as a customer. In response to an inquiry from the deputy about whether the massage was "full service," Respondent Tang made a non-verbal gesture indicating sexual activity could be included. Section 480.0485, Florida Statutes, prohibits "sexual misconduct in the practice of massage therapy," defined as a massage therapist using his or her relationship with a patient "to induce or attempt to induce the patient to engage, or to engage or attempt to engage the patient, in sexual activity outside the scope of practice or the scope of generally accepted examination or treatment of the patient." The Department of Health ("DOH") issued an Administrative Complaint against Respondent Tang, charging her with inducing or attempting to induce a patient to engage in sexual activity.

OUTCOME: The ALJ concluded that although DOH proved by clear and convincing evidence that Respondent Tang attempted to engage the deputy in sexual activity outside the scope of practice, DOH did not charge Respondent Tang with that offense. Instead, DOH charged Respondent Tang only with inducing or attempting to induce the deputy to engage in sexual activity, and the ALJ found that it was the deputy sheriff who initiated the issue of sexual activity, and not Tang who attempted to persuade or influence the deputy to engage in sexual activity. Because Respondent Tang never induced or attempted to induce the deputy to engage in sexual activity, the ALJ recommended that the Board of Massage Therapy enter final order finding her not guilty of the allegations set forth in the Administrative Complaint.

Rule Challenges
Costa Farms, LLC, et al., v. Dep't of Health, DOAH Case Nos. 14-4296RP, 14-4299RP, 14-4517RP, and 14-4547RP (Final Order Nov. 14, 2014).

FACTS: Beginning January 1, 2015,

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the Compassionate Medical Cannabis Act of 2014 ("the Act") authorizes licensed physicians to order low-THC cannabis for qualified patients under specified conditions, primarily those suffering from cancer or severe and persistent seizures and muscle spasms. In order to implement the portion of the Act authorizing one dispensing organization for each of five different geographic regions in the State, the Department of Health ("DOH") published a Notice of Proposed Rule establishing a regulatory structure for the selection and regulation of those dispensing organizations. Proposed rule 64-4.002(4)(a) provided that if there are multiple qualified applicants for a dispensing region, then DOH would utilize a "double blind random lottery-type" system to designate the approved applicant. Several nurseries and the Florida Medical Cannabis Association challenged proposed rule 64-4.002(4)(a) and other proposed rules within chapter 64-4 were invalid exercises of delegated legislative authority.

OUTCOME: The ALJ concluded that the Act delegates reasonable discretion to DOH to select the five dispensing organizations consistent with stated statutory parameters to further the Legislature's objective to ensure accessibility and availability of low-THC cannabis to needy patients. The ALJ also concluded that the Legislature intended for DOH to qualitatively evaluate applicants for each of the five dispensing organizations. Because proposed rule 64-4.002(4)(a) authorizes DOH to use a lottery to select dispensing organizations rather than reasoned judgment, the ALJ held the proposed rule modified or enlarged the enabling statute. With regard to DOH's assertion that it is unable to score or comparatively evaluate dispensing organizations, the ALJ held that "[d]ifferent proposals can be evaluated in the exercise of reasoned judgment as to which will best serve the need identified consistent with the statutory objectives and criteria." Accordingly, the ALJ concluded that proposed rule 64-4.002(4)(a) and several other proposed rules within chapter 64-4 were invalid exercises of delegated legislative authority.

Attorney's Fees

Dep't of Envtl. Prot. v. Bernard Spinrad and Marien Spinrad, DOAH Case No. 14-5291F (Final Order Nov. 24, 2014).

FACTS: On February 20, 2013, the Department of Environmental Protection ("DEP") issued a proposed authorization enabling the Guerreros to proceed with the following activities on their property in the Florida Keys: repair of the shoreline, repair of the NE and SW jetties, replacement of an earthen boat ramp with a concrete boat ramp, repair and replacement of a wood dock, replacement of mooring piles, removal of the mid-jetty extension, and maintenance dredging of an existing channel. DEP determined it was unnecessary for the Guerreros to obtain an environmental resource permit because there would be minimal or insignificant impact on water resources. The Spinrads own adjoining parcels of property in close proximity to the Guerreros and challenged the proposed activities by asserting they would adversely affect the Spinrad's enjoyment of their property. Following a formal administrative hearing at DOAH that proceeded under Case No. 13-2254, DEP rendered a Final Order on September 8, 2014, approving the proposed authorization. DOAH then considered DEP's motion for attorney's fees under section 57.105 in which DEP sought fees as sanctions against both the Spinrads and their counsel. DEP alleged that the Spinrads caused unreasonable delay by eliciting irrelevant or cumulative testimony at the final hearing, failing to call all witnesses listed in the Spinrads' witness list, and attempting to introduce undisclosed exhibits into evidence during the final hearing, in violation of the prehearing order.

OUTCOME: The ALJ issued a Final Order on November 24, 2014, denying DEP's motion for attorney's fees. In doing so, the ALJ concluded that "[i]f parties being overly inclusive in their court-ordered witness lists, presenting witnesses and evidence that opposing parties believe to be irrelevant or cumulative, or exhibiting relatively minor non-compliance with prehearing orders is the standard for an award of fees, then courts and administrative tribunals should be prepared to clear their dockets for the flood of attorney's fees cases to follow. Fortunately, for all involved, the facts alleged in support of an award of fees under section 57.105 must show conduct on the part of a litigant that is substantially more egregious than that exhibited by any party to DOAH Case No. 13-2254."

Immediately after the Final Order was entered, the Spinrads' attorneys filed a motion for attorney's fees based on section 768.79, Florida Statutes, the offer of judgment statute. In support thereof, the Spinrads' attorneys argued they were now entitled to recover their reasonable costs and fees responding to DEP's attorney's fees motion, because DEP had rejected an offer of judgment they made to settle DEP's attorney's fees claim. In an Addendum to the Final Order, the ALJ denied this motion because section 768.79 applies to civil actions, and "[a]n administrative proceeding challenging proposed agency action pursuant to chapter 120 is not a civil action for damages." The motion for fees was also based on section 57.041, which applies to a "party recovering judgment." However, the ALJ ruled that "[a]n administrative proceeding challenging proposed agency action pursuant to chapter 120 does not result in a 'judgment.' Unlike sections 57.105(5) and 57.111, there is nothing in section 57.041 that would extend its reach to proceedings under chapter 120."

AHCA v. The Chrysalis Center, Inc., DOAH Case No. 14-0136MPI (Final Order on Attorney's Fees Dec. 5, 2014).

FACTS: The Agency for Health Care Administration ("AHCA") had sought to recover $284,535.83 in Medicaid overpayments from the Chrysalis

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Center even though one of its program analysts had previously determined that the vast majority of the services at issue were reimbursable by Medicaid. During the overpayment hearing, the ALJ determined in his Recommended Order that AHCA was entitled to recover less than 1% of that amount. (The overpayment administrative orders are summarized in DOAH Case Notes in the December 2014 Newsletter). Also, in a portion of the Recommended Order that the ALJ characterized as a "Final Order," he sua sponte determined that the Chrysalis Center was entitled to an award of attorneys' fees under section 57.105(1)(a), Florida Statutes. During the subsequent hearing on attorneys' fees, AHCA did not dispute the reasonableness of the hourly rates charged by the Chrysalis Center's attorneys. But, AHCA did argue that the total amount sought--over $180,000--was unreasonable.

OUTCOME: The ALJ issued a Final Order awarding $61,505 in attorneys' fees to the Chrysalis Center. While noting that nothing in the record suggested any conscious overbilling by the Chrysalis Center's attorneys, the ALJ found that the 475 hours claimed by the Chrysalis Center's attorneys was excessive given the straightforward nature of the underlying case. In support thereof, the ALJ stated that "[i]f the Overpayment Case had been as factually complicated as [the Chrysalis Center] now claims, somewhere, in the pile of transcripts and exhibits constituting the record of the Overpayment Hearing, a material fact would have provided enough support for [AHCA]'s overpayment claim to avoid liability for attorneys' fees under section 57.105, Florida Statutes." The lack of any such material fact "now inures to the detriment of [the Chrysalis Center] as it attempts to prove the reasonableness of extensive legal work in the Overpayment Case."

The Chrysalis Center appealed to the Third District Court of Appeal, where it was assigned case number 3D14-3150.

Agency Snapshot: The Office of Early Learning

by Lauri Goldman

Part of the Florida Department of Education, the Office of Early Learning (OEL) dedicates its people, time and energy to ensuring access, affordability, and quality of early learning services for the state's children and families. Florida welcomes 600 newborns every day and is home to more than one million children under the age of 5. As many as 700,000 of these children attend some type of early learning program. OEL supports these children, their families, and the child care providers who serve them, through administration and management of 30 early learning coalitions across the state. Early learning coalitions deliver early learning services at the local level. They are not-for-profit corporations with governing boards made up of members of the local community. OEL oversees how early learning coalitions and other subcontractors use federal, state, local, and private resources. The goal is for Florida's children to achieve the highest possible level of school readiness.

OEL oversees three programs—Florida's School Readiness, the Voluntary Pre-kindergarten Education Program and Child Care Resource and Referral services. The Florida School Readiness Program offers financial assistance to low-income families for early education and care so they can become financially self-sufficient and their young children can be successful in school in the future. Florida's Voluntary Pre-kindergarten Education Program (VPK) is a free educational program that prepares 4 year olds for success in kindergarten and beyond. Within the options for VPK is the new program of Voluntary Pre-kindergarten Specialized Instructional Services that allows 4 year old children with disabilities to obtain specialized instructional services outside of the traditional classroom setting. The Child Care Resource and Referral service is a statewide network with information for families with young children. The service is free for any family living in or preparing to move to Florida. It operates a toll-free early learning call center for families and providers with information and access to all early learning programs in Florida.

In addition to the oversight of these programs, OEL is responsible for numerous statewide initiatives that offer training and professional development to early education providers and establish early education standards.

Agency Head

Rodney MacKinnon, Interim Executive Director of OEL, has extensive knowledge of the school readiness and voluntary pre-kindergarten education programs as well as the workings of the early learning coalitions. Immediately preceding his appointment as Interim Executive Director, Mr. MacKinnon served as the Inspector General for OEL. He has also held the positions of Assistant General Counsel and Accountability Analyst within OEL and previously worked for a children's services council. Mr. MacKinnon holds a juris doctor from Stetson University College of Law and a master's degree in business administration from Florida State University.

Agency Clerk

The Agency Clerk is Judy Jones. The hours for filing are: 8:00 a.m. to 5:00 p.m. Filings may be hand delivered or sent to: 250 Marriott Drive, Tallahassee, FL 32301. At this time, OEL does not accept electronic filings. Ms. Jones may be reached at 850-717-8550.

General Counsel

Margaret O'Sullivan Parker is General Counsel. Ms. Parker has extensive experience in education law and has been an adjunct professor at the FSU College of Law. Ms. Parker may be contacted at: maggi.parker@oel.myflorida.com.

The Office of General Counsel provides legal services to OEL's leadership and divisions. It provides legal support for contracts, rulemaking, and administrative hearings related to good cause exemptions.

Law School Liaison

Florida State University College of Law Spring 2015 Update

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

This column highlights three of the many administrative and environmental law programs the College of Law is hosting this spring. We hope Section members will join us for one or more of them. The column also features updates on student accomplishments.

Special Program on Florida Administrative Law

On April 6, 2015, the College of Law's administrative law course will feature a special panel on Florida administrative law issues. Brent McNeal, Deputy General Counsel, Division of Vocational Rehabilitation and the Division of Blind Services, Florida Department of Education, and other leading practitioners will participate in the panel.

Spring 2015 Distinguished Lecture

Katrina Wyman, Sarah Herring Sorin Professor of Law, New York University School of Law, presented the College of Law's Spring 2015 Distinguished Lecture on February 25, 2015.

Spring 2015 Enrichment Lunch

Jeff Wood, a partner with Balch and Bingham, in Washington, D.C., will discuss federal administrative law and environmental law issues with the College of Law's Environmental Certificate students on April 2, 2015.

Recent Student Achievements

- Chris Hastings' student note, entitled *Implementing a Carbon Tax in Florida Under the Clean Power Plan: Policy Considerations,* was recently selected for publication in volume 42 of Florida State University Law Review. He is considering multiple offers for another student note, entitled *TSCA Reform and the Need to Preserve State Chemical Safety Laws*.
- Valerie Little earned 1st place in the AWMA (Air & Waste Management Association) Student Challenge.
- Several College of Law students have Spring 2015 externships involving administrative law, including: David Rehr, State of Florida Division of Administrative Hearings; Valerie Little, State of Florida Division of Administrative Hearings; Joseph Varona, Department of Corrections; Chase Den Beste, Department of Transportation; Sara Benvenisty, Disability Rights of Florida; Ashley Paine, Leon County Attorney's Office; Kelly Baker, NextEra Energy; Kelsey Watry, Public Service Commission; Megan Zbikowski, Office of the Attorney General-Administrative Law; and Joshua Pratt, Office of the Attorney General-State Programs.

AGENCY FINAL ORDERS
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orders. Some agencies prepare their own index. What really stands out is how many agencies responded to the survey question on how final orders can be accessed by the public with "Public Records Request" or "Contact [_____]." It is difficult for practitioners to understand and accept such methods of access when we live in this era of electronic technology where so much information is available almost instantaneously on the internet. Part of the blame for this lack of uniformity and use of antiquated systems for indexing must be placed on the language of section 120.53, Florida Statutes. A previous chair of the Administrative Law Section's executive council summed it best when he wrote that:

> [w]ithout detailing the many well-intentioned, but sadly often counterproductive, amendments that followed, suffice it to say that we are left today with statutory provisions in sections 120.53 and 120.533 that in some instances are contradictory and in others duplicative, and which are so poorly organized as to be nearly incomprehensible. This is no doubt because statutory "fixes" were crafted to respond to various issues without much regard for the existing statutory structure. Go ahead, take a quick look at these two sections, and any relevant rules of the Department of State (of course, the statutes call for rules, too) and see if you come away with a clear picture of the system that is in place. It would be one thing if all of this complication were the only way that we could provide broad public access to agency orders, but is anyone prepared to seriously argue that the current system meets that objective?[1]

The committee recognized that the key to achieving uniformity in how agencies keep final orders and make them available to the public is to completely overhaul section 120.53, Florida Statutes.

The committee has proposed a major revision to section 120.53, which will eliminate the traditional subject matter index and instead require all state agencies to upload electronic copies of certain categories of final orders (the same categories of final orders that agencies are now required to keep in a subject matter index under section 120.53(1)(a)2.c.) to the website of the Division of Administrative Hearings (DOAH).[2] The proposal will also do away with section 120.533, Florida Statutes, and the rules thereunder. This revision would be prospective in nature so that agencies would not have to scan and upload all of their existing final orders. Agencies will still be required to maintain subject matters indices for final orders rendered prior to the effective date of the proposed revision. The Section, through the efforts of the legislative committee, will work toward advancing this proposal during the 2015 legislative session.

Why require state agencies to use DOAH's website? First, DOAH has the capacity to handle every agency's final orders at little to no additional expense. Second, agencies that are currently using private vendors, such as the FALR, to index their final orders, will save thousands of dollars each year by using DOAH's website instead. Third, and most importantly, everyone will know where to look for agency final orders and have immediate access to them. If this proposal becomes law, it will mark the first time that indexed final orders from every agency will be kept in one central location that is easily accessible by the public. I am confident that, as technology advances, it will become easier and easier to sift through this repository in order to find the valuable precedents practitioners seek out when searching through prior agency final orders.

Richard J. Shoop *is the Agency Clerk for the Agency for Health Care Administration. Mr. Shoop has been a member of the Administrative Law Section's executive council since 2009, and is currently serving as chair-elect of the Section. The views expressed herein are those of the author and not intended to reflect the views of the State of Florida or the Agency for Health Care Administration.*

Endnotes:

1 F. Scott Boyd, *From the Chair: "Order, Order!"*, Administrative Law Section Newsletter, Volume XXXIV, No. 2, January 2013, at 2.

2 For those not familiar with DOAH's website, it has a page where any member of the public can search final orders that have been uploaded to the website from several agencies. It allows for searches by agency, agency case number, issuance date (date the final order was rendered), type, and subject, and even includes a text search. I invite you to go to their webpage at https://www.doah.state.fl.us/FLAIO/ and try it out for yourself.

THE FLORIDA BAR

The Florida Bar
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