ADMINISTRATIVE LAW SECTION
Newsletter
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Court Provides Fresh Look at Disqualifying an Agency Head for Bias, Prejudice, or Interest

by Donna E. Blanton

No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time . . . .[1]

The Administrative Procedure Act ("APA") includes a provision allowing a party to move to disqualify "any individual serving alone or with others as an agency head" for "bias, prejudice, or interest." This relatively obscure statute, section 120.665, Florida Statutes, has long been part of the APA, but it had been interpreted by courts only a handful of times until recently.

In 2015, the First District Court of Appeal issued three opinions construing section 120.665, all involving harbor pilots and the Pilotage Rate Review Committee ("PRRC"), a subset of the Board of Pilot Commissioners ("BOPC"), which is housed in the Department of Business and Professional Regulation. *See Biscayne Bay Pilots, Inc. v. Fla. Caribbean Cruise Ass'n*, 160 So. 3d 559 (Fla. 1st DCA 2015) (*Biscayne Bay Pilots I*); *Port Everglades Pilots Ass'n v. Fla. Caribbean Cruise Ass'n*, 170 So. 3d 952 (Fla.

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From the Chair

by Richard J. Shoop

Welcome to another new year! I hope that you had a wonderful holiday and are as excited about the Section's plans for the year as I am. Our law school liaison committee will be sharing the experience of practicing administrative law with law school students in several law schools around the state this spring. Our newly formed ad hoc committee on compiling and maintaining certification exam review materials, which consists of Michael Glazer, Judge John Van Laningham, and Susan Clark, is hard at work developing a study guide for those who sign up to take the State and Federal Government and Administrative Practice Certification exam. And our young lawyers committee is continuing to offer events geared towards the younger members of our Section. In other words, we are busy, busy, busy!

In my previous columns, I have thanked all the members of our Section's executive council, as well as our committee members and Section liaisons. For this column, I want to thank a very important group of people who never get recognition yet are vital to the success of our Section: the employers of our executive council

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members, committee members and Section liaisons. I cannot thank these individuals enough for allowing our members to take time to serve the Section in their respective capacities. I am so appreciative of my own supervisors, Stuart Williams and William Roberts, who have not only graciously allowed me to have the time I needed to perform my duties as a member and officer of the Section's executive council over the past few years, but have also encouraged me to engage in such service. There is no doubt that my service to the Section has benefitted me greatly, both personally and professionally. If you are a supervisor, I hope that you will encourage the attorneys you supervise to get involved in Bar service, whether it be with the Section or in some other capacity. I am confident that it will benefit your company or organization as well as them individually.

I also want to encourage all the members of our Section who have never done so before to get involved in pro bono work this year. I know that it is hard for us as administrative lawyers to consider doing such work because we don't have experience with other practice areas, and are afraid we will do more harm than good if we tried to work on such matters. Let me try to put those fears to rest. There are legal aid organizations in the state that offer various ways to do pro bono work where such expertise in not a prerequisite. Take for example, Legal Services of North Florida, Incorporated (LSNF) in Tallahassee. They have a program called the Legal Services Hotline. Clients will call into the Hotline with legal questions. The questions and the client's contact information is reduced to writing and given to volunteer attorneys to call the person back and give them legal advice over the telephone. LSNF provides its volunteer attorneys with a manual that contains answers to most of the common questions asked in cases involving areas like family law, consumer law, and landlord-tenant law, as well as access to its staff attorneys and other volunteer attorneys with expertise in particular fields, in case you come across an issue that the manual does not cover. I have tried to volunteer on the hotline once a month for the past decade, and every time I have done it I have come away feeling so grateful and thankful being able to help those less fortunate, even if that help was just listening to them and trying to comfort them. LSNF staff John Fenno and Carolyn Gregory have done a phenomenal job with this service and make every volunteer attorney feel like part of the family. I know that there are other such organizations doing great work around the state, and I encourage you to at least try it once this year.

Speaking of service, I want to recognize executive council members Brian Newman, Fred Springer, Jowanna Oates, Judge Gar Chisenhall, Judge Lynne Quimby-Pennock, and Judge Suzanne Van Wyk, who participated in a day of service this past October by stuffing bags of food for needy elementary school students at Second Harvest of the Big Bend. Not only did these individuals take a couple of hours out of a Saturday morning to volunteer, but some of them even stayed past the allotted time until all the food had been bagged (over 500 bags in total). Second Harvest of the Big Bend provides over 800 elementary school-aged children with such bags on a weekly basis, a figure that amazed me and made me even more appreciative of being able to provide food (and other necessities of life) for my own family. They are but one of many organizations that serve many different needs in this state. There is so much that we can do, and by doing we can change the perception of attorneys for the better in the eyes of our society. Please join me and become involved in your community this year. I guarantee that you won't regret it.

There is also another opportunity for service open to everyone in the Section that I want to highlight: writing an article for the Section's newsletter or the *Journal*. Such articles are very beneficial to the members of the Section and often become valuable resources for them in their practice. Unfortunately, Jowanna Oates and Judge Elizabeth McArthur, the co-editors of the Section's newsletter, and Stephen Emmanuel, the Section's editor for The Florida Bar *Journal*, find themselves scrambling for articles time and time again. I know that not everyone loves to engage in research and writing, but these three people will go out of their way to make it as easy and painless as possible. They will even suggest topics for you if you have the desire but do not know where to begin. Plus, engaging in such work helps you to gain more knowledge and understanding about administrative law. It would be awesome to see a surplus of articles for both publications by the end of the year, so please consider making the commitment to write one this year.

Lastly, I want to encourage every member of the Section to take the time to go to the Section's website (http://www.flaadminlaw.org/) and look at the names of our executive council members, committee members, and Section liaisons, and then either call them, shoot them a quick email, or send them a note, thanking them for their service. The things that these individuals do for the Section often go unnoticed, and they never seek credit for them, but our Section would be in dire straits if not for their efforts. It will only take a few minutes of your time, and will most definitely make their day. And, as I have said before, please feel free to send me any comments or suggestions you have about any of the work the Section is doing. This is your section, and your feedback is important to me, and to the rest of the executive council. I hope that you have a terrific year!

APPELLATE CASE NOTES

by Larry Sellers, Gigi Rollini, and Tara Price

Agency Authority—Extensions of Certificates of Need

Baker County Medical Services, Inc. v. Agency for Health Care Administration, 178 So. 3d 71 (Fla. 1st DCA 2015).

Baker County Medical Services, Inc., d/b/a Ed Fraser Memorial Hospital (Fraser Hospital) appealed the circuit court's dismissal of its amended complaint, which sought a declaratory judgment that the Agency for Health Care Administration (AHCA) exceeded its statutory authority in issuing a certificate of need to West Jacksonville Medical Center (West Jacksonville).

Fraser Hospital alleged that West Jacksonville sought a certificate of need in 2009 for the construction of a new hospital in Duval County. St. Vincent's Hospital challenged the need for the certificate. West Jacksonville and St. Vincent's Hospital entered a settlement agreement, which AHCA approved, in November 2010. The agreement provided that West Jacksonville would receive a certificate of need with a validity period that would not begin until June 1, 2013. Additionally, the agreement provided that the new hospital would not be licensed prior to December 1, 2016.

Fraser Hospital challenged the certificate of need in circuit court, seeking a declaratory judgment that the certificate expired in June 2012. Fraser Hospital alleged that AHCA exceeded its statutory authority by approving a certificate of need that exceeded the 18-month term allowed by statute. It further alleged that AHCA lacked statutory authority to delay the validity period of the certificate and that West Jacksonville—which by October 2015 had not even begun construction on the new hospital—needed to request a new certificate of need.

West Jacksonville and AHCA moved to dismiss Fraser Hospital's amended complaint, arguing (1) Fraser Hospital waived the right to contest the certificate by failing to participate in the earlier administrative proceedings; and (2) Fraser Hospital's amended complaint was an improper collateral attack on AHCA's certificate—a final order—which must be challenged in the administrative, not a judicial, forum. The circuit court agreed with West Jacksonville and AHCA, ruling that the "declaratory judgment is an unauthorized collateral attack on final agency action" on the basis that AHCA "did not act without colorable statutory authority in issuing the Final Order." Fraser Hospital appealed the circuit court's dismissal of its declaratory judgment action.

The appellate court reversed, holding that Fraser Hospital's declaratory judgment action was not an improper collateral attack because AHCA had exceeded its statutory authority. First, the court noted that Fraser Hospital faced a heavy burden in collaterally attacking a final agency order in the trial courts, but that such a judicial exception was permissible when "an agency acts without colorable statutory authority that is clearly in excess of its delegated powers." The court next analyzed section 408.040(2)(a), Florida Statutes, which provides that, generally, a certificate of need "[u]nless the applicant has commenced construction . . . *shall terminate* 18 months after the date of issuance[.]" The court then noted that section 408.040(2)(c) allowed AHCA to extend the certificate of need validity period only when commencement of the project is delayed by litigation or government action or inaction.

The court determined that neither statutory grounds for extension applied, as the commencement of the hospital project was not delayed by litigation or by government action or inaction.

Further, the court noted that the Legislature amended section 408.040(2)(a) to provide that "certificates of need issued on or before April 1, 2009" would terminate after 36 months, instead of 18. The Legislature did not provide the same extension for certificates of need issued after April 1, 2009. The court concluded that this lack of extension "strongly suggests that no statutory authority exists for all others," meaning that AHCA could not simply extend the validity period of a certificate of need for economic reasons. The court also rejected the argument that AHCA's broad powers under section 408.15(2) and (10), Florida Statutes, permitted such an extension: "Whatever authority AHCA has, colorable or apparent, is not so elastic as to allow an effective quadrupling of the statutorily set validity period."

Thus, the court reversed the circuit court's dismissal of Fraser Hospital's declaratory judgment action. Because AHCA exceeded its statutory authority, Fraser Hospital could proceed with its declaratory judgment action in the circuit court without first exhausting its remedies in the administrative realm. The court, however, noted in dicta that West Jacksonville and AHCA could raise affirmative defenses, such as whether Fraser Hospital waived its ability to challenge the certificate of need by failing to participate in the earlier administrative proceedings.

Administrative Finality—"Corrective" Orders

WHS Trucking LLC v. Reemployment Assistance Appeals Commission, 41 Fla. L. Weekly D182 (Fla. 1st DCA Jan. 15, 2016).

The Department of Economic Opportunity, Reemployment Assistance Program (DEO), received a timely claim for benefits. DEO entered a Notice of Approval that determined the claimant's discharge was for reasons other than misconduct, the claimant was entitled to benefits, and

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benefits paid would be charged to the employer's account. The employer appealed to challenge the finding of no misconduct. After a hearing, the Reemployment Assistance Appeals Referee (Referee) entered a decision finding the employer failed to prove the discharge was for misconduct, thereby affirming DEO's conclusion that the claimant was entitled to benefits, but that the employer would not be charged for those benefits. The decision contained the standard language regarding appeal rights: "This decision will become final unless a written request for review or reopening is filed within 20 calendar days."

After the 20-day period for appeals expired without action from either party, a Notice of Benefits Paid was issued to the employer identifying a charge had been made to its account with respect to the claimant. The day after that Notice was issued, the Referee *sua sponte* entered a proposed corrected decision to align the decision with the Notice of Benefits Paid, on the premise that the corrected decision was correcting "clerical errors." Therein, the Referee changed the finding that the employer would not be charged to, "The employer will be charged because misconduct was not established."

The employer immediately sought review by the Commission on the basis that the proposed corrected decision was entered without jurisdiction, because the original decision had already become final and binding on the parties and DEO. The employer argued the correction was not merely clerical, but was a prohibited, substantive change that affected the employer's substantial interests. Subsequently, the Referee entered the corrected decision making the change. The employer again sought review on jurisdictional grounds.

The Reemployment Assistance Appeals Commission (RAAC) upheld the Referee's actions in both regards. The RAAC concluded that a referee may make corrections so long as the corrections are clerical and not substantive corrections that would affect a party's substantial interests. The RAAC also concluded that, in correcting the employer's chargeability, the Referee was merely rendering the decision consistent with the conclusion that the employer had not established the termination was for misconduct.

On appeal, the court explained that Florida agencies only have the authority. Section 443.151(4)(b)6., Florida Statutes, provides that a referee's decision is final unless an appeal is initiated within 20 days. Since the proposed corrected decision issued after the 20-day period expired, the original decision was final, and the Referee was divested of jurisdiction to make any correction.

The court rejected the RAAC's reliance on *Taylor v. Department of Professional Regulation, Board of Medical Examiners*, 520 So. 2d 557 (Fla. 1988). While *Taylor* recognized an agency's inherent authority to correct clerical errors and errors arising from mistake or inadvertence, *Taylor* specifically recognized that upholding the agency's inherent authority in the case did not affect the doctrine of administrative finality, and such authority was not applied in a manner that would result in prejudice to a party. Because expanding DEO's jurisdiction to allow the "clerical" correction would actually prejudice the employer in this case, *Taylor* was inapposite. Thus, the court reversed the RAAC's order, quashed the Referee's corrected decision, and reinstated the original decision concluding that the claimant would receive benefits, but the employer would not be charged.

Administrative Orders—Penalty
Smith v. Dep't of Business and Professional Regulation, 41 Fla. L. Weekly D49 (Fla. 1st DCA Dec. 31, 2015).

In an order of the Florida Real Estate Commission (Commission), the Commission concluded that Charles Seymour Smith violated section 475.25(1)(u), Florida Statutes, which requires a real estate broker to direct, control, or manage a broker associate or sales associate employed by such broker. As the penalty, the Commission imposed a five-year suspension of his license. Mr. Smith appealed, contending the Commission, in imposing this penalty, considered unalleged and unproven facts.

The court recognized that Mr. Smith, by requesting an informal rather than a formal hearing, had waived the opportunity to dispute the facts alleged in the administrative complaint. Accordingly, the only issues remaining were the conclusions of law to be drawn and the penalties to be imposed. However, while the Commission did not err in its decision that the conceded facts constituted the statutory violation charged, the Commission erroneously discussed "facts" in determining the penalty that were neither alleged in the administrative complaint, nor established through any admission by Mr. Smith or evidence in the proceeding.

As such, the court found that its decision in *Chrysler v. Department of Professional Regulation*, 627 So. 2d 31 (Fla. 1st DCA 1993), controlled. In *Chrysler* the licensee had requested an informal hearing under section 120.57(2), Florida Statutes, conceding the facts alleged in the administrative complaint. However, the appeal centered on the board's consideration of matters not raised in the complaint and for which no notice was given that such matters would form part of the administrative proceeding or the basis for imposing a penalty. Because there was, like in this case, "a reasonable probability that the Board would have imposed a less harsh penalty but for the improper consideration of the" unalleged matters, the case was reversed and remanded for reconsideration of the penalty imposed.

Although the court noted that this was not a case in which a regulatory board explicitly finds a licensee guilty of an uncharged violation, the court held that the Commission erred by considering facts not alleged or established in determining the penalty.

Attorneys' Fees—Condition Precedent to Recovery in Court Proceedings
Dep't of Economic Opportunity v. Consumer Rights, LLC, 40 Fla. L. Weekly D2809 (Fla. 1st DCA Dec. 18, 2015).

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Opportunity appealed a trial court's award of attorney's fees to Consumer Rights, LLC (CR), pursuant to section 119.12, Florida Statutes, of the Public Records Act (Act). CR's attorney sent a public records request to a Department employee. When the Department failed to respond to the request, CR filed a complaint for enforcement of the Act against the Department. The Department then produced the requested records. Approximately ten months after the complaint was filed, CR e-served a copy of the complaint on the Department of Financial Services pursuant to section 284.30, Florida Statutes. The trial court concluded that the Department had unjustifiably delayed producing the records in violation of the Act, and as such, CR was entitled to reasonable attorneys' fees.

The appellate court reversed, concluding that CR was not entitled to attorneys' fees because it failed to comply with the condition precedent required by section 284.30. While CR argued that this statute is inapplicable to a public records request, the court looked to the plain language of section 284.30, which provides:

> A state self-insurance fund, designated as the "State Risk Management Trust Fund," is created to be set up by the Department of Financial Services and administered with a program of risk management, which fund is to provide insurance, as authorized by s. 284.33, for [among other things] court-awarded attorney's fees in other proceedings against the state except for such awards in eminent domain or for inverse condemnation or for awards by the Public Employees Relations Commission. A party to a suit in any court, to be entitled to have his or her attorney's fees paid by the state or any of its agencies, must serve a copy of the pleading claiming the fees on the Department of Financial Services; and thereafter the department shall be entitled to participate with the agency in the defense of the suit and any appeal thereof with respect to such fees.

The court concluded that while the statute does explicitly exclude certain proceedings from its requirements, a public records case is not one of them.

Certiorari Review—Student Disciplinary Proceedings
Louis v. University of South Florida, 181 So. 3d 578 (Fla. 2d DCA 2016).

A student appealed a final decision by the University of South Florida (USF) imposing disciplinary sanctions against him for violating the Student Code of Conduct, arguing his due process rights were violated.

The court agreed with USF's argument that USF's final decision was not appealable. Instead, that decision is reviewable by certiorari in the appropriate circuit court. The court explained that in making a final determination in student disciplinary proceedings, USF was acting pursuant to its authority under article IX, section 7(d) of the Florida Constitution, and not as an "agency" as defined by the APA. Accordingly, the court transferred the case to the Thirteenth Judicial Circuit for treatment as a petition for certiorari.

Declaratory Statements
Society for Clinical and Medical Hair Removal, Inc. v. Dep't of Health, 41 Fla. L. Weekly D44 (Fla. 1st DCA Dec. 31, 2015).

The Society for Clinical and Medical Hair Removal, Inc. (Society), requested that the Board of Medicine (Board) issue a declaratory statement on the issue of whether Florida law required electrologists to receive continual recertification or whether a one-time certification was sufficient. The Board referred the petition to the Electrolysis Council for a recommendation. The Council held a hearing and recommended that the Board issue a statement that only an initial certification was necessary. The Board also held a hearing and agreed with the Council's recommendation.

Before the Board issued its declaratory statement, however, the Society requested to withdraw its petition for a declaratory statement, arguing that the Board's intended declaratory statement would be an "un-promulgated rule" and was unnecessary if the Board initiated rulemaking to clarify its position. The Board denied the Society's request to withdraw its petition and issued a declaratory statement that no Florida rule or statute requires continual certification. The Society appealed the Board's declaratory statement, arguing that the Board (1) exceeded the permissible scope for declaratory statements by announcing an unadopted rule, and (2) misinterpreted the certification requirements for electrologists in statutes and rules.

The court affirmed the Board's declaratory statement. First, it held that the Board did not exceed the permissible scope of a declaratory statement. Reviewing *Florida Department of Business & Professional Regulation v. Investment Corp. of Palm Beach*, 747 So. 2d 374 (Fla. 1999), the court noted that declaratory statements are not unlawful simply because they have a broader application than to one person. The court also stated that the Florida Supreme Court had concluded that an agency is not required to decline to issue a declaratory statement when it also intends to initiate rulemaking on the issue. *See id.* at 386 ("We are not aware of any rule of law that precludes an agency from simultaneously pursuing both courses of action.").

Concluding that the Society simply "did not like the answer it got in response to its petition," the court advised that if the Society believed "that the issue . . . in its petition could only be addressed by rulemaking, it should have petitioned for rulemaking . . . instead of a declaratory statement[.]"

In addition, the court affirmed the Board's declaratory statement on the merits. Noting that the standard of review was only whether the Board's interpretation was clearly erroneous or outside "the range of possible and reasonable interpretations," the court had "no trouble concluding that the Board's legal analysis in the declaratory statement . . . . [was the] most logical and natural reading" of the applicable statutes and rules. The court then suggested the Society raise its policy arguments with the Board during the rulemaking process, "because this court does not have the authority to make policy or to

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second-guess the wisdom of the policy embedded in the Board's rules."

Fair Hearings—Dismissal of Request

J.W. c/o Dawn Broun/Flagler Hospital v. Agency for Health Care Administration, 178 So. 3d 542 (Fla. 1st DCA 2015).

J.W. is a Florida Medicaid recipient enrolled in a Managed Care Organization, Magellan Behavioral Health of Florida, Inc., under contract with the Agency for Health Care Administration (AHCA). On May 5, 2013, J.W. was admitted to Flagler Hospital for inpatient psychiatric treatment. On May 10, 2013, Flagler Hospital submitted a prior authorization request to Magellan for J.W. to continue receiving inpatient psychiatric treatment. Magellan denied the request, citing a lack of medical necessity for the requested level of care beyond May 9, 2013.

J.W. sought an internal appeal with Magellan regarding the denial. Thereafter, Magellan issued an appeals decision letter upholding the denial of preauthorization for inpatient psychiatric services. The letter advised J.W. of his right to seek further review through a fair hearing conducted by the Department of Children and Families (DCF). In the meantime, Flagler Hospital continued providing J.W. inpatient psychiatric treatment until he was transferred to another hospital.

Thereafter, an employee of Flagler Hospital, acting as J.W.'s authorized representative, submitted a fair hearing request on his behalf to DCF. At the telephonic hearing, counsel for Magellan contended that because J.W. received the requested treatment from Flagler Hospital, the matter ceased to be subject to a fair hearing and was now a dispute between the hospital and Magellan over payment for the treatment. DCF's hearing officer agreed and dismissed J.W.'s hearing request.

On appeal, the court determined that J.W., as a Medicaid beneficiary, would have been entitled to a fair hearing to challenge Magellan's denial of prior authorization for Medicaid-covered inpatient psychiatric treatment after May 9, 2013. But then, before seeking such hearing, J.W. received the requested treatment from his health care provider, Flagler Hospital. DCF was therefore correct to dismiss J.W.'s fair hearing request because, once J.W. received the continued psychiatric treatment he requested, he no longer needed agency review of Magellan's decision not to authorize the treatment. Rather, the issue at that point became whether Flagler Hospital could be paid by Medicaid for the services it had rendered without prior authorization. The court concluded that a provider's right to payment by Medicaid is not an issue for which a Medicaid beneficiary has the right to a hearing.

Public Records—Private Entities Providing Services to Public Agencies

Economic Development Commission v. Ellis, 178 So. 3d 118 (Fla. 5th DCA 2015).

The Economic Development Commission of Florida's Space Coast, Inc. (EDC), appealed a trial court's final judgment requiring EDC to provide records to Scott Ellis, in his official capacity as Clerk of the Courts for Brevard County (Ellis). The appellate court reversed and remanded with directions as to the proper test, to determine whether EDC should be compelled to do so.

The court explained that Florida's Public Records Act defines "agency" to include any private business entity "acting on behalf of any public agency." § 119.011(2), Fla. Stat. This broad definition is designed to prevent a public agency from avoiding disclosure under the Act simply by contractually delegating to a private entity that which otherwise would be an agency responsibility. However, a private entity merely providing goods or services to a public agency pursuant to contract is not required to comply with chapter 119.

When analyzing whether a private entity is acting on behalf of a governmental agency for public records purposes, courts have examined a number of factors: (1) the level of public funding; (2) the comingling of funds; (3) whether the activity in question was conducted on publicly owned property; (4) whether the services contracted for are an integral part of the agency's decision-making process; (5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform; (6) the extent of the public agency's involvement with, regulation of, or control over the private entity; (7) whether the private entity was created by the public agency; (8) whether the public agency has a substantial financial interest in the private entity; and (9) for whose benefit the private entity is functioning. This analytical methodology is referred to as the "totality of factors" or the *Schwab* test. *See News & Sun-Sentinel Co. v. Schwab, Twitty & Hauser Architectural Grp., Inc.*, 596 So. 2d 1029, 1031 (Fla. 1992).

Florida courts have determined that the factor-by-factor analysis outlined by *Schwab* is not necessary when the delegation of governmental responsibility is clear and compelling, for instance, where there is a complete assumption of a governmental obligation by a private entity. In that circumstance, the Act would apply to the private entity's documents concerning that governmental function.

Rather than using the *Schwab* totality of factors test, the trial court in this case applied only the delegation of function test. The court concluded this was erroneous because there was not a clear, compelling, complete delegation of a governmental function to EDC. As such, the trial court erred in using the delegation of function test, instead of the *Schwab* totality of factors test. Accordingly, the trial court's order was reversed, and the case remanded for application of the proper test.

Statutory Construction

Dep't of Education v. Educational Charter Foundation of Florida, Inc., 177 So. 3d 1036 (Fla. 1st DCA 2015).

The Department of Education (DOE) appealed from a summary final judgment enjoining it from declassifying appellee as a high-performing charter school. Therein, the central question was whether two statutory

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provisions could be harmonized, as appellee contended, or were so repugnant the appellate court should defer to DOE's interpretation of the statute, so that DOE should be allowed to declassify appellee.

In answering this question, the court explained that generally, Florida courts will defer to an agency's interpretation of statutes that the agency is charged with implementing and enforcing. However, courts are under no obligation to defer to an agency interpretation that results in a statutory provision being voided by administrative fiat. Courts will avoid construing a statute as repealed by implication unless that is the only reasonable interpretation. A statute should be interpreted to give effect to every clause in it and to accord meaning and harmony to all of its parts. A court cannot read a statutory subsection in isolation, but must read it within the context of the entire section in order to ascertain legislative intent for the provision. It is the court's duty to construe two apparently contradictory enactments together in harmony if by any fair, strict, or liberal construction the court can find a reasonable field of operation for both without destroying their evident intent and meaning. There must be a hopeless inconsistency between two statutory provisions before rules of construction are applied to defeat the plain language of one of them.

In applying these rules of statutory construction to this case, the court concluded that the trial court properly harmonized the subsections DOE contended were hopelessly inconsistent. The court examined to the legislative history in which the amendment that gave rise to the alleged conflict was made. The court explained it must presume the Legislature is aware of existing statutory provisions when it enacts an amendment, and that it would not intend to keep contradictory provisions on the books or effectively repeal an important statute without expressing any intent to do so. Therefore, the court concluded that the trial court properly interpreted the two statutes in a harmonious way, rather than in a way that essentially repealed one of the two statutes.

Venue—Home Venue Privilege
Hunter v. Shaw, 41 Fla. L. Weekly D43 (Fla. 1st DCA Dec. 31, 2015).

The Sheriff of Columbia County challenged the trial court's order denying his motion to dismiss for improper venue based on the home venue privilege. The Sheriff had been sued in his official capacity, along with a deputy sheriff, for damages allegedly incurred when the deputy rear-ended appellees' car. The complaint alleged that the Sheriff was vicariously liable for the deputy's negligence because the deputy was acting within the course and scope of his employment, and alternatively alleged that the deputy was personally liable because he acted in a reckless, willful, and wanton manner. The trial court denied the motion to dismiss for improper venue, relying on a "joint defendant" exception to the home venue privilege.

The court explained that the State and its agencies or subdivisions, including the county sheriffs, enjoy a home venue privilege. This privilege is subject to only four specific exceptions, one of which is when a governmental body is sued as a "joint tortfeasor." The court concluded that the trial court too broadly defined "joint tortfeasor" in a way that created a "co-defendant" exception not recognized in Florida. Joint tortfeasors are usually defined as two or more negligent entities whose conduct combines to produce a single injury. Here, however, the complaint set forth only a principal and agent, or vicarious liability, theory. As such, the court held that the trial court erred in concluding that such allegations could fall within the "joint tortfeasor" exception to the home venue privilege.

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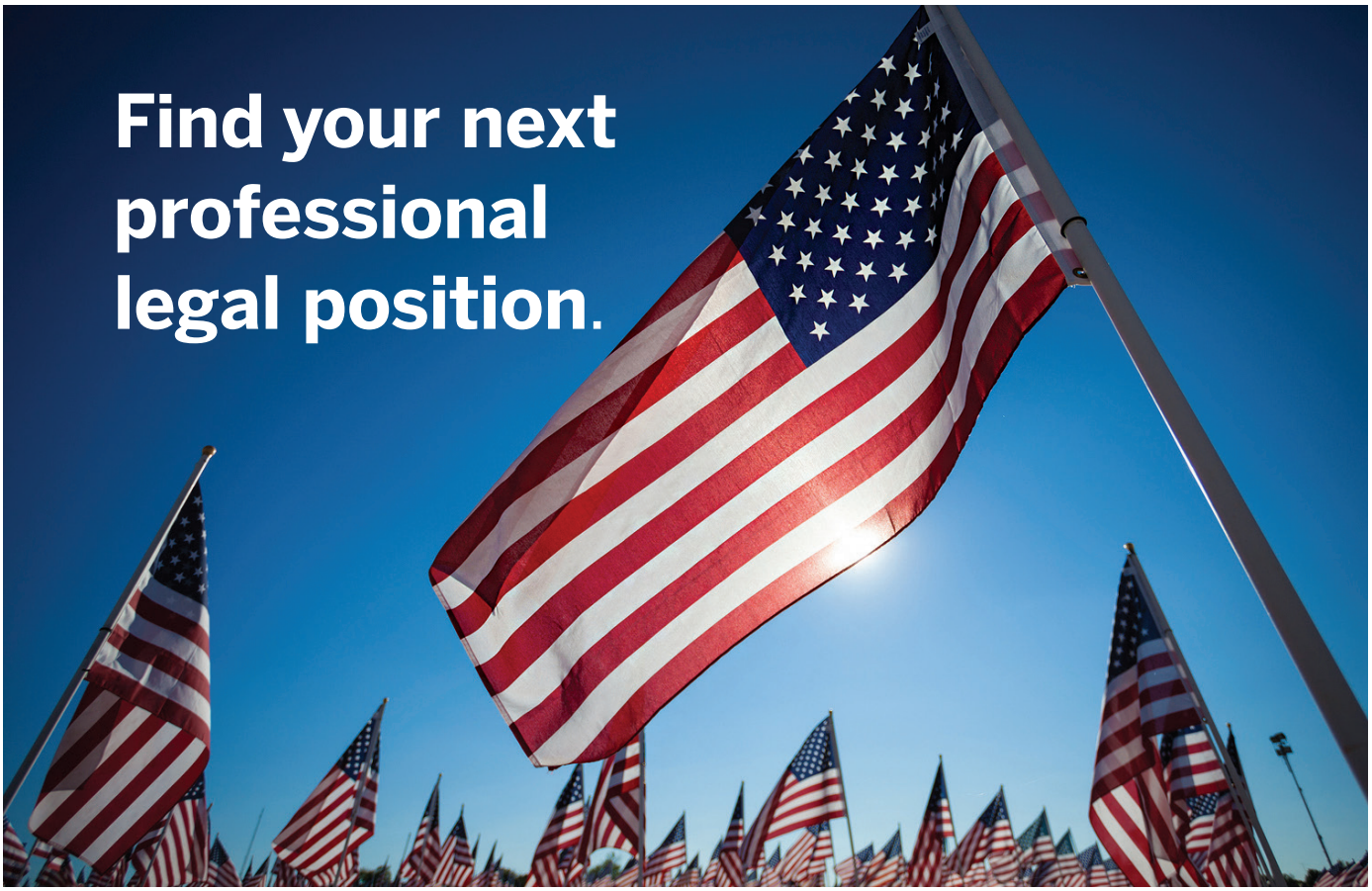

The Florida Bar Practice Resource Institute
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DOAH CASE NOTES

License Renewal Hearings

Agency for Persons with Disabilities v. Daniel Madistin LLC #1, DOAH Case No. 15-2422 (Recommended Order Nov. 25, 2015).

FACTS: The Agency for Persons with Disabilities ("APD") issued an Administrative Complaint against Daniel Madistin LLC #1 ("DM1"), a licensed group home operator, charging it with violations of statutes and rules governing group homes and their staffs, for which the complaint sought to impose the penalty of nonrenewal of DM1's license. DM1 timely requested a disputed-fact administrative proceeding, and the case was referred to DOAH.

OUTCOME: The ALJ recommended that APD enter a final order finding DM1 not guilty of the offenses charged. The ALJ concluded that APD bore the burden of proving the allegations by clear and convincing evidence, reasoning that refusing to issue a renewal license for cause is tantamount to revocation and thus requires the same burden of proof otherwise applicable in penal proceedings. The ALJ noted: "Those who think an application for renewal is the same as an initial application for licensure naturally tend to conclude that the standard of proof for nonrenewal based upon a disciplinable offense should be preponderance of the evidence. They maintain that when a license reaches its renewal date, it simply vanishes in the eyes of the law, returning the licenses to the status quo ante licensure, as if he had never been licensed, which obviates the need to revoke." However, the ALJ rejected this view, opining that it does not adequately account for the true nature of licensure: "For most licensees, the license represents a long-term commitment to a business, occupation, or profession, one that often entails a substantial investment of resources. Once obtained, a license is the sort of thing around which careers and lives are planned . . . . To the licensee, nonrenewal for cause is indistinguishable from revocation; either event frustrates reasonable expectations of ongoing licensure arising from possession of the license in a way that denial of initial licensure, before one has come to rely upon the license, does not."

Kirk Ziadie v. Dep't of Bus. & Prof'l Reg., Div. of Pari-Mutuel Wagering, DOAH Case No. 15-5037 (Recommended Order Nov. 25, 2015).

FACTS: The Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("the Division"), regulates Florida's pari-mutuel wagering industry, pursuant to chapter 550, Florida Statutes. At all relevant times, Kirk Ziadie held an individual occupational license for pari-mutuel wagering and he raced horses at Gulfstream Park. On August 26, 2015, the Division issued a letter notifying Mr. Ziadie that his application to renew his pari-mutuel professional occupational license would be denied based on allegations that three of his race horses had prohibited drugs in their systems in violation of section 550.2415(1)(a), Florida Statutes. Those allegations resulted from sampling procedures performed in conformity with the 2010 Equine Detention Barn Procedures Manual ("the Manual"). The Manual is applicable to every horse-racing facility in Florida. However, the Division has not incorporated the Manual into a rule. In taking blood samples from Mr. Ziadie's race horses, the Division followed certain sampling procedures set forth in the Manual that differed from the sampling procedures set forth in the Division's adopted rule 61D-6.005(3).

OUTCOME: The ALJ recommended that the Division enter a final order granting Mr. Ziadie's licensure renewal application. In doing so, the ALJ concluded that denial of Mr. Ziadie's "application for license renewal may not be based upon the test results of serum obtained pursuant to the unadopted procedures of subsection 4.6 of the Manual and not pursuant to the adopted rule." The Recommended Order also contained a discussion regarding the appropriate standard of proof. In noting that the Division bore the burden of proving the specific acts of misconduct that allegedly demonstrated Mr. Ziadie's lack of fitness, the ALJ observed that it was "not completely settled" as to whether the standard of proof is a preponderance of the evidence or clear and convincing evidence. After reviewing several appellate cases, the ALJ concluded that the appropriate standard of proof depends on "[t]he nature of the license involved" and "the provisions of the applicable licensing statute." The ALJ concluded that "the provisions of chapter 550, when considered in light of the language of section 120.57(1)(j), are interpreted to require proof of violations of section 550.2415 that form the basis for denial of renewal of a professional occupational license by clear and convincing evidence."

A Place Called Home v. Agency for Health Care Administration, DOAH Case No. 15-2042 (Recommended Order Dec. 9, 2015).

FACTS: The Agency for Health Care Administration ("AHCA") is responsible for licensing and monitoring assisted living facilities in Florida. Since 2013, AHCA has licensed A Place Called Home ("APCH") to operate an eight-bed, assisted living facility in Miami, Florida. On March 10, 2015, AHCA issued a letter notifying APCH that its licensure renewal application would be denied, based on alleged deficiencies discovered during a recent survey of the facility. APCH requested a formal administrative hearing, and the matter was referred to DOAH.

OUTCOME: The ALJ recommended

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that AHCA enter a final order granting APCH's licensure renewal application. In doing so, the ALJ noted that it is unsettled whether an agency seeking to deny a licensure renewal application based on alleged misconduct must prove the alleged misconduct by clear and convincing evidence or by a preponderance of the evidence. While concluding that AHCA had to prove the alleged deficiencies by a preponderance of the evidence, the ALJ noted that the foregoing conclusion "should not be read as a definitive ruling that in all non-renewal licensure cases, the preponderance of the evidence standard applies." Instead, the ALJ opined that the circumstances of a particular case could determine which burden of proof applies. With regard to the instant case, the ALJ noted that "[t]he Notice of Intent to Deny seeks to impose the ultimate penalty of non-renewal only, although the events giving rise to the Notice of Intent to Deny occurred many months earlier while APCH was duly licensed and acting in its capacity as a licensee. Had AHCA not waited until after the expiration of the license to take action, and instead, filed an administrative complaint seeking either the penalty of a fine or revocation, there would be no question that the burden of proof on AHCA in such a proceeding would be by clear and convincing evidence."

Rule Challenges

W.D., C.V., K.E. and K.M. v. Dep't of Health, DOAH Case No. 15-6009RP (Final Order Dec. 16, 2015).

FACTS: The Department of Health ("DOH") administers the Children's Medical Services Program ("CMS"), which provides financial assistance for medically necessary services to eligible children with special health care needs. On July 29, 2015, DOH published notice of its intent to repeal rule 64C-4.003, which requires CMS Pediatric Cardiac Facilities and CMS Cardiac Regional and Satellite Clinics to comply with certain standards published in October 2012. On October 22, 2015, Petitioners, CMS beneficiaries suffering from serious heart conditions requiring pediatric cardiac service, who received such services through the CMS program, filed a petition alleging that the proposed repeal of rule 64C-4.003 was an invalid exercise of delegated legislative authority. Petitioners alleged that a repeal of rule 64C-4.003 would reduce the quality of care available within CMS and deprive Petitioners of the high quality pediatric cardiac services to which they are entitled.

OUTCOME: The ALJ issued a Final Order dismissing the challenge, because Petitioners failed to prove that repealing rule 64C-4.003 "would be the proximate cause of a real or immediate diminution in the quality of cardiac care provided to CMS recipients." In doing so, the ALJ concluded that "[i]t should not and cannot reasonably be assumed that people do what's right in their private conduct, whether at work, in their homes, or out in public, only because the government has ordered them to behave in a particular fashion. Many people derive personal satisfaction from doing a job well, whether the job is, e.g., painting a house or performing open-heart surgery, and they strive to deliver a quality product, not in obedience to the superintending guidance of the administrative state, but because they *want* to. The notion, therefore, that every facility in the CMS network would suddenly stop providing quality pediatric cardiac services immediately upon the repeal of the Standards rests of pure speculation – and is a little insulting to the health care professionals who personally deliver those services. Such an imagined across-the-board loss of quality care is not reasonably foreseeable and cannot qualify as a real or immediate injury in fact for purposes of standing."

Three of the four Petitioners appealed the Final Order to the First District Court of Appeal, Case No. 1D15-5948, but later voluntarily dismissed. The fourth Petitioner, represented by the same counsel as the other three Petitioners, appealed the Final Order to the Third District Court of Appeal, where the appeal is pending as Case No. 3D16-0023.

Second Chance Jai-Alai, LLC, et. al. v. Dep't of Bus. & Prof'l Reg., Div. of Pari-Mutuel Wagering, DOAH Case Nos. 15-4352RP & 15-4353RP (Final Order Dec. 17, 2015).

FACTS: The Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("the Division"), proposed to adopt rule 61D-2.026(4), which would require that jai alai games be conducted on a three-walled court meeting specific height, length, width, make, and live viewing requirements ("Court Rule"). The Division also proposed to adopt rule 61D-2.026(6), which would require that jai alai permit holders utilize a rotational system of at least eight different players or teams ("Roster Rule"). Summer jai alai permit-holders filed petitions alleging the proposed Court Rule and Roster Rule were invalid exercises of delegated legislative authority.

OUTCOME: The ALJ issued a Final Order invalidating the proposed rules, determining that the Court Rule and the Roster Rule did not implement or interpret specific powers and duties granted by any enabling statute. The ALJ concluded: "Not one of the many provisions within sections 550.0251, 550.105, or 550.70 even mentions jai alai courts or rosters." As such, he determined that although the proposed rules did not contravene the statutes, they enlarged and modified the statutes. As the ALJ explained: "The Court Rule and Roster Rule do not contravene these statutory provisions any more than they contravene a statute governing the permitting of a power plant: the cited statutes do not address court dimensions and roster sizes. Clearly, though, the path from the cited statutes to the Court Rule and the Roster Rule required [the Division] to enlarge and modify one or more of these statutes to construe them as authority for a proposed rule governing court dimensions and roster sizes."

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Bid Protests

Ranger Construction Indus., Inc. v. Dep't of Transp. and Community Asphalt Corp., DOAH Case No. 15-5535BID (Recommended Order Nov. 20, 2015).

FACTS: The Department of Transportation ("DOT") elected to widen a 4.3 mile portion of the Kanner Highway in Martin County from four lanes to six, and DOT determined that the public interest would be best served if DOT utilized the adjusted-score design-build contract procurement procedures set forth in section 337.11(7), Florida Statutes, and in DOT rules of procedure authorized by section 337.11(7)(b). On September 22, 2014, DOT posted a notice describing the project on its "planned advertisement" webpage. DOT then officially announced the project with an October 6, 2014, posting on its "current advertisement" webpage. Both announcements contained a draft version of the RFP, and invited interested firms to submit expanded letters of interest detailing their qualifications and providing other information. By rule, only the three qualifying firms whose letters of interest were found responsive and who elected to proceed with the procurement process were "shortlisted" and entitled to receive the "final" RFP. DOT issued the "final" RFP to the three firms, and subsequently issued RFP addenda that amended the RFP. Notice of the addenda was posted on DOT's website, and each addendum, along with a revised RFP (as amended by the addenda), were transmitted electronically to the three participating firms. Each version of the RFP had a separate section setting forth protest rights, but none of the shortlisted firms protested any of the RFP addenda. One of the shortlisted firms, Ranger Construction Industries, Inc. ("Ranger Construction"), had objections to Addendum 3 issued on April 27, 2015, and voiced those concerns to DOT personnel. However, Ranger Construction did not file a notice of protest or a formal written protest in response to Addendum 3. Ultimately, DOT awarded the project to Community Asphalt Corp. Ranger Construction then filed a notice of protest and formal written protest, raising the same objections to Addendum 3 that had been informally raised with DOT officials. DOT filed a Motion to Relinquish Jurisdiction, alleging that Ranger Construction's Petition was an untimely specifications challenge. Ranger Construction argued in response that DOT's postings of the RFP and the addenda could not provide a clear point of entry, since they failed to comply with section 120.57(3), Florida Statutes, and rule 60A-1.021, because they were not on the MyFloridaMarketPlace vendor bid system at myflorida.com. Discovery was allowed on the issues raised by the Motion to Relinquish Jurisdiction.

OUTCOME: The ALJ granted the Motion to Relinquish Jurisdiction and issued a Recommended Order of Dismissal, concluding that "[t]he Petition challenges the DOT intended contract award solely on the basis of objections to the terms, conditions, and specifications of the RFP, as amended by Addendum 3. Because [Ranger Construction] failed to timely file a protest to the terms, conditions, and specifications of the RFP, its belated attempt to challenge the award to Intervenor on this basis must fail." The ALJ further concluded that "[h]aving chosen not to raise its specification objections in a timely Protest, and having submitted a price proposal based on the RFP as amended by Addenda 1 through 5, [Ranger Construction] waived its right to chapter 120 proceedings." Also, the ALJ concluded that Ranger Construction's untimely specifications challenge could not be cured by amending the Petition. While the Petition was filed within the window of opportunity to challenge DOT's intended contract award decision, Ranger Construction failed on two occasions to offer proposed amended petitions that raised grounds for challenging the intended award decision rather than the specifications in the addenda that were not timely challenged. As for Ranger Construction's argument that the points of entry offered by DOT were ineffective because the procurement documents on the MyFloridaMarketPlace vendor bid system, the ALJ cited language within section 287.057(3)(e)11, Florida Statutes, and rule 60A-1.032 in concluding that "DOT, as the procuring agency for procurements under section 337.11, is not required to conduct such procurements using MyFloridaMarketPlace."

Attorney's Fees

We Care Life Source, LLC v. Agency for Persons with Disabilities, DOAH Case No. 15-3621F (Final Order Nov. 18, 2015).

FACTS: The Agency for Persons with Disabilities ("APD") licenses group homes. On June 13, 2014, We Care Life Source, LLC ("We Care") filed an application to operate a group home facility in Wesley Chapel, Florida. Because it did not own the property on which its facility was to be operated, We Care was required to submit a copy of a fully-executed landlord-tenant lease agreement with its application. On July 29, 2014 (more than 30 days after the application was filed), APD notified We Care that certain required items were missing from the application. However, APD did not identify a lease agreement as one of those missing items. After receiving a second application with the supplemental information requested, the APD reviewer forwarded the second application to APD's Central Office in Tallahassee for final disposition. On October 6, 2014, APD issued its Notice of License Application Denial based upon the failure of We Care's application to include a lease agreement. Following a formal administrative hearing, an ALJ found that APD failed to comply with section 120.60(1), Florida Statutes, by notifying We Care of any apparent errors or omissions within 30 days after We Care filed its application. The ALJ accepted testimony that a lease agreement had been filed with We Care's initial application, but made

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no finding as to what happened to the document. Accordingly, the ALJ deemed We Care's application complete by operation of law and recommended that APD reconsider We Care's application. APD adopted the ALJ's recommendation and approved the application. On June 19, 2015, We Care filed a motion for attorneys' fees and costs pursuant to section 57.111, Florida Statutes.

OUTCOME: The ALJ denied We Care's motion for attorney's fees and costs. The ALJ reasoned that the APD was substantially justified in denying the application because APD's Central Office in Tallahassee was required by law to deny the application packet due to the absence of the required lease agreement. "This was reasonable and appropriate governmental action based on the information available to [APD] at the time." The ALJ also concluded that special circumstances made an award of fees unjust because if We Care's representative had "indicated in her request for a hearing that a lease agreement was submitted with the initial application, or otherwise raised this issue in a timely manner, or submitted a fully executed lease agreement to [APD] prior to the hearing, the dispute could have been resolved informally. In other words, had any one of those relatively simple steps been taken, it would have allowed [APD] to correct a mistake before the case proceeded to hearing."

Kenneth Stahl, M.D. v. Dep't of Health, Bd. of Med., DOAH Case No. 15-6760F (Final Order Dec. 23, 2015).

FACTS: The Department of Health ("DOH") filed a Second Amended Administrative Complaint on April 14, 2015, alleging that Dr. Kenneth Stahl performed a wrong procedure by removing an ovary and part of a fallopian tube during an appendectomy. On October 22, 2015, the Board of Medicine rendered a Final Order adopting an ALJ's recommendation that the case be dismissed. Dr. Stahl filed a renewed motion for attorneys' fees at DOAH on November 19, 2015, pursuant to section 57.105, Florida Statutes. DOH did not appeal the Final Order, but DOH responded in opposition to the motion for attorneys' fees by asserting that DOAH had no jurisdiction because Dr. Stahl's proposed recommended order did not discuss attorneys' fees.

OUTCOME: Because Dr. Stahl had complied with the "safe harbor" provision of section 57.105 by serving DOH with his motion for attorneys' fees on March 20, 2015, the ALJ concluded that DOH (by failing to object during the final hearing) waived any argument that Dr. Stahl failed to plead entitlement to attorneys' fees. As for the timeliness of Dr. Stahl's motion for attorneys' fees, the ALJ noted that the uniform rules applicable to administrative proceedings do not address the appropriate timing for filing fee or cost motions. However, because Dr. Stahl filed his motion for attorneys' fees 27 days after the Final Order by which he became the prevailing party, the ALJ concluded that the motion was timely. Nevertheless, the ALJ ultimately denied Dr. Stahl's motion for attorneys' fees on the merits, because Dr. Stahl failed to demonstrate that DOH knew or should have known that its prosecution was unsupported by the material facts necessary to establish its claims or that they were unsupported by the application of then-existing law to those facts.

Meet the New DOAH Case Notes Team Member

VIRGINIA LANGSTON PONDER is an Assistant General Counsel with the Department of Economic Opportunity. Ms. Ponder's responsibilities include litigation, public records law, and community development/planning. Ms. Ponder joined DEO in 2014 after two years as an intellectual property associate at Pennington Law, P.A., where her practice focused on intellectual property litigation and licensing.

Agency Snapshot: Department of Revenue

by Jamie L. Jackson

The Florida Department of Revenue is a Cabinet-based agency responsible for three primary functions: the administration of the state's child support program, oversight of the administration of property taxes, and the administration of the state's revenue laws. To accomplish these functions, the Department collects and distributes more than $1.5 billion dollars a year in child support payments, aids in the establishment of paternity, oversees the local appraisal and assessment of taxes of property, reviews the property tax roll for each Florida county, collects $38 billion dollars a year in taxes and fees while processing more than 9 million tax filings annually, and processes over $5 billion dollars in receipts for other state agencies. This is done in the Department's three primary programs: child support, property tax oversight, and general tax administration.

The Department is headed by the Governor and Cabinet comprised of the Attorney General, the Chief Financial Officer, and the Commissioner of Agriculture. The Department's Executive Director is appointed by the Governor and Cabinet and is responsible for the daily administration of the Department.

Executive Director:
Marshall Stranburg
Florida Department of Revenue
Post Office Box 5906
Tallahassee, Florida 32399-0100
Phone: 850-617-8600

Mr. Stranburg first joined the Department in 1991. Prior to being appointed as the Department's Executive Director in 2013, Mr. Stranburg has served as a senior attorney, Chief Assistant General Counsel, Deputy General Counsel, General Counsel, and Deputy Executive Director of the Department. [Ed. Note: Mr. Stranburg announced his resignation as Executive Director effective April 1, 2016. A replacement has not yet been announced.]

Agency Clerk:
Sarah Wachman Chisenhall
Phone: 850-617-8347
Fax: 850-488-7112

Mailing Address:
Florida Department of Revenue
Office of the General Counsel
Post Office Box 6668
Tallahassee, Florida 32314-6668

Location:
Florida Department of Revenue
Office of the General Counsel
Building 1, Suite 2400
2450 Shumard Oak Boulevard
Tallahassee, Florida 32399-0104

Hours for Filings:
8 a.m. – 5 p.m.

General Counsel:
Nancy Staff
Florida Department of Revenue
Post Office Box 6668
Tallahassee, Florida 32314-6668
Phone: 850-617-8347

Prior to becoming the General Counsel for the Department, Ms. Staff represented the Department of Labor and Employment Security, providing counsel for the administration of the Special Disability Trust Fund as well as the workers' compensation program for the state. She also served as the Deputy General Counsel at both the Department and the Department of Business and Professional Regulation. She received her J.D. in 1989 from the University of Florida.

Number of lawyers on staff: 27

Kinds of Cases:
The Office of the General Counsel (OGC) provides legal guidance and representation to the Department and is responsible for all legal opinions of the Department. The Department's attorneys provide support to the revenue litigation section of the Office of the Attorney General in the litigation of tax assessment and refund denial disputes. To accomplish its role in child support enforcement matters, the Department contracts with legal service providers to represent the Department's interests. Attorneys from the OGC function as subject matter experts and liaisons to facilitate this representation. In addition to its functions related to tax assessment disputes and child support enforcement proceedings, the OGC handles bankruptcy matters, procurement challenges, Sunshine Law and public records disputes, employment and personnel cases.

Practice Tips:
Prior to filing matters with the Department, practitioners should ensure that filings conform, both in content and in timeliness, with the Uniform Rules of Procedure contained within chapters 28-101 through 28-110 and 28-112, Florida Administrative Code.

For information related to requesting public records, visit http://dor.myflorida.com/opengovt/Pages/public_records.aspx.

Law School Liaisons

Spring 2016 Update from the Florida State University College of Law

by David Markell, Steven M. Goldstein Professor

This column lists the impressive roster of programs the College of Law has hosted or will be hosting this spring. It also highlights recent accomplishments of our College of Law students. We hope Section members will join us for one or more of these enrichment events.

Spring Semester 2016 Events

Special Guest Lectures

Governor Jack Markell (Delaware) made a special visit to the College of Law on February 12, 2016, to talk with faculty, students, and others about contemporary policy challenges.

Environmental Certificate and Environmental LL.M. Enrichment Series

The Environmental Certificate and Environmental LL.M Enrichment Series welcomed two distinguished speakers this spring: Courtney Schoen, Coordinator, Tallahassee's Think about Personal Pollution (TAPP) on January 20, 2016, and Kelly Samek, Gulf Restoration Coordinator, Florida Fish and Wildlife Conservation Commission on February 17, 2016.

Spring 2016 Distinguished Lecture

Carol Rose, Gordon Bradford Tweedy Professor Emeritus of Law and Organization and Professorial Lecturer in Law, Yale Law School, is the spring Distinguished Lecturer, on March 23, 2016, from 3:30 p.m. - 4:30 p.m. in Room 310, followed by a reception in the Rotunda. CLE credit approval is pending.

Guest Lecturers

Brent McNeal, Deputy General Counsel, Division of Vocational Rehabilitation and the Division of Blind Services, State of Florida Department of Education, will be guest lecturing in Professor Markell's Legislation & Regulation course this semester.

Bram Canter, Administrative Law Judge, State of Florida Division of Administrative Hearings, was a guest lecturer in Professor Markell's Administrative Law course in February.

Spring 2016 Colloquium

The Environmental, Energy and Land Use Law Spring 2016 Colloquium will take place on Wednesday, April 6, 2016, from 3:15 p.m. - 5:00 p.m. in Room A221, with a reception to follow in the Advocacy Center Reading Room.

More information on these events is available at http://law.fsu.edu/academics/jd-program/environmental-energy-land-use-law/environmental-program-events.

Recent Student Achievements

- Sarah Logan Beasley received the book awards for Oil and Gas Law and the online section of Energy Law. She has also accepted a clerkship with Judge Robert Hinkle, U.S. District Court for the Northern District of Florida, for 2016-2017.
- Sarah Logan Beasley and Stephanie Schwarz will be representing FSU Law again this February at the Pace National Environmental Law Moot Court Competition. This year's problem addresses timely questions concerning renewable energy, regulating carbon emissions, and the Clean Air Act.
- The *Journal of Land Use & Environmental Law* is working on its Spring Issue of Volume 31. The issue includes an important article on the Recovery of U.S. Fisheries written by Professor Katrina Wyman, Sarah Herring Sorin Professor of Law and Director, Environmental and Energy Law LLM Program, New York University School of Law, our Distinguished Lecturer from last spring. We are looking forward to this spring's Distinguished Lecturer, Professor Carol Rose, Gordon Bradford Tweedy Professor Emeritus of Law and Organization and Professorial Lecturer in Law, Yale Law School. The Executive Board consists of Stephanie Schwarz, Gannon Coens, Joseph Leavitt, Stefan Barber, Kristen Larson, and Lazaro Fields.
- The current Environmental Law Society Board is composed of President Sarah Fodge, Vice President Travis Voyles, Secretary Bailey Howard, Treasurer Jess Melkun, and Social and Networking Chair Stephanie Schwarz. ELS has an excellent mentor program that pairs up interested law students with local attorneys who practice environmental law. Along with mentor-mentee mixers every semester and a successful mentor-mentee kayaking trip last semester, there was a camping trip to St. George Island at the end of January and a Habitat for Humanity build with attorneys at Hopping Green & Sams in February.
- Robert Pullen has begun working at the Florida Fish and Wildlife Commission.

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1st DCA 2015); *Biscayne Bay Pilots, Inc. v. Fla. Caribbean Cruise Ass'n*, 177 So. 3d 1043 (Fla. 2015) (*Biscayne Bay Pilots II*).

All three cases involved requests by the Florida Caribbean Cruise Association ("FCCA") to reduce the rates of pilotage by 25 percent for commercial passenger cruise ships at PortMiami and Port Everglades. FCCA is a nonprofit trade association consisting of fifteen member cruise lines.[2] Two members of the PRRC, Thomas Burke and Enrique Miguez, were senior executives of FCCA members.[3]

FCCA's request to reduce pilotage rates in PortMiami was filed first, in March 2014. The application was filed pursuant to section 310.151(1)(b), Florida Statutes, which provides that applications for a change in rates of pilotage may be filed by "[a]ny pilot, group of pilots, or other person or group of persons whose substantial interests are directly affected by the rates established by the committee . . . ."[4] The PRRC is charged with investigating an application for a change in the rates of pilotage and conducting a public hearing on the application.[5] Following the public hearing, any dissatisfied party may seek a hearing at the Division of Administrative Hearings ("DOAH").[6]

The PRRC consists of seven members, all of whom must fit into statutorily designated categories.[7] Two members of the PRRC must be "actively involved in a professional or business capacity in the maritime industry, marine shipping industry, or commercial passenger cruise industry."[8]

Before the PRRC's scheduled public hearing concerning the rate reduction request in PortMiami, Biscayne Bay Pilots, Inc. ("BBP"), filed a motion pursuant to section 120.665 to disqualify Commissioners Burke and Miguez. The motion asserted that Commissioners Burke and Miguez should be disqualified for bias and prejudice because they are employed by members of FCCA – the very applicant seeking a reduction in pilotage rates for passenger vessels calling on PortMiami.[9]

Section 120.665 explicitly recognizes that even when the Florida Code of Ethics does not require a public officer to refrain from participating in a particular proceeding, there are times when an "agency head" should nonetheless be disqualified because of "bias, prejudice, or interest." Section 120.665(1) provides:

> Notwithstanding the provisions of s. 112.3143, any individual serving alone or with others as an agency head may be disqualified from serving in an agency proceeding for bias, prejudice, or interest when any party to the agency proceeding shows just cause by a suggestion filed within a reasonable period of time prior to the agency proceeding. If the disqualified individual was appointed, the appointing power may appoint a substitute to serve in the matter from which the individual is disqualified. If the individual is an elected official, the Governor may appoint a substitute to serve in the matter from which the individual is disqualified. However, if a quorum remains after the individual is disqualified, it shall not be necessary to appoint a substitute.

(Emphasis supplied).[10]

"Agency head" is defined in the APA as "the person or collegial body in a department or other government unit statutorily responsible for final agency action."[11] The PRRC is responsible for final agency action regarding rates.[12] Thus, the PRRC is an "agency head" subject to section 120.665.

The PRRC heard argument and unanimously voted to deny the motion to disqualify Commissioners Miguez and Burke at the beginning of the hearing, and a written order reflecting that decision was entered several weeks later.[13] At the conclusion of the hearing, the PRRC voted 4 to 3 (with Commissioners Burke and Miguez in the majority) to approve the 25 percent rate reduction requested by FCCA. That decision was not final, however, because a second meeting was to be scheduled to consider an order memorializing the oral vote to reduce rates.[14]

Before the vote on the motion to disqualify the commissioners, the PRRC's counsel advised that he did not believe the committee had the authority to disqualify two of its own members.[15] Nonetheless, the full committee voted on the motion. PRRC's counsel then asked Commissioners Burke and Miguez whether they wished to recuse themselves. Both orally declined, but no order was entered reflecting their statements.[16]

BBP filed a petition for writ of prohibition with the First District Court of Appeal within days of entry of the order reflecting the Committee's vote declining to disqualify Commissioners Burke and Miguez.[17] BBP also filed motions to stay further action by the PRRC on the rate decrease until the court ruled on the petition for writ of prohibition. The court entered a temporary stay until the PRRC could meet, and the PRRC granted the pilots' motion to stay on October 23, 2014.[18]

The court focused on whether the PRRC had the authority to vote on the motion to recuse two of its members, noting the question was one of first impression. "The parties have not cited, nor has our research located any case addressing who has the authority to rule on a motion to disqualify an individual serving on a collegial agency head: the agency head or the individual that is the subject of the motion," Judge Wetherell wrote for the majority. "The only reported cases applying section 120.665 to agency heads involve motions to disqualify an individual agency head . . . . Section 120.665 does not provide any guidance on the issue presented in this case. The statute clearly provides that individual members of a collegial agency head 'may be disqualified,' but it begs the question: by whom?"[19]

The majority ultimately concluded that the PRRC did not have the authority to vote on the motion; only the individual commissioners could vote to disqualify themselves. Because no orders had been entered reflecting their oral votes declining to do so, the court found that BBP's motion was premature. Thus, the petition for writ of prohibition was denied "without prejudice to the Pilots' right to seek review of the written orders entered by the individual commissioners."[20]

Although the court did not reach the merits of BBP's argument, the majority signaled in a footnote how it viewed the case: "Although the Cruise

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Association is the named party in the underlying proceeding, the cruise lines that are members of the association (including Royal Caribbean and Carnival) are the de facto parties because section 310.151(2), Florida Statutes, only allows groups whose 'substantial interests are directly affected by the rates set by the committee' to apply for a rate change and *Florida Home Builders Association v. Department of Labor and Employment Security*, 412 So. 2d 351 (Fla. 1982), and its progeny make clear that a trade association's standing to participate in an administrative proceeding is based on the fact that its members' substantial interests are being affected by the agency action at issue."[21]

That footnote, along with one other, helped shape the outcome of the next two cases. In footnote 5, the court relied on *Charlotte County v. IMC-Phosphates Company*[22] to state the test for legal sufficiency of a motion to disqualify an agency head for bias, prejudice, or interest: "whether the facts alleged would prompt a reasonably prudent person to fear that they would not obtain a fair and impartial hearing. It is not a question of how the [agency head] actually feels, but what feeling resides in the movant's mind and the basis for such feeling. The [agency head] may not pass on the truth of the allegations of fact, and countervailing evidence is not admissible."[23]

Once Commissioners Burke and Miguez entered orders refusing to disqualify themselves, BBP filed a second petition for writ of prohibition.[24] By that time, a similar petition also had been filed by the Port Everglades Pilots Association ("PEPA"), also alleging that Commissioners Burke and Miguez should be disqualified because they were, in essence, employed by the applicant entity.[25]

The court in *Port Everglades Pilots* agreed, relying on the *IMC-Phosphates* test for legal sufficiency of the motion, as well as on the footnote in *Biscayne Bay Pilots I* equating FCCA's member cruise lines (including Carnival and Royal Caribbean) to the

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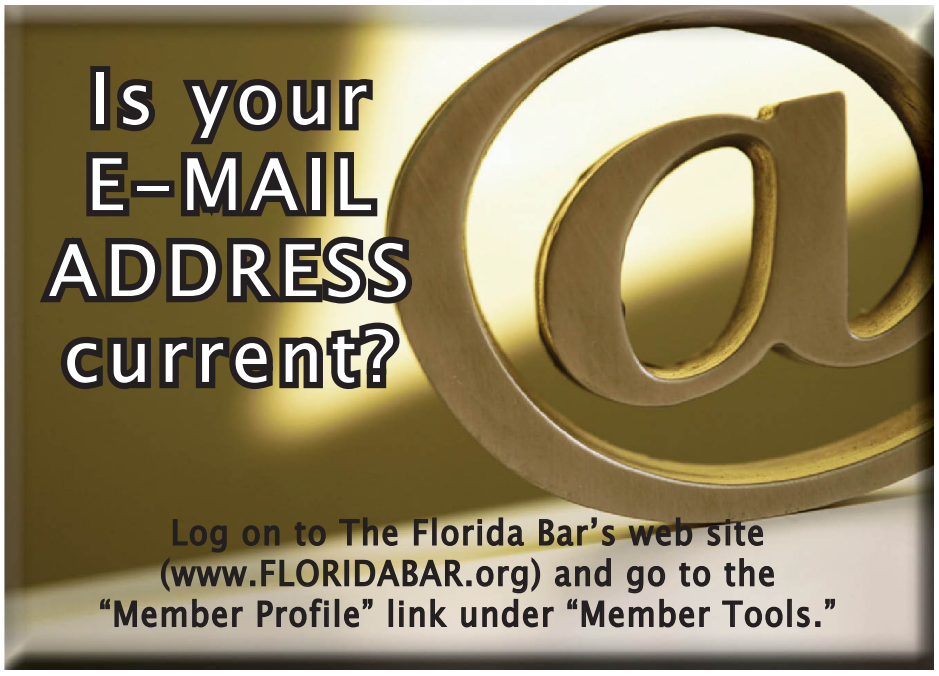

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applicant entity. The court also noted that the opinion in *IMC-Phosphates* states that "an impartial decision-maker is a basic component of minimum due process in an administrative proceeding" and that "in any motion to recuse the head of an administrative agency, the practical recognition of the numerous roles played by the agency as well as the agency head (investigator, prosecutor, adjudicator, and political spokesman) must be weighed against a reasonable fear on the part of the movant that it will not receive a fair and impartial hearing."[26]

The court also cited several other cases emphasizing the importance of a fair proceeding and that "the decision-maker must not allow one side in the dispute to have a special advantage in influencing the decision."[27] The court granted PEPA's petition for writ of prohibition, quashed the orders of Commissioners Burke and Miguez denying the motion for disqualification, and remanded with directions that the motion be granted.[28]

The court declined to consolidate the case involving BBP's second petition for writ of prohibition with PEPA's case, although both petitions were pending at the same time. Instead, a new panel[29] heard BBP's case and issued its opinion almost three months after *Port Everglades Pilots* was decided. The results, however, were the same.

The court in *Biscayne Bay Pilots II* relied on both footnote 2 in *Biscayne Bay Pilots I* and on *Port Everglades Pilots* to grant BBP's petition for prohibition and quash the orders of Commissioners Burke and Miguez denying the motion for disqualification. The court reasoned: "BBP's motion for disqualification should have been granted because a reasonably prudent person would fear that he or she would not obtain a fair and impartial proceeding before Committee members who are senior executives of the *de facto* parties that initiated the proceeding and whose rate change application is awaiting the Commissioners' decision."[30]

In the wake of these decisions, Commissioners Burke and Miguez left the PRRC. The Governor has appointed new members who are not employed by FCCA member cruise lines. Both petitions for rate decreases are still pending.

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Endnotes:

1 The Federalist No. 10 (James Madison), *available at* http://thomas.loc.gov/home/histdox/fed_10.html.

2 *Biscayne Bay Pilots II*, 177 So. 3d at 1044.

3 *Port Everglades Pilots*, 170 So. 3d at 954.

4 § 310.151(2), Fla. Stat. Chapter 310, Florida Statutes, governs pilots, piloting, and pilotage in the waters, harbors, and ports of Florida. Section 310.141 requires that, except in certain narrow circumstances, all vessels shall have a licensed state pilot or deputy pilot on board to direct the movements of the vessel when entering or leaving ports of the state or when underway on the navigable waters of the state's bays, rivers, harbors, and ports. Pilots are paid by each ship's owner for their services.

5 *Id*. at § 310.151(3), Fla. Stat.

6 *Id*. at § 310.151(4), Fla. Stat. Contrary to usual procedures involving proposed agency action under the APA, the PRRC's proposed rate determination is not stayed and is immediately effective even if the applicant or a substantially affected person or entity requests an administrative hearing. § 310.151(4)(b), Fla. Stat. The statute also requires that, pending entry of a final order in the proceeding, the pilots in the subject port are required to deposit in an interest-bearing account all amounts received that represent the difference between the previous rates and the proposed rates. *Id*.

7 *Id.* at § 310.151(1)(b), Fla. Stat.

8 *Id*. The PRRC's seven members also serve on the 10-person BOPC. Section 310.151(1)(b), Florida Statutes, states that the PRRC shall consist of:

> [T]wo board members who are licensed state pilots actively practicing their profession, who shall be appointed by majority vote of the licensed state pilots serving on the board; two board members who are actively involved in a professional or business capacity in the maritime industry, marine shipping industry, or commercial passenger cruise industry; one board member who is a certified public accountant with at least 5 years of experience in financial management; and two board members who are citizens of the state.

9 *Biscayne Bay Pilots I*, 160 So. 3d at 560. This was actually BBP's second motion for disqualification of PRRC members. As Judge Benton explained in his concurring opinion in *Biscayne Bay I*:

> Before Governor Scott appointed Commissioners Burke and Miguez, the Pilots had moved for disqualification of two other employees of cruise companies that would benefit from a reduction in pilotage fees at the Port of Miami. Board counsel reportedly advised these gentlemen, Commissioners Nielsen and Fox, or "intend[ed] to strongly advise" them, that recusal was in order; which apparently led them to resign from the Board, creating the openings Governor Scott then filled (with two other cruise company employees) shortly before the rate hearing at which Commissioners Burke and Miguez declined to disqualify themselves.

160 So. 3d at 564.

10 Section 310.151(1)(c), Florida Statutes, which governs the PRRC and its consideration of changes in pilotage rates, references section 112.3143, Florida Statutes, which is part of the Florida Code of Ethics for public officials. Section 310.151(1)(c) provides: "Committee members shall comply with the disclosure requirements of s. 112.3143(4) if participating in any matter that would result in special private gain or loss as described in that subsection."

11 § 120.52(3), Fla. Stat.

12 *Id.* at §§ 310.151(4)(a) and (7), Fla. Stat.

13 *Biscayne Bay Pilots I*, 160 So. 3d at 561.

14 *Id*.

15 *Id*.

16 *Id*.

17 The court originally treated the petition as one seeking review of non-final agency action under section 120.68(1), Florida Statutes, but, "upon reflection," concluded that "prohibition is the appropriate remedy to review the order in this case." 160 So. 3d at 562.

18 *Biscayne Bay Pilots I*, 160 So. 3d at 565-66 (Benton, J., concurring in result).

19 *Id*. at 562.

20 *Id*. at 564. The PRRC's counsel had advised the court at oral argument that orders would be entered reflecting the votes of the individual commissioners. *Id*. at 562, n.6.

21 *Id*. at 560, n.2.

22 824 So. 2d 298, 300 (Fla. 1st DCA 2000).

23 *Biscayne Bay Pilots I*, 160 So. 3d at 562, n.5, quoting *IMC-Phosphates*.

24 *Biscayne Bay Pilots II*, 177 So. 3d at 1044.

25 *Port Everglades Pilots*, 170 So. 3d at 954. As a result of the opinion in *Biscayne Bay Pilots I*, individual orders were entered reflecting the Commissioners' votes not to disqualify themselves.

26 *Id*. at 955, quoting *IMC-Phosphates*, 824 So. 2d at 300. *Biscayne Bay Pilots I* and *Port Everglades Pilots* were heard by different panels, with only Judge Benton overlapping. In *Biscayne Bay Pilots I* Judge Benton concurred in the result only, arguing that review of the PRRC's decision on disqualification could wait until review of final agency action pursuant to section 120.68, Florida Statutes. In *Port Everglades Pilots*, Judge Benton concurred with the majority.

27 *Id*. at 956, quoting *Cherry Communications v. Deason*, 652 So. 2d 803, 805 (Fla. 1995).

28 *Id*. at 957.

29 Judge Lewis overlapped on the panels in *Port Everglades Pilots* and *Biscayne Bay Pilots II*. He wrote the unanimous opinion in *Port Everglades Pilots*.

30 *Biscayne Bay Pilots II*, 177 So. 3d at 1045, quoting *Port Everglades Pilots*, 170 So. 3d at 956-57.

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