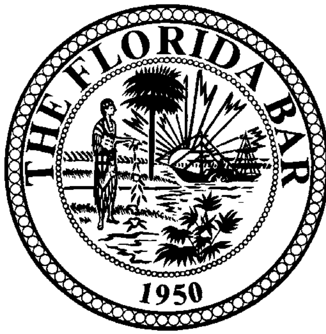

ADMINISTRATIVE LAW SECTION NEWSLETTER

Vol. XXXIV, No. 3 Jowanna N. Oates and Elizabeth W. McArthur, Co-Editors April 2013

Attention! Amendments to the Uniform Rules of Procedure Take Effect!

by Paul H. Amundsen

Tedious as they may be, the uniform rules of procedure and the APA are what drive Florida administrative practice. The substantive merits of your case, your effectiveness as an advocate, and therefore, *your client's interests* will be seriously compromised by lack of command over procedure. Agencies, Administrative Law Judges, and all counsel expect and demand it.

Did you ever notice that when you examine a familiar rule of procedure—freshly, in the context of new and different facts—you sometimes notice a wrinkle that you never thought of before? I have been reading the APA and the uniform rules for over thirty years and still see new things. No, it's not because my memory is failing or because I am crazy—it's because of a phenomenon wrought by the scriptural quality of rules and laws, and the application of law to fact. Because of this phenomenon, early on I developed a habit that I still try to instill in younger lawyers: revisit and re-read the applicable rule of procedure *every time* before citing to it or relying upon it. I have been heard to say many times: "Eye-ball the . . . rules!" (Not a complete quote.)

Now, after two and a half years in the making, there really ARE new things in the uniform rules for all of us to "eye-ball." If your law practice revolves around Florida administrative procedure—which is highly likely if you are still reading this—you will be absolutely riveted by the fascinating, page-turning and thrill-packed

See "Uniform Rules" page 17

From the Chair: Pro Se Protocols

by F. Scott Boyd

One of the goals of Florida's innovative Administrative Procedure Act in 1974 was to allow citizens to inexpensively and simply contest agency decisions. The expansion of due process rights ushered in by *Goldberg v. Kelly*[1] certainly played a role in the creation of this policy, but it is also clear that use of the term "substantial interests" in the Act was intended to expand the availability of hearings well beyond those instances in which a hearing was constitutionally required.[2] Recognizing that the courts would be ill-equipped to hear so many new cases, and that the formalities of full judicial hearings would often be unnecessary, the Act created a new Division of Administrative Hearings (DOAH) to provide a more streamlined process while attempting to balance the values of independence and agency expertise.[3]

While most practitioners today might concede that a DOAH hearing is more efficient than trial in circuit court, administrative hearings can still be quite complex. In addition to familiarity with the substantive law involved, a party may need to be familiar with the Administrative Procedure Act, the Uniform Rules, the Rules of Civil Procedure relating to discovery, and much of the Evidence Code. In addition, many administrative law cases have constitutional

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FROM THE CHAIR
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separation of powers issues lying just below the surface, which parties ignore at their peril. As Justice Scalia quipped, "administrative law is not for sissies."[4]

Notwithstanding the complexity of administrative hearings, many parties at DOAH do not hire an attorney to represent them, likely often due to cost considerations.[5] DOAH Clerk Claudia Llado advises that out of 5,428 cases referred to DOAH by agencies in fiscal year 2011-2012, 3,057 involved an unrepresented party.[6] Thus, a full 56% of DOAH cases present the special challenges inherent in a pro se case.

THE UNEASY UNREPRESENTED

Even the most basic issues can be confusing to a citizen at his or her first administrative hearing. Some believe that the ALJ is an employee of the agency. Many are confused by the discovery process, and do not understand either how to conduct basic discovery themselves or the consequences of failing to respond to requests from the agency. Others create uncomfortable and awkward situations for agency counsel when they ask them for advice. Many pro se litigants introduce hearsay evidence at hearing, unaware of the limitations on its use. Others believe that everything they have told the agency, and all documents they have provided to it, are already admitted into evidence (to the extent they understand the concept of evidence at all). Some have difficulty conducting cross-examination or distinguishing between unsworn argument and sworn testimony. Others do not understand which party has the burden of proof, or what that really means. Professional agency counsel, concerned with the quality of the hearing afforded to a pro se litigant, will tell you that it is often much more difficult to try a case against a pro se litigant than against one who is represented by competent counsel.

While most ALJs attempt to assist pro se litigants with procedural questions that may come up during the course of a hearing, other issues arise which might have been completely resolved earlier had the pro se litigant only been better informed. What often is needed is the opportunity for a citizen to simply talk in confidence with someone familiar with administrative hearings at an early point in the process.

DOAH Chief Judge Robert S. Cohen approached the Administrative Law Section last year to see if there was a way the Section might be able to assist pro se litigants, especially those unable to afford an attorney. Section Chair Allen Grossman agreed, and Executive Council member Richard Shoop graciously agreed to chair a special ad hoc committee to examine the issue. It was decided that the goal should be to set up a pilot program to offer basic legal advice to pro se litigants early in the process, to see what impact it might have. The Section concluded that, at least initially, it should try to work under the umbrella of a legal aid association already set up to provide assistance. This would establish a limited geographic region, identify individuals unable to afford an attorney, provide liability insurance for volunteers, and provide an administrative structure. The Section contacted John Fenno, Director of Development/Private Attorney Involvement at Legal Services of North Florida (LSNF) to discuss possible options.

LSNF'S LEGAL ADVICE HOTLINE

After talking with John, it seemed likely that many pro se litigants at DOAH might meet the guidelines for assistance from LSNF or other legal aid associations. LSNF provides services to low-income individuals in sixteen counties in North Florida. The income thresholds are based on household size and are set at approximately 125% of the federal poverty guidelines, though applicants with greater incomes may also be eligible if certain of their expenses can be deducted or if their assistance can be funded from certain dedicated sources (such as funds directed to senior citizens or domestic and sexual violence victims). Among other services supplied by the Private Attorney Involvement program, LSNF operates a telephonic Legal Advice Hotline in which volunteer attorneys return calls from eligible persons seeking advice, primarily in landlord/tenant, consumer, and family law matters. John Fenno was enthusiastic about working with the Administrative Law Section to assist pro se litigants at DOAH.

It was decided that the first step would be for the Section to provide LSNF with some extra Hotline volunteers and reference materials outlining DOAH procedures (while a few of the current Hotline volunteers are experts in administrative procedures, most are not). Richard Shoop began putting together basic administrative law training materials to add to LSNF's Hotline Manual, and solicited help in areas with which he was unfamiliar (special thanks to Colin Roopnarine at DBPR for his help and DOAH Judge Pete Peterson for portions dealing with child support proceedings). Richard did a wonderful job, and LSNF now has administrative law guidance in place for attorney volunteers to consult as they are advising Hotline callers. The next step was to make DOAH litigants aware that they might be eligible to utilize these services.

DOAH'S NEW INITIAL ORDERS

In many cases, the first information a pro se litigant receives after a case is referred to DOAH is the Initial Order, which explains how to file documents in the case and asks the parties to work together to provide the ALJ with mutually agreeable dates and a location for the hearing. It often also contains a one-page Summary of Procedures, which, as its name suggests, briefly covers such topics as how to register for electronic filing, conduct discovery, arrange for a court reporter, exchange witness and exhibit lists, and request special accommodations under the Americans with Disabilities Act. In all cases arising in the Second Judicial Circuit which involve an unrepresented party, beginning on February 1, 2013, this summary has also included the following notice:

> Under a program between Legal Services of North Florida (LSNF) and the Administrative Law Section of The Florida Bar, parties not represented by an attorney (Pro

Se Litigants) may be entitled to a free telephone consultation with an attorney. If you are interested in this program, you may call LSNF's Legal Advice Hotline at (850) 385-0029 in order to qualify for assistance. Once qualified, volunteer attorneys make legal advice calls between 2:00 and 5:00 p.m. every Monday through Thursday.

Deputy Chief Judge David Maloney also directed that for cases in which an Initial Order is not usually issued, such as those involving child support or special education, similar language will be provided in the Notice of Hearing or other preliminary order.

UPCOMING CLE

In order to help prepare current Hotline volunteers and others who might be interested in assisting DOAH pro se litigants, John Fenno has arranged for a CLE program to be conducted on April 23rd. It will explain the new pro se program and focus on questions unrepresented litigants are likely to have about DOAH procedures. Chief Judge Bob Cohen, Judge Pete Peterson, and AHCA Clerk Richard Shoop have all agreed to be presenters for the one-hour lunch program, so it should be both fun and informative. It will be held in the LSNF conference room at 2119 Delta Boulevard in Tallahassee, so attendance will be limited to about 30. The CLE will also be teleconferenced live on April 23, from noon to 1:00 p.m., for those unable to attend in person.

More information on the CLE is available from LSNF. Contact John Fenno at (850) 701-3306 or john@lsnf.org. The course brochure is not yet complete at the time of this writing, but as soon as it is available it will be posted on the Administrative Law Section's website at: http://www.flaadminlaw.org/.

YOUR HELP IS NEEDED

A volunteer at LSNF may be on the telephone Hotline at this very moment explaining to someone in an upcoming DOAH case how to request a continuance. If you want to broaden your administrative law experience and can volunteer to talk with some unrepresented parties like this, we can certainly use your help.

If you have a particular administrative law specialty that might be implicated in a pro se case, you can also volunteer to talk with the Hotline attorneys about more specific questions as they arise. A few Section attorneys have already stepped up to help in this role: Gar Chisenhall, Department of Business and Professional Regulation; Fred Dudley, Holland & Knight; Richard Shoop, Agency for Health Care Administration; and Allen Grossman, Grossman, Furlow, & Bayo. LSNF will post your willingness to discuss issues with the Hotline attorneys, along with your area of expertise and your contact information, at the volunteer attorney work stations at LSNF. If you are a government attorney, remember that many agencies will allow you to take up to five hours of administrative leave per month to help on the Hotline.

Some of you may wish to go still further to provide full-fledged pro bono representation, and LSNF will of course support you in that effort. Whatever assistance you can provide will be gratefully accepted. A good first step might be to attend the upcoming CLE mentioned earlier. Why not log some CLE credit while you find out more about the program?

It is too early to tell how many pro se litigants at DOAH will take advantage of this opportunity for consultation prior to their appearance at hearing, what the effects of that assistance will be, or whether this pilot program will ultimately be expanded throughout the state. If you are interested in donating some pro bono hours in your administrative law specialty, though, this is the ideal time for you to get involved in this important new program. Please give Richard Shoop a call now at (850) 412-3671.

Endnotes:

[1] 397 U.S. 254 (1970).

[2] As the Reporter noted, the Act inserted hearing officers into cases that previously would not have been constitutionally or statutorily subject to either administrative hearing or judicial review under writ of certiorari. Arthur England, "Reporters Comments on Proposed Administrative Procedure Act for the State of Florida" at 17 (1974), reprinted in Arthur J. England, Jr. and L. Harold Levinson, *Florida Administrative Practice Manual* (Supp. 1999).

[3] For a discussion of some of the legislative history and purpose behind the creation of the Division of Administrative Hearings, see Boyd, *Florida's ALJs: Maintaining a Different Balance*, 24 Nat'l Ass'n Admin L. Judges 175 (2004).

[4] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511 (1989). In context, Justice Scalia's comment was addressed as much to the sometimes tedious nature of administrative law as to its complexity, but these characteristics do often go together.

[5] As recently as 2011, some had hoped that the United States Supreme Court would recognize a categorical right to counsel in civil cases that might result in a loss of liberty. In *Turner v. Rogers*, 131 S. Ct. 2507, 2512 (2011), a pro se mother sued a pro se father for failing to pay child support. The issue was whether the father could be conditionally confined for civil contempt without a right to an appointed attorney. The Court unanimously rejected a federal right to counsel. It should be noted that a majority directed courts to provide some minimal procedural assistance to such pro se litigants, however.

[6] There were actually more unrepresented parties, since these 3,057 cases had 4,770 pro se litigants involved (a single case sometimes involves multiple unrepresented parties, such as a married couple or a parent and child).

Jowanna Oates New Co-Editor

Everyone reading this newsletter is indebted to Jowanna Oates, who recently has agreed to assume the position of Co-Editor, serving along with Elizabeth McArthur. On behalf of the entire Section, I want to thank Jowanna for her willingness to take on this new responsibility, and especially for her excellent work on this issue on short notice. Please drop Jowanna a note today thanking her for serving as Co-Editor and let her know of your thoughts on possible topics and authors for future articles. As you are reading this, she will already be hard at work on the next issue!

– Scott Boyd

APPELLATE CASE NOTES

by Mary F. Smallwood and Lawrence E. Sellers, Jr.

Adjudicatory Proceedings
Sharkey v. Florida Elections Commission, 90 So. 3d 937 (Fla. 2d DCA 2012) (Opinion filed June 22, 2012)

Sharkey, a candidate for city Fire Commissioner, made allegations against his opponent in the elections campaign that the opponent had wasted taxpayers' money in taking trips to Harvard and Paris to engage in education or fire preventions classes. A complaint was filed with the Florida Elections Commission asserting that the allegations from Sharkey were malicious false statements. Sharkey argued that the statements were based on information from a colleague who had been a Fire Commission liaison. He admitted that the statements were ultimately determined to be false. The administrative law judge determined that Sharkey had engaged in reckless disregard of the facts by failing to independently determine the truth of the allegations.

The court reversed. It held that the administrative law judge had applied an incorrect legal standard. It held that reckless behavior must be determined by whether the individual publishing the information entertained serious doubts about the truth of the allegations.

Morgan v. Department of Environmental Protection, Board of Trustees of the Internal Improvement Trust Fund and Adeeb, 98 So. 3d 651 (Fla. 3rd DCA 2012) (opinion filed September 19, 2012).

In 2005, Adeeb applied for a permit with the Department of Environmental Protection to use sovereign submerged lands for construction of a 500-foot long dock extending into the Atlantic Ocean. DEP granted the permit and Adeeb began construction four years later. Morgan subsequently filed suit to secure an injunction against the construction of the dock and to require removal. DEP also issued a noticed of violation and an order for corrective action for, among other things, Adeeb's false submissions in a geological survey taken prior to the issuance of the permit. Adeeb requested a formal administrative hearing, which DEP forwarded to DOAH. Adeeb and DEP thereafter submitted a joint request to the administrative law judge to place the case in abeyance. The ALJ granted the request and continued to grant similar requests over a two-year period.

Morgan moved to intervene in the administrative proceedings. However, because the proceedings were an enforcement action, the ALJ denied the motion on the grounds that Florida law does not grant standing to citizens in agency enforcement proceedings. Thereafter, Morgan filed an amended complaint with the trial court. In count III, Morgan petitioned for enforcement of agency action pursuant to s. 120.69, F.S. Adeeb moved to dismiss for lack of subject matter jurisdiction. The trial court granted the motion.

On appeal, the court affirmed both rulings. First, the court held that the ALJ properly ruled that citizens do not have a right to intervene in agency enforcement proceedings. The court interpreted the Environmental Protection Act of 1971, giving citizens the right to intervene as a party without meeting standing requirements, to apply only to license and permit proceedings. *See* s. 403.412(5), F.S. (2010).

The appellate court also affirmed the trial court's dismissal of Morgan's enforcement action brought pursuant to s. 120.69. That statute provides that a substantially interested person may not bring a cause of action for enforcement of agency action if an agency has filed and is diligently prosecuting a petition for enforcement. The appellate court agreed that DEP had continually prosecuted the action over time, even if that action has consisted of joint requests to suspend further action.

School Bd. of Hillsborough Cty. v. Tampa School Development Corp. d/b/a Trinity School for Children, 38 Fla. L. Weekly 211 (Fla. 2d DCA 2013) (Opinion filed January 25, 2013)

Trinity School operated two charter schools in Hillsborough County across the street from each other,

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one an elementary school and the other a middle school. The schools were operated by the same governing board and shared staff and facilities. The schools originally operated under one charter but were subsequently separated into two charters.

Trinity subsequently determined that it could save substantial funds by reconsolidating the schools under a single charter. After consultation with the school board and the Department of Education, Trinity was led to believe that reconsolidation was allowable.

However, based on a statutory change that would have cost the school board approximately $60,000 per year if the schools were reconsolidated, the school board reversed its position and rejected the consolidation.

Trinity filed a petition for an administrative hearing, and the school board moved to dismiss for lack of subject matter jurisdiction.

Pursuant to s. 1002.33(6)(h), F.S., the Division of Administrative Hearings has jurisdiction to rule on matters related to charter schools except for application denial, charter termination, or denial of charter renewal (which are addressed in other provisions and have different review procedures). The administrative law judge determined that the school board's action did not fall into any of these categories, and denied the motion to dismiss. An evidentiary hearing was conducted, and the administrative law judge issued a final order approving the consolidation of the two schools.

On appeal, the court agreed with the determination that DOAH had subject matter jurisdiction. The court concluded that the reconsolidation was a modification of the charters, not a termination, denial, or nonrenewal. On the merits, the court found competent substantial evidence to support the administrative law judge's final order, and affirmed. The court did not comment on the somewhat unusual procedural posture, whereby the agency was the appellant from an adverse final order issued by an administrative law judge in a substantial-interest adjudicatory proceeding.

In addition, of interest was the court's observation, in rejecting a challenge to the constitutionality of the charter school statutes, that there was a dearth of record evidence directed to the constitutional claims. The suggestion was that if parties want to raise a constitutional issue on appeal, they need to develop the record accordingly in their administrative hearings.

Duke's Steakhouse Ft. Myers, Inc. v. G5 Properties, LLC and South Florida Water Management District, 106 So. 3d 12 (Fla. 2d DCA, January 18, 2013)

G5 Properties applied for an Environmental Resource Permit to construct a medical office building adjacent to Duke's Steakhouse. A permit was issued by South Florida Water Management District, and G5 constructed the project. Subsequent to completion, Duke's challenged the permit. Following an administrative hearing, the administrative law judge recommended denial of the permit. The judge found that the application met all of the permitting criteria except for requirements relating to water quality storage and treatment. The District argued that the permit should issue because the project would result in a net improvement in water quality. However, the ALJ concluded that the District had not established sufficient authority for a net improvement standard to justify permit issuance.

The District rejected the recommended order and issued the permit.

On appeal, Duke's argued that the District had inappropriately rejected findings of fact in the recommended order. The court affirmed the final order; it held that the District was not modifying findings of fact but simply rejecting the administrative law judge's interpretation of substantive provisions of law. It noted that an agency's interpretation of its own law should not be rejected unless clearly erroneous.

Gonzales-Gomez v. Department of Health, 38 Fla. L. Weekly 32 (Fla. 3d DCA 2012) (Opinion filed December 19, 2012)

Gonzales-Gomez was convicted of conspiracy to commit healthcare fraud in violation of federal law. He was sentenced to 24 months in federal prison, followed by 24 months of supervised release, payment of costs, and restitution. He continued to cooperate with the federal authorities in their ongoing investigation; however, he did not notify the State Board of Medicine that he had surrendered his license to practice medicine to his parole officer.

The Department of Health subsequently filed a three-count administrative complaint. Count 1 charged Gonzales-Gomez with violating section 458.331(1)(c), F.S., by being convicted of a crime directly relating to the practice of medicine. Counts 2 and 3 charged him with violating s. 456.072(1)(x), F.S., by failing to report the conviction to the Board of Medicine within 30 days and by failing to update practitioner information to reflect a conviction for health care fraud.

Gonzales-Gomez requested an informal hearing before the Board in an effort to mitigate the penalties. He argued that the Board should follow its own precedent in similar factual cases and mitigate the penalty. The prosecuting attorney argued that the only disciplinary rule that applied, Rule 64B8-001(2)(c)1, required revocation and a fine. The Board adopted that argument and entered a final order revoking Gonzales-Gomez's license and imposing a $10,000 fine. On appeal, the court held that the Board properly applied the only guideline and penalty applicable to the offense, and that the Board did not abuse its discretion in refusing to mitigate the penalty. In a footnote, the court suggested that the facts in this case involved a different level of offense and therefore the level of penalty to be applied, than the precedent cited by Gonzales-Gomez.

Bollone v. DMS, Division of Retirement, 100 So. 3d 1276 (Fla. 1st DCA 2012) (Opinion filed November 26, 2012)

Bollone requested an administrative hearing to contest the decision by the Division of Retirement of the Department of Management Services (DMS) to forfeit all of his Florida Retirement System rights and benefits based on his pleas of no contest to three counts of child pornography in connection with his employment

continued...

APPELLATE CASE NOTES
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as an instructor at Tallahassee Community College (TCC). Following a formal hearing, the ALJ entered a recommended order finding, among other things, that Bollone knowingly possessed child pornography using the computer that had been assigned to him, that his possession was done willfully, that he was aware that this use of this computer was a violation of TCC policies, and that he had pled no contest to three counts of possession of child pornography, which are third degree felonies. The ALJ recommended that DMS enter a final order finding that Bollone was a public employee convicted of a "specified offense" committed prior to retirement pursuant to s. 112.3173, F.S., and directing the forfeiture of his FRS rights and benefits. Bollone filed no exceptions to the recommended order, and DMS entered a final order adopting the recommended order in its entirety.

On appeal, the court agreed that the ALJ properly determined that Bollone had been convicted of a "specified offense" under the "catch-all" provision in s. 112.3173(2)(e)6, F.S. In particular, the court agreed that the criminal acts were done willfully and with intent to defraud the public of the right to receive the faithful performance of his duties as a professor at TCC, were done to obtain a profit, gain or advantage for the employee (here, his personal gratification), and were done through the use of the power, rights, privileges, duties, or position of his public employment (the use of his work computer). Accordingly, the court affirmed the final order.

Appeals

Department of Corrections v. Schwarz, 37 Fla. Law Weekly 1926 (Fla. 1st DCA 2012) (Opinion issued August 10, 2012)

On a motion for reconsideration, the court reversed its prior decision relating to a decision of the Public Employees Relations Commission ("PERC") that reinstated five Department employees with back pay. The court had previously dismissed the appeal by the Department on the grounds that the PERC order reserved jurisdiction to determine the amount of back pay and was, therefore, not a final order. The Department moved for reconsideration, noting that PERC had subsequently entered orders determining back pay for each of the employees prior to the appeal being dismissed but subsequent to its filing.

The court granted the motion for reconsideration and held that a premature filing of an appeal vests jurisdiction in the appellate court so long as a final order is issued below before dismissal of the appeal.

Attorney's Fees

Town of Davie v Santana, 98 So. 3d 262 (Fla. 1st DCA 2012) (Opinion filed October 12, 2012)

The Town of Davie claimed that the ALJ erred in concluding that he lacked jurisdiction to adjudicate the Town's motion for attorney's fees and costs filed pursuant to s. 120.595(1), F.S., after the ALJ closed the cases and relinquished jurisdiction to the Florida Commission on Human Relations.

On appeal, the court affirmed because there was no pending motion for attorney's fees when the appellees voluntarily dismissed their cases and when the ALJ closed the files and relinquished jurisdiction. The court distinguished the ruling by the Fifth DCA in *G.E.L. Corp. v. Department of Environmental Protection*, 875 So. 2d 1257, 1263 (Fla. 5th DCA 2004), where the motion for fees was filed prior to the voluntary dismissal and the ALJ's order closing the file. The appellate court also rejected the Town's claim that the ALJ's ruling deprived the Town of its substantive right to attorney's fees and costs without due process.

Licensing

Sabates v. Department of Health, 104 So. 3d 1227 (Fla. 4th DCA 2012) (Opinion filed December 19, 2012)

Dr. Sabates requested a formal administrative hearing to dispute the charges in an administrative complaint filed by the Department of Health. The hearing was conducted by one ALJ. After the hearing, the recommended order was issued by a different ALJ. The recommended order explained that the case was transferred due to the imminent retirement of the prior ALJ. Following the issuance of the recommended order, the Department moved for an order assessing costs and fees for the investigation and prosecution of the case. Dr. Sabates filed timely exceptions to the recommended order, primarily arguing that it was invalid because it was not issued by the ALJ who presided over the hearing. He also opposed the motion for fees, disputing the total amount and the accuracy of the documents attached to the affidavit. The Board rejected the exceptions and entered a final order adopting the recommended order. The Board also granted the Department's motion for fees in the full amount requested.

On appeal, the court rejected Dr. Sabates argument that his due process rights were violated when the successor ALJ issued the recommended order. The court held that the requirements for due process in the administrative context are set out in the APA, and the APA expressly authorizes a different ALJ than the one who presided over the hearing to make findings of fact and conclusions of law based on only the existing record. *See* s. 120.57(1)(a), F.S. The court recognized that both the First and Second Districts had affirmed this concept, and it distinguished a contrary ruling by the Fourth District because that decision did not address the application of this express provision in the APA. Accordingly, the court held that Dr. Sabates' due process rights were not violated.

However, the court held that the Board should not have granted the motion for attorneys' fees because the Department did not support the award with attorney affidavits. The court held that an award of attorneys' fees must be supported by competent substantial evidence by the attorney performing the services and by an expert as to the value of those services, citing *inter alia,* the Second District's decision in *Georges v Department of Health*, 75 So. 3d 759, 762 (Fla. 2d DCA 2011). The court also recognized that the

First District has certified conflict with *Georges*, in *Carlisle v DOH*, 37 Fla. L. Weekly 2403 (Fla. 1st DCA Oct. 16, 2012).

Rulemaking

Department of Health v. Bayfront Medical Center, Inc., et al, 37 Fla. L. Weekly Fed. C2754 (Fla. 1st DCA 2012) (Opinion filed November 30, 2012)

Four existing trauma centers filed a rule challenge to Rule 64J-2.010, a Department of Health rule that allocates trauma centers throughout the state. Following a formal hearing, the ALJ issued an order concluding that the rule was invalid, both because it exceeded or contravened the grant of legislative authority and because it was arbitrary and capricious.

On appeal, the court held that the ALJ correctly determined that the rule contravened the Department's grant of rulemaking authority, as it failed to implement changes to the authorizing statutes enacted in 2004. The trauma statutes were amended in 2004, but the rule had been unchanged since 1992.

The court concluded that the rule did not implement the 2004 amendments to s. 395.4015 F.S., which required that trauma regions "cover all geographical areas of the state and have boundaries that are coterminous with the boundaries of the regional domestic security task forces established under s. 943.0312." The challenged rule continued to set forth nineteen trauma service areas instead of changing to trauma regions coterminous with the boundaries of the seven regional domestic security task forces. Accordingly, the court found that the rule did not implement the 2004 amendments to s. 395.4015.

The court also agreed that the rule failed to implement the 2004 amendments to s. 395.402 F.S. The version of that statute in effect when the rule was promulgated set forth nineteen trauma center service areas reflected in the rule. But the 2004 version of the statute required the Department to complete an assessment of Florida's trauma system by February 1, 2005, and provided that the nineteen trauma service areas would remain in effect until the completion of the 2005 assessment. The Department completed the 2005 assessment and recommended that the nineteen trauma service areas be reduced to seven regions that are coterminous with the task force regions; but the rule had not been amended to reflect this recommendation.

Standard of Proof

RLI Live Oak, LLC v. South Florida Water Management District, 99 So. 3d 560 (Fla. 5th DCA 2012) (Opinion filed August 31, 2012); *on motion for rehearing, rehearing en banc, or certification*, 37 Fla. L. Weekly 2528 (Fla. 5th DCA Oct. 26, 2012)

RLI Live Oak filed suit in circuit court seeking a declaratory judgment that property it owned did not contain jurisdictional wetlands. The Water Management District counterclaimed that RLI had engaged in unlawful construction activities on jurisdictional wetlands without obtaining a permit. The court awarded the District civil penalties after finding that RLI had not obtained necessary permits.

On appeal, the court reversed and remanded. It held that the circuit court had applied a preponderance of the evidence standard in determining that violations occurred when the required standard was clear and convincing.

The court subsequently denied the District's motion for rehearing and rehearing en banc, but granted the motion for certification. The court agreed that the applicability of the clear and convincing evidence standard presented an issue of great public importance, and certified the question to the Florida Supreme Court.

Mary F. Smallwood *is a partner with the firm of GrayRobinson, P.A. in its Tallahassee office. She is a Past Chair of the Administrative Law Section and a Past Chair of the Environmental and Land Use Law Section of The Florida Bar. She practices in the areas of environmental, land use, and administrative law. Comments and questions may be submitted to* mary.smallwood@gray-robinson.com.

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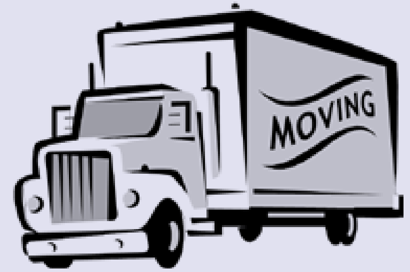

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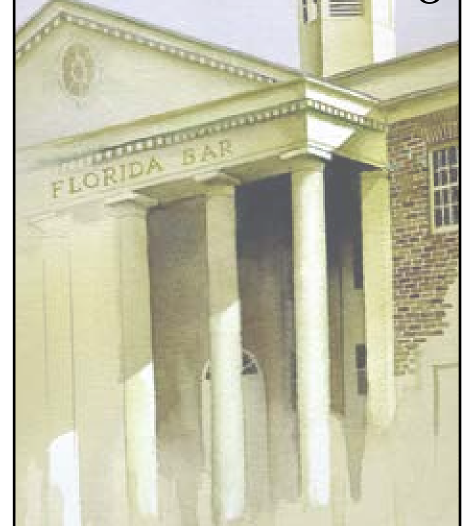

DOAH CASE NOTES

As previewed in the last Newsletter issue, Gar Chisenhall has assembled a team and coordinated the preparation of the first installment of the new DOAH Case Notes in time for publication in this issue. Last issue's preview described the concept for this new feature: to find and provide summaries of final, recommended, and non-final administrative orders that demonstrate legal concepts helpful to many (or all) administrative law practitioners. The mission is to highlight those orders that further the knowledge base of the administrative law bar.

Gar renews his invitation to all administrative law practitioners to alert the team to final, recommended, or non-final orders they believe have significant legal concepts that should be shared with other practitioners. The team is particularly interested in learning of significant non-final orders, as those will be the hardest to ferret out without the help of practitioners. Please send the DOAH case number and the name of the case to garnett.chisenhall@dbpr.state.fl.us. Also, please describe why you believe the order is significant.

SUBSTANTIAL INTEREST HEARINGS

Miami-Dade County et al. v. Dep't of Juvenile Justice, DOAH Case Nos. 10-1893, 10-1894, 10-1895, 10-1896, 10-1945, 10-2194, 10-2195, & 10-3166 (Recommended Order Aug. 22, 2012), DJJ Case No. 12-0072 (Final Order Jan. 11, 2013)

FACTS: Section 985.686(1), Florida Statutes, provides that the State and counties have a joint obligation to contribute to the financial support of the detention care provided for juveniles. Each non-fiscally constrained county is required to pay the costs of providing detention care for juveniles for the period of time prior to final court disposition; the State assumes that responsibility after final court disposition. Section 985.686(5) provides a framework by which each county's costs are estimated at the beginning of the fiscal year, based on the county's prior use of secure detention. The cost estimates are reconciled at fiscal year's end by the Department of Juvenile Justice (DJJ), to each county's actual costs when actual usage is known.

PROCEDURAL HISTORY: Several counties challenged DJJ's assessments from the FY 2008-2009 annual cost reconciliation. The counties argued the assessments were inconsistent with section 985.686 and implementing rules 63G-1.001 - 63G-1.009, Fla. Admin. Code.

OUTCOME: After a very extensive analysis, the ALJ concluded that DJJ "deviated from the requirements of section 985.686(5) by failing to calculate 'actual costs' and by treating the counties as a collective entity responsible for the collection of the entire amount of the Shared Trust Fund appropriation for fiscal year 2008-2009." Those counties that timely challenged the DJJ reconciliation and that did not accept a subsequent adjustment offered by DJJ were entitled to have their actual costs determined for providing predisposition juvenile detention for fiscal year 2008-2009 without regard to any other county. In addition, the ALJ disagreed with DJJ's position on what constituted "final court disposition," noting that DJJ's position was based on the faulty premise that "disposition" should be read to mean "commitment to DJJ," whereas a court's disposition could result in a detention outcome other than commitment to DJJ.

DJJ filed exceptions. In the Final Order, DJJ granted the exception to the ALJ's interpretation of "final court disposition." DJJ also granted the exception to the ALJ's determination that DJJ did not follow the requirements of section 985.686(5) in performing its annual reconciliation. The DJJ reinstated the annual reconciliation announced for all counties.

The counties have appealed to the First District Court of Appeal.

Landings at Cross Bayou, LLP v. Fla. Housing Finance Corp., DOAH Case No. 12-2899 (Recommended Order Jan. 22, 2013)

FACTS: Landings at Cross Bayou, LLP ("Landings") is in the business of providing affordable housing units. The Florida Housing Finance Corporation ("FHFC") is a public corporation whose responsibilities include administering a federal tax credit program for low income housing. Because the demand for low income housing tax credits exceeds the credits available under the tax credit program, affordable housing developments must compete for funding. In order to assess the merits of proposed developments, FHFC established a competitive application process known as the Universal Cycle.

Landings, along with other competing applicants, applied to FHFC for funding in the 2011 Universal Cycle. Pursuant to FHFC's rules, Landings filed a "Notice of Possible Scoring Error" on a competing application filed by MLF Towers. The notice pointed to an inconsistency between the address of MLF Towers' development site according to one exhibit, and the site described in the land purchase contract. MLF Towers attempted to cure the deficiency, but Landings argued the cure contained information inconsistent with other information in MLF Towers' application. However, FHFC ultimately accepted MLF Towers' cure materials. MLF was awarded funding, and Landings was denied funding.

PROCEDURAL HISTORY: Landings petitioned for an administrative hearing, alleging that it would have received funding but for FHFC's erroneous scoring of MLF Towers' application.

OUTCOME: The ALJ recommended that FHFC enter a final order con-

cluding it erred in scoring MLF Towers' application and that Landings was entitled to an award of tax credit funds from the next available allocation. The ALJ took note of previous FHFC decisions and concluded that he was "at a loss to reconcile the approach urged by [FHFC] in this case with its own precedents." The ALJ found that although FHFC's position "is not unreasonable when considered in isolation," it was so at odds with FHFC's historic practice as to be arbitrary. As the ALJ noted, "No rationale was proffered as to why the inconsistency in the instant case was so trivial as to be disregarded, but similar or even more trivial inconsistencies in other cases were cause for rejection. No rationale was proffered as to why MLF Towers was given [an] opportunity to cure the deficiency caused by its cure materials, when other applications were not."

The ALJ was not swayed by the testimony of FHFC's executive director that FHFC would decline to interpret its rules "in a way that doesn't help us get to the right conclusion, the factually accurate conclusion." In rejecting that rationale, the ALJ pointed to FHFC precedents that placed a high priority on establishing a bright line for applicants. "The reasons for this priority are clear and salutary. [FHFC] receives hundreds of applications during each application cycle, and could not begin to give each application the attention that would be required by a subjective evaluation to 'weigh or to determine the materiality of an inconsistency.' Strict objective review of the four corners of an application may lead to results that appear harsh in individual cases, but has the virtue of treating all applicants equally and enabling [FHFC] to process the volume of applications before it in a timely fashion."

Memorial Healthcare Group, Inc. v. AHCA, et al., DOAH Case No. 12-0429CON (Recommended Order Dec. 7, 2012)

FACTS: Shands Jacksonville applied for a Certificate of Need ("CON") to establish a new 100-bed "satellite" general acute care hospital in northern Jacksonville, under a modified CON application process enacted by the 2008 Legislature for these projects.

PROCEDURAL HISTORY: After its initial review, AHCA published notice of its preliminary approval of Shands Jacksonville's CON application to establish a new 100-bed acute care hospital. Memorial, an existing hospital, filed a petition challenging the preliminary decision.

OUTCOME: The ALJ recommended that AHCA enter a final order denying the CON application. The ALJ found that AHCA's deferential attitude toward applications for new hospitals was not supported by the current statutory review scheme. Although the 2008 changes to the CON laws streamlined the process somewhat and eliminated several previously applicable CON review criteria for new acute care hospital projects, the ALJ found it significant that "the Legislature did not remove 'need'. . . as a review criterion." In addition, "an applicant for a new hospital must still prove that, on balance, approval of the application is consistent with the statutory and rule review criteria." The ALJ found that Shands Jacksonville failed to persuasively establish need for its proposed satellite hospital.

DISCIPLINARY/ENFORCEMENT ACTIONS

Dep't of Health, Bd. of Med. v. Umesh Madhav Mhatre, M.D., DOAH Case No. 12-1705PL (Recommended Order Nov. 20, 2012)

FACTS: Dr. Mhatre is a psychiatrist who treated S.C. between 1999 and May of 2008 for moderate to severe mental illness. Beginning in the spring of 2004, Dr. Mhatre prescribed Geodon (an anti-psychotic drug), and S.C. responded very positively. During his treatment of S.C., Dr. Mhatre also gave lectures for Pfizer Pharmaceuticals to small groups of mental health providers on Geodon's benefits. Between 2005 and March of 2008, S.C. participated in six seminars with Dr. Mhatre, describing her experience with Geodon and comparing it to other psychotropic drugs that had been prescribed for her. Unfortunately, S.C. experienced a relapse and voluntarily admitted herself to a crisis stabilization unit in July of 2008. A discharge summary noted that S.C. identified Dr. Mhatre's strong encouragement for her to participate in the seminars as a recent stressor.

PROCEDURAL HISTORY: The Department of Health filed a complaint on behalf of the Board of Medicine (Board), alleging that Dr. Mhatre violated section 458.331(1)(t), Florida Statutes, by failing to meet the relevant standard of care. The most noteworthy allegation was that Dr. Mhatre committed a "boundary violation" by supposedly recruiting S.C. to appear in commercial presentations on behalf of a drug company.

OUTCOME: The ALJ recommended that the Board dismiss the complaint. The ALJ found that "there was no violation of the relevant standard of care with respect to Dr. Mhatre's care and treatment of patient S.C." In the course of making that finding, the ALJ noted that "there was no statute or rule, as compared to sexual misconduct, that identified the type of conduct alleged in this case as a boundary violation, and that [Dr. Mhatre's expert witness] testified that he knew of no peer review or authoritative literature that identified this conduct as a departure from the standard of care." The ALJ concluded: "Dr. Mhatre testified credibly that it never occurred to him that allowing S.C. to appear at the Pfizer presentations was improper. With no statute, rule, or authoritative literature advising against it, his position is reasonable." In addition, the ALJ found that "there was no evidence presented that Dr. Mhatre persuaded S.C. to participate in the presentations."

Dep't of Health, Bd. of Med. v. Oscar Ramirez, M.D., DOAH Case No. 12-0358PL (Recommended Order July 10, 2012), DOH Case No. 2011-12111 (Final Order Dec. 17, 2012)

FACTS: Dr. Ramirez was licensed to practice medicine in Florida, and he was board-certified in plastic surgery. In July 2011, the Maryland State Board of Physicians ("the MD Board")

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revoked Dr. Ramirez's license to practice medicine in Maryland. The MD Board concluded that Dr. Ramirez violated the standard of care on two occasions by performing a combination of plastic surgery procedures in a single operation in an office-based surgical setting instead of in a hospital or ambulatory surgical center.

PROCEDURAL HISTORY: The Department of Health issued an administrative complaint on behalf of the Board of Medicine ("Board"), alleging that Dr. Ramirez violated section 458.331(1)(b), Florida Statutes, by virtue of disciplinary action having been taken against his license to practice medicine in another state.

OUTCOME: The ALJ found Dr. Ramirez guilty of having his license to practice medicine revoked in another jurisdiction. The ALJ recommended that the Board enter a final order imposing a reprimand and a $1,000 fine, based on the ALJ's analysis of rule 64B8-8.001(2)(b), Fla. Admin. Code, the Board's disciplinary guidelines rule. The applicable penalty range was as follows: "From imposition of discipline comparable to the discipline which would have been imposed if the substantive violation had occurred in Florida to suspension or denial of the license until the license is unencumbered in the jurisdiction in which disciplinary action was originally taken, and an administrative fine ranging from $1,000 to $5,000."

In its Final Order, the Board agreed that rule 64B8-8.001(2)(b) required a determination of the comparable substantive violation that would have been charged against the practitioner if the underlying incident had occurred in Florida. However, the Board disagreed with the ALJ's conclusion that the rule required the fact-finder to determine whether the underlying facts (as presented in the other state's final order) would have constituted a violation of the substantive charge under Florida law. Instead, the Board interpreted the rule as requiring a determination of what penalties would be imposed if the practitioner was charged in Florida with the substantive violation that occurred in the other state. The Board concluded that "its reading of rule 64B8-8.001(2)(b) is more reasonable than that of the ALJ's because it does not require the tribunal to speculate as to what would have occurred in Florida if the out of state disciplinary action occurred in Florida and was charged and litigated under Florida law."

Despite disagreeing with the ALJ's interpretation of rule 64B8-8.001(2)(b), the Board accepted his penalty recommendation. Dr. Ramirez did not appeal the Final Order.

Dep't of Health, Bd. of Med. v. Herbert R. Slavin, M.D., DOAH Case No. 12-79PL (Recommended Order Jan. 7, 2013)

FACTS: Dr. Slavin, a licensed physician, diagnosed a patient with a thyroid dysfunction, and prescribed medication. Periodically over the next several months, Dr. Slavin saw the patient and continued the same course of treatment. Six months after the initial diagnosis, the patient was admitted to the hospital with chest pains and other symptoms. The hospital's endocrinologist attributed the patient's symptoms to physician-induced overactive thyroid, and the patient was taken off the medicine prescribed by Dr. Slavin.

PROCEDURAL HISTORY: The Department of Health filed an administrative complaint on behalf of the Board of Medicine ("Board"), alleging that Dr. Slavin violated section 458.331(1)(t), Florida Statutes, in that his treatment of the patient fell below the appropriate standard of care.

OUTCOME: At the hearing, the Board's expert offered his opinion that Respondent deviated from the standard of care by prescribing and refilling an unwarranted prescription. The expert based his standard-of-care opinion on guidelines promulgated by the American College of Endocrinology ("ACE Guidelines"). The Board's expert stated that he found the ACE Guidelines to be "absolute and binding."

The ALJ found that the Board failed to prove a standard-of-care violation. Instead, the Board's expert relied solely on the ACE guidelines, contending that a failure to follow the ACE guidelines alone constituted a violation of the standard of care. The ALJ concluded that while an expert may rely on information that has not been admitted into evidence, such as the ACE guidelines, in forming an opinion, it is improper for an expert to base an opinion entirely on hearsay. The ALJ found that the Board's expert's opinion showed a "misunderstanding of the means by which a standard of care is properly formulated." Guidelines published by professional associations like the American College of Endocrinology are "just guidelines," and do not establish a standard of care. Rather, a standard of care is demonstrated by "prevailing practices in the community," and the demonstration of the "ordinary skills, means and methods that are recognized as necessary and which are customarily followed" by physicians in an area of practice in a community.

Dep't of Revenue v. Colorcars Experienced Automobiles, Inc., DOAH Case No. 12-1956 (Recommended Order Dec. 13, 2012), DOR Case No. 2013-001(Final Order Jan. 24, 2013).

FACTS: Colorcars Experienced Automobiles, Inc. ("Colorcars"), a used car business, held a dealer certificate under chapter 212, Florida Statutes, which required it to collect sales tax from its customers and remit the sales tax to the Department of Revenue ("DOR"). In 2005, DOR asserted a sales tax deficiency from three prior years of approximately $185,000, plus penalties and interest. Colorcars initially petitioned for an administrative hearing, but the owner-qualified representative and DOR signed an Agreed Dismissal with Prejudice, by which Colorcars dismissed its petition and acknowledged that the DOR sales tax assessment was final as of 2008. Thereafter, Colorcars made no voluntary payments to reduce the 2008 sales tax assessment, and interest mounted. In April 2009,

DOR froze funds in a Colorcars bank account, and, after litigation, DOR was able to levy on roughly $64,000. Subsequently, Colorcars filed returns reporting sales tax collected from customers over two months, but Colorcars did not pay the collected taxes over to DOR.

PROCEDURAL HISTORY: DOR filed an administrative complaint to revoke Colorcars' dealer certificate based on violations of Chapter 212, including the failure to pay the 2008 assessment that had grown, with interest, to over $375,000, and the failure to remit sales taxes collected from customers in two recent months. Colorcars requested an administrative hearing.

OUTCOME: The ALJ found that DOR clearly and convincingly proved that Colorcars failed to comply with chapter 212, by failing to pay the substantial sales tax liability from the 2008 assessment that Colorcars admittedly owed. In addition, the ALJ found that Colorcars failed to pay sales taxes collected from its customers over a two-month period. The ALJ rejected Colorcars' argument that it was unable to make payments due to DOR's freeze on the bank account set up for electronic tax payments, because the evidence showed that Colorcars could have made the payments by other means, but never tried.

The ALJ also rejected Colorcars' claim that it was deprived of its right to counsel. Two days before the final hearing, new counsel filed a notice of appearance and motion for continuance because he had "just been retained." By amended motion for continuance, filed "less than 24 hours before the hearing was supposed to begin," new counsel disclosed that he was scheduled to be in court in another county on the day of the hearing. The ALJ looked to rule 28-106.210, Fla. Admin. Code, which provides that continuances will not be granted unless requested at least five days before the scheduled hearing, "absent emergency." In denying the motion and amended motion for continuance, the ALJ found: "Respondent's failure to retain counsel until the last minute and Respondent's failure to ensure that the counsel retained at the last minute was actually available for the scheduled final hearing, did not constitute emergencies."

In the conclusions of law, the ALJ discussed the interplay between the asserted right to counsel and the factors to consider in ruling on a last-minute motion for continuance. The ALJ cited case law stating that there is no guaranteed right of counsel in administrative proceedings. In this case, Colorcars was informed of its right to represent itself or to obtain representation by counsel or a qualified representative, and made its election by designating the owner (a lawyer licensed to practice in another state) as Colorcars' representative. Colorcars maintained the election throughout the entire pre-hearing phase, was informed of the limitations on continuances, and waived its right to change its election by not attempting to do so until the last minute and offering no legitimate excuse for not doing so sooner.

DOR rendered a Final Order adopting the Recommended Order and revoking Colorcars' dealer certificate. Colorcars has appealed to the Second District Court of Appeal.

In Re: John Marks, DOAH Case Nos. 12-2508EC & 12-2509EC (Recommended Order Nov. 27, 2012); Comm'n on Ethics Case No. 13-004 (Final Order Jan. 30, 2013)

FACTS: John Marks, mayor of Tallahassee ("City"), was a voting member of the City Commission ("Commission") and presided over Commission meetings. Mr. Marks was also "of counsel" to a law firm based in Miami. In the course of performing city business, Mr. Marks met Bueno Prades, an account executive for Honeywell International, Inc. ("Honeywell"). Anticipating a Honeywell matter coming before the Commission for a vote, Mr. Marks asked Mr. Prades to determine whether Honeywell or any of its subsidiaries was represented by the law firm to which Mr. Marks was of counsel. He was told there was no such relationship. Although Mr. Marks would usually check with the firm itself regarding conflicts, Mr. Marks relied solely on the information provided by Mr. Prades. On four occasions, Mr. Marks voted at Commission meetings on matters that resulted in private gain or loss to Honeywell. Contrary to the information provided by Mr. Prades to Mr. Marks, Honeywell was, at the relevant time, a law firm client. The reason that Mr. Prades found no relationship between the law firm and Honeywell was because the firm had been hired by an insurance company to defend Honeywell, and was not hired by Honeywell itself.

Mr. Marks was also a paid member of the board of advisors of ADE, an Atlanta-based not-for-profit organization established to help develop and deploy broadband technology to underserved communities. In 2010, the City applied for a federal Broadband Technologies Opportunity Program ("BTOP") grant. The BTOP is a grant program administered by an office within the U.S. Department of Commerce to bring broadband internet infrastructure and service to underserved communities. The City's BTOP grant application identified ADE as one of three "partners" that would contribute products or services to the proposed project. The City was awarded the BTOP grant. The Commission, including Mr. Marks, voted in favor of a "recommended action" to approve the City's participation in the grant.

PROCEDURAL HISTORY: The Commission on Ethics found probable cause to believe that Mr. Marks violated section 112.3143(3), Florida Statutes, which prohibits voting in an official capacity on any measure which would inure to the gain or loss of any principal by whom the voter is retained, or to the parent or subsidiary of a corporate principal by which the voter is retained. The Commission based its probable cause determination on Mr. Marks having voted on four matters that inured to the private gain of Honeywell, while of counsel to a law firm representing Honeywell, and also, on Mr. Marks having voted to approve the City's participation in the BTOP grant, while serving in a compensated position for ADE.

OUTCOME: The ALJ found that the evidence was insufficient to clearly

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and convincingly prove violations of section 112.3143(3), and recommended that the Commission on Ethics issue a public report so finding. With regard to Honeywell, the ALJ concluded that Mr. Mark's reliance on the company representative, Mr. Prades, was not unreasonable at the time, even though in hindsight, it was a mistake in that the inquiry did not reveal the true state of affairs. With regard to the BTOP grant, the ALJ determined that ADE could not have benefited from the Commission vote. Because ADE was a 501(c)(4) organization engaged in lobbying activities, it was ineligible to accept BTOP grant money. The ALJ noted that under the "remote and speculative test," the voting prohibition did not apply in situations where, at the time of the vote, there was uncertainty whether there will be any gain or loss. Here, the ALJ determined that any benefit to ADE from the Commission vote would not merely have been remote and speculative, but illegal under federal law.

The Commission on Ethics rendered a Final Order adopting the ALJ's recommendation.

Lee County Sch. Bd. v. Charles Staub, DOAH Case No. 12-2579 (Recommended Order Dec. 11, 2012), LCSB Case No. 12-0008 (Final Order Jan. 22, 2013)

FACTS: Charles Staub was a plumber employed by the Lee County School District ("District") since 2003. His personnel file contained several reports of improper work, unacceptable behavior, and conflicts with other employees. He had been disciplined a number of times, including four written warnings.

PROCEDURAL HISTORY: The District's superintendent filed a petition to terminate Mr. Staub's employment, alleging that Mr. Staub had committed willful neglect of duties, insubordination by failing to obey direct orders, and misconduct in office. Mr. Staub requested an administrative hearing, and the case was referred to DOAH for hearing and issuance of a Recommended Order to the Lee County School Board ("Board") for final action.

OUTCOME: In the Recommended Order, the ALJ found deficiencies in Respondent's work, such as failing to properly install a drain pan and a pressure relief line when replacing a hot water heater, and leaving a rubber glove over a smoke detector. The ALJ also found that Respondent failed to repair a leaking toilet before going home for the day, and failed to help unload a van, both contrary to a supervisor's explicit directions. The evidence also substantiated an allegation that Respondent called a co-worker a vulgar name. However, the ALJ found no credible non-hearsay evidence to support several other allegations in the petition.

The ALJ reviewed Mr. Staub's personnel file, including the prior discipline for incidents of alleged wrongdoing. The ALJ noted that the Board properly followed its protocol for progressive discipline, culminating in the petition for termination. Although a number of the allegations in the petition were proven, the ALJ found that the proven allegations did not add up to just cause for Respondent's termination: "While there is some evidence to generally acknowledge the bases of the claims, there is

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not a preponderance of evidence, as presented by the Board, to substantiate just cause for termination of Staub's employment."

The Board filed exceptions. In its Final Order, the Board granted exceptions and found competent substantial evidence that Respondent committed insubordination, willful neglect of duties, and misconduct. In adopting some of the exceptions, the Board noted that the ALJ failed to credit facts to which the parties had stipulated, which established that some of the alleged misconduct was set forth in written reprimands, which were not grieved by Respondent. Accordingly, the Board concluded that evidence of what actually occurred was not necessary, because Respondent waived his right to contest those allegations.

The Board concluded that determining just cause for termination was a matter within the Board's substantive jurisdiction, and that a preponderance of the evidence substantiated just cause to terminate Respondent's employment.

RULE CHALLENGES

Fla. Med. Ass'n, et al., v. Dep't of Health, Bd. of Nursing, DOAH Case No. 12-1545RP (Summary Final Order Nov. 2, 2012)

FACTS: The Board of Nursing ("Board") proposed an amendment to its "unprofessional conduct" rule, rule 64B9-8.005, Fla. Admin. Code, to "establish professional guidelines for the administration of conscious sedation and to update the instances of unprofessional conduct" for licensed nurses in the state of Florida. The Board identified the sources of its statutory rulemaking authority for the proposed rule as sections 464.006 and 464.018(1)(h), Florida Statutes, and the law implemented as section 464.018(1)(h).

PROCEDURAL HISTORY: The Florida Medical Association ("FMA"), Florida Osteopathic Medical Association ("FOMA"), and the Florida Podiatric Medical Association ("FPMA") filed a petition challenging the proposed rule amendment. The Petitioners' arguments were as follows: 1) the Board exceeded its rulemaking authority pursuant to section 120.54(3)(a)1, Florida Statutes, and enlarged the "specific provisions" of the law implemented by the proposed rule; 2) the proposed rule was vague; and 3) the Board failed to comply with rulemaking requirements in sections 120.54 and 120.541, Florida Statutes.

OUTCOME: The ALJ determined that the proposed rule amendment was invalid on several grounds. First, the ALJ found that the Board materially failed to follow rulemaking procedures in a number of respects. The Board did not describe the information relied on to justify its failure to prepare a Statement of Estimated Regulatory Costs ("SERC") or to submit the rule for legislative ratification, despite acknowledging that regulated persons or entities would be required to bear the cost of additional training under the rule, nor did the Board prepare a reasonable estimate of what this additional training cost would be. The ALJ also determined that the proposed amendment violated the single-subject requirement in section 120.54(1)(g). In this regard, the ALJ pointed to the rule notices, which referred to the subject matter variably as either unprofessional conduct or conscious sedation. Beyond the material errors of rulemaking procedure, the ALJ concluded that the proposed rule exceeded the Board's legislatively delegated rulemaking authority, and contravened other restraints on rulemaking. The rulemaking authority relied on by the Board only authorized the Board to adopt rules defining "unprofessional conduct" for purposes of disciplinary action. Instead, the proposed rule amendment purported to set standards of care and scope of practice for Florida's licensed nurses, despite the absence of statutory rulemaking authority for the Board to adopt rules setting practice standards, and despite statutory restrictions on such rulemaking. Finally, with regard to the Petitioners' vagueness challenge, the ALJ found the proposed rule amendment vague in one limited respect, by virtue of a confusing reference to podiatrists in the definition of "duly authorized practitioner." Except to that limited extent, the ALJ was not persuaded that the proposed rule amendment was vague.

The Board has appealed to the First District Court of Appeal.

Fla. Institute for Neurologic Rehab. v. Dep't of Health, DOAH Case No. 12-3463RX (Final Order Jan. 25, 2013)

FACTS: The Florida Institute for Neurologic Rehabilitation ("FINR") is licensed as a transitional living facility ("TLF") treating 84 patients. On the hearing date, approximately 45 of FINR's patients suffered from non-traumatic brain or spinal cord injuries. FINR's remaining patients suffered from traumatic brain or spinal cord injuries. The Department of Health's ("DOH") rules prescribe the services that may be provided by TLFs to their patients. Rule 64I-1.005(1)(b) provides that "TLF services are solely for persons who have sustained brain or spinal cord injury as defined in section 381.745(2), F.S." That statute defines "brain or spinal cord injury" to mean only those injuries resulting from external trauma.

PROCEDURAL HISTORY: FINR filed a petition challenging Rule 64I-1.005(1)(b) as an invalid exercise of delegated legislative authority because it: (a) enlarges, modifies, or contravenes the specific provisions of law implemented; and (b) is arbitrary or capricious.

OUTCOME: The ALJ concluded that the challenged rule was invalid. The ALJ found that the rule "enlarges and contravenes the statutory authority provided the Department by sections 400.805 and 381.739-381.79, and is not supported by either the plain and unambiguous language of the statutes at issue or basic rules of statutory construction." The ALJ also found that "the decision to exclude care at TLFs for non-traumatic injuries was arbitrary." The ALJ was persuaded by FINR's evidence "that the etiology of brain disorders makes little, if any, difference in either a patient's deficits or their needs for rehabilitation. For example, patients with both traumatic and non-traumatic brain injury may have communication disorders, problems speaking, and aphasias,

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and may require speech, language, and physical therapy." In contrast, "[t]he Department offered no testimony as to the factual basis for distinguishing between the causes of brain injury or any rationale, other than its incorrect statutory interpretation, for limiting treatment at TLFs to patients with traumatic injury."

BID PROTESTS
Lab. Corp. of Amer. v. Dep't of Health, et al., DOAH Case No. 12-3170 (Recommended Order Dec. 10, 2012), DOH Case No. 12-007 (Final Order Jan. 16, 2013).

FACTS: The Department of Health ("DOH") issued an Invitation to Bid ("ITB") for clinical lab testing services. Laboratory Corporation of America ("Labcorp") and Quest Diagnostics Clinical Laboratories, Inc. ("Quest") were competing bidders. The DOH announced its intent to award the contract to Quest.

PROCEDURAL HISTORY: Labcorp timely filed a notice of intent to protest, following by a formal written protest, to challenge DOH's intended award to Quest. Quest intervened.

OUTCOME: The ALJ determined that DOH did not act contrary to its governing statutes, rules, or policies, or the proposal specifications. The ALJ rejected Labcorp's argument that Quest's proposal was fatally defective by failing to comply with the ITB requirement to "identify" the "key personnel" proposed for the services. Labcorp argued that the ITB required specific names, rather than a general description of the qualifications of personnel who would fill the key roles. The ALJ disagreed, finding that the winning bidder complied with the ITB requirement to "identify" the "key personnel" by providing a general description rather than specific names of the staff. The ALJ reasoned as follows: "The names are likely meaningless to the Department. 'Sharon Kaplan, Project Manager' provides no more useful information than does Quest's description of the education, knowledge, and experience it requires of a project manager." The ALJ found that even if one could characterize Quest's response as a deviation from the ITB requirement, such deviation would only be a "minor irregularity" rather than a fatal failure to meet a "mandatory requirement," because Quest's response had no demonstrable effect on the price bid, it did not adversely impact the interests of DOH, and there was no competitive advantage gained by not identifying the personnel by name.

DOH rendered a Final Order adopting the Recommended Order, dismissing Labcorp's bid protest, and awarding the contract to Quest.

ATTORNEY'S FEES
Secure Enterprises, LLC v. Office of Ins. Reg. and Financial Servs. Comm'n, DOAH Case No. 12-3604F (Final Order Jan. 16, 2013).

FACTS: The Legislature amended section 627.0629, Florida Statutes, to require that insurer rate filings provide discounts for six categories of fixtures and construction that mitigate windstorm damage to residential property. The Office of Insurance Regulation and Financial Services Commission ("OIR") adopted a form and a rule incorporating the form by reference, to implement the statutory amendment. In adopting the forms, OIR relied on the engineering expertise and computer modeling capability of Applied Research Associates ("ARA") and a detailed report that ARA had produced. However, in DOAH Case No. 12-1994RX, Secure Enterprises, LLC ("Secure") successfully challenged the validity of one form and its incorporating rule based on the form's omission of any discount for fixtures and construction techniques that increase the wind resistivity of doors, which was one of the six discount categories.

PROCEDURAL HISTORY: Secure filed a petition for attorney's fees pursuant to section 120.595(3), based on Secure's successful challenge of the OIR form/rule.

OUTCOME: Even though the Petitioner successfully challenged an OIR form and incorporating rule, the ALJ denied the request for attorney's fees, finding that OIR demonstrated that its actions were substantially justified, in that "there was a reasonable basis in law and fact at the time the actions were taken" to adopt the form and rule. *See* § 120.595(3).

The ALJ observed that the establishment of discounts for mitigative fixtures and construction techniques is a complicated process, and that to develop the challenged form, OIR was dependent on highly specialized engineering expertise, featuring computer modeling. In developing the form, OIR relied on ARA's detailed report, which purported to address all six discount categories, but which, upon dissection, was determined to have collapsed two categories--impact resistivity and wind resistivity--into one category. Given the complexity of the subject matter, the fact that the omission of one discount category was "not apparent in the richly detailed 2002 ARA Report[,]" and the added factor of time pressure to implement the statute, the ALJ found a reasonable basis in fact for OIR's actions adopting the form in reliance on ARA. The ALJ also found that while the statute's mandate for six categories of discounts was clear, putting meaning to the statutory terms implicated the same complicated process that led the ALJ to find that OIR acted with a reasonable basis in fact by relying on ARA's expertise. The ALJ equated OIR's reliance on ARA to the sort of reliance by a prosecuting agency on an expert to determine probable cause for disciplinary action. In that context, the ALJ noted that even where experts disagree, a lone expert's opinion can provide an agency with a reasonable basis for action.

Secure appealed the Final Order to the First District Court of Appeal.

Meet the DOAH Case Notes Team

***Team Coordinator:* Gar Chisenhall**

Gar Chisenhall *began his legal career in 2000 as a staff attorney at the First District Court of Appeal. In 2002, he began working for the Agency for Health Care Administration and split his time between appeals and DOAH hearings. Gar was promoted to AHCA's Chief Appellate Counsel in 2005 and held that position until 2007 when he joined the Administrative Law Section of the Attorney General's Office. Since December 2008, Gar has been the Chief Appellate Counsel for the Department of Business and Professional Regulation, Florida's largest regulatory agency.*

Team Members: **Melinda Butler, Alyssa Cameron, Paul Rendleman, and Jaakan Williams**

Melinda Butler *began her legal career in 2008 in private practice, handling criminal, civil, and administrative cases. She then served as an Assistant General Counsel to Florida's Chief Financial Officer. Ms. Butler now is a Senior Attorney at DBPR representing the Division of Alcoholic Beverages and Tobacco.*

Alyssa Cameron *began her legal career in 2011 as an associate with a national insurance defense firm. In March of 2012, Alyssa joined the Department of Agriculture and Consumer Service's Office of General Counsel.*

Paul Rendleman *began his legal career in 2010 as a staff attorney at the Department of Business and Professional Regulation in the Construction Prosecution Unit. In 2011, Paul transitioned to a senior attorney position in the Division of Real Estate. He joined the Department of Education in August 2012, where he handles the prosecution of educator certificates.*

Kurt Schrader *is a December 2012 honors graduate of the Florida State University College of Law. While in law school, he served as an editor with the* Journal of Land Use & Environmental Law. *His experience includes working for the Florida Department of Business and Professional Regulation, focusing primarily on professional licensing matters.*

Jaakan Williams *began his legal career in 2009 as an Assistant General Counsel at the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, where he handled alcoholic beverage license violations and tobacco permit violation cases. In August 2012, Jaakan joined the Florida Elections Commission as an Assistant General Counsel, where he handles cases involving campaign finance and election code violations.*

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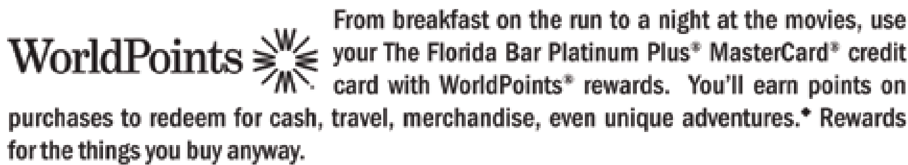

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Agency Snapshot:

Department of Agriculture and Consumer Services

by Alysssa Cameron

The Florida Department of Agriculture and Consumer Services safeguards the public and supports Florida's agricultural economy by ensuring the safety and wholesomeness of food and other consumer products through the following: carrying out inspection and testing programs; protecting consumers from unfair and deceptive business practices and providing consumer information; assisting Florida's farmers and agricultural industries with the production and promotion of agricultural products; and conserving and protecting the state's agricultural and natural resources by reducing wildfires, promoting environmentally safe agricultural practices, and managing public lands.

The Department's twelve divisions are as follows: Administration; Agricultural Environmental Services; Animal Industry; Aquaculture; Consumer Services; Florida Forest Service; Food Safety; Food; Nutrition and Wellness; Fruit and Vegetables; Licensing; Marketing and Development; and Plant Industry. The Department also has the offices of Agricultural Law Enforcement, Agricultural Water Policy, and Energy.

Head of the Agency:
Adam H. Putnam, Commissioner of Agriculture
Florida Department of Agriculture and Consumer Services
The Capitol
Tallahassee, FL 32399

Floridians elected Adam Putnam to serve as Florida's Commissioner of Agriculture, and he took office on January 4, 2011. In this capacity, he is the head of the Department, a state agency with the mission of promoting Florida agriculture, fostering innovation in energy development, providing a safe and abundant food supply, managing the state forest resources, and safeguarding consumers. As a member of Florida's Cabinet, Commissioner Putnam, with the Governor, Attorney General and Chief Financial Officer, oversees 13 boards, commissions and departments. Previously, Commissioner Putnam served five terms as Congressman for Florida's 12th Congressional District in the U.S. House of Representatives and two terms in the Florida House of Representatives.

Agency Clerk:
Paul Palmiotto
Mayo Building
407 South Calhoun Street
Tallahassee, FL 32399
850-617-7000

Hours for Filings:
8 a.m. - 5 p.m.

General Counsel:
Lorena Holley
Florida Department of Agriculture and Consumer Services
The Capitol
Tallahassee, FL 32399
850-617-7700
lorena.holley@freshfromflorida.com

Prior to joining the Department in January 2011, Ms. Holley spent a number of years with the Florida Public Service Commission, most recently serving as a Senior Attorney with the Commission's Office of General Counsel Division of Appeals, Rules and Mediation. During her years at the PSC, Ms. Holley also served as a Chief Advisor to a Commissioner, advising on legal and policy issues related to the economic regulation of Florida's electric, gas, telecommunications, and water and wastewater utility industries. Ms. Holley also spent several years working for the law firm of Rutledge, Ecenia, Purnell & Hoffman, P.A., and as a staff attorney with Legal Services of Greater Miami, Inc. She received her J.D. in 1999 from the Texas Tech School of Law in Lubbock, Texas and is a member of The Florida Bar.

Number of lawyers on staff: 20

Kinds of Cases:

The Office of General Counsel ("OGC") provides legal services to all twelve divisions, the numerous offices of the Department, and the Commissioner of Agriculture in his official capacity as a member of the Florida Cabinet. Office of General Counsel attorneys have a variety of responsibilities and duties, including the drafting and enforcement of administrative actions, litigation of cases involving the Department, and state and federal civil and administrative appeals. The OGC routinely brings administrative and civil actions for the Division of Consumer Services, which is charged with regulating game promotions, health studios, traveling amusement companies, the sale of liquefied petroleum, motor vehicle repair, intrastate moving services, and sellers of travel. The OGC also supports the Division of Consumer Services in carrying out its charge of enforcing the Sale of Business Opportunities Act, the Solicitation of Contributions Act, the Dance Studio Act, the Florida Pawnbroking Act, and the Florida Telemarketing Act. Department attorneys provide counsel to and litigate before the Board of Professional Surveyors and Mappers. The Division of Licensing has in-house attorneys who assist in legal matters concerning the issuance of concealed weapon licenses and associated programs. The OGC regularly assists the Department with drafting and interpreting proposed legislation, provides statutory interpretation and legal counsel, and coordinates all Department rulemaking endeavors. In addition, the General Counsel and Assistant General Counsel work closely with the Commissioner, Chief of Staff, and members of the Capitol staff.

UNIFORM RULES
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subject of this article: Amendments to the uniform rules of procedure which took effect on February 5, 2013.

While you are trying to contain your excitement, I will describe the process leading up to the amendments. A committee to consider possible amendments to the uniform rules was appointed in the Spring of 2010 by Cathy Sellers, then the Chair of the Administrative Law Section who made this a priority of her term of leadership. The committee's first meeting convened on July 31, 2010, ably chaired by the Honorable Linda Rigot, one of the DOAH's longest-standing ALJs, who has since retired. The committee was a good a cross-section of Administrative Law Judges, government attorneys and private practitioners. In addition to this author, the committee members were: Andy Bertron, Wellington Meffert, Elizabeth McArthur, Lisa Nelson, Linda Rigot, Larry Sellers, Shaw Stiller, and Lynne Quimby-Pennock.

After a series of committee meetings between July and December 2010, scores of e-mails, drafts and re-drafts, the possible amendments recommended by the committee and executive council were transmitted to the Administration Commission in mid-2011. I commend Cathy Sellers, Linda Rigot and the committee members for their substantial work.

A year and a half later, after receiving comments and making revisions, on January 16, 2013, the Administration Commission filed for adoption amendments to the following uniform rules: 28-106.104, .105, .106, .201, .2015, .204, .205, .213, .217, .301, .303, .402, and .404; 28-108.001; 28-112.001; 28-101.001; 28-102; 28-104 and 28-105.

This article offers discussion and highlights on some of the amendments. Please note well that this is not an exhaustive discussion of every rule amendment--nobody would read such an article.

Amendment Highlights

E-Mail Addresses Required

A common change throughout the amendments is the requirement that e-mail addresses be provided, across-the-board. Wherever the rules required an agency, a party petitioner, an attorney, or anyone else to provide contact information, an e-mail address is now required, if the person has e-mail. For example, Rule 28-105.002(1), relating to the contents of a petition for declaratory statement, was amended to require the petition to contain: "[t]he name, address, any e-mail address, telephone number and any facsimile number of the petitioner." Subsection (3) of the same rule is similar and requires counsel's e-mail address. This requirement is added throughout the amendments.

Terminology Change: Florida Administrative Register

Another across-the-board amendment is that references to the Florida Administrative Weekly are changed to the Florida Administrative Register, wherever they appear.

File Documents by One Method

Technology has developed multiple ways to file a document. Rule 28-106.104(8) has been added to discourage multiple, duplicate filings: "A document shall be filed by only one method (e-filing, facsimile, courier, hand-delivery, or U.S. mail) and shall not be filed multiple times. A duplicate filing will not be docketed and will be destroyed."

Intervention By Motion

Intervention is now requested by a "motion" to intervene, rather than a "petition" to intervene. In declaratory statement proceedings under Rule 28-105.0024, for example, the agency receiving a petition for a declaratory statement must publish a notice providing the applicable time limit for filing motions to intervene or petitions for administrative hearing. Also, in Rule 28-105.0027(1), motions for leave to intervene must be filed within 21 days of publication or at such later time as specified in the Florida Administrative Register notice. However, a motion to intervene can be filed later "for good cause shown." This is more liberal than the previous rule, which required a petition to intervene to be filed "at least 10 days before the final hearing." It also adds clarity in that declaratory statements can be rendered without a "final hearing," erasing doubt about when intervention is timely.

In the instance of declaratory statements under Rule 28-105.0027 and in proceedings affecting substantial interests under Rule 28-106.205, the contents of the motion to intervene are specified by rule. Formerly the contents of a petition to intervene were identified by reference to Rule 28-106.201.

My favorite amendment is found in the intervention rule, invoking a seldom relied upon definition of "party" that dates back to the early days of the APA. Section 28-106.205(3) is added stating: "Specifically-named persons, whose substantial interests are being determined in the proceeding, may become a party by entering an appearance and need not request leave to intervene." This rule, for example, allows a permit applicant to to become a party by simply appearing of record in a proceeding brought by a third party petitioner who objects to the permit.

Clarifications on Motion Practice

Changing an intervention request from a petition to a "motion" carries some subtle baggage, as it brings into play Rule 28-106.204, the general rule regarding motion practice. That rule was also amended with some important clarifications.

Replies are now expressly prohibited. We have all seen replies to responses in Rule 28-106.204 motion practice. Some lawyers cannot resist getting in the last word. When a response to a motion contains truly new issues, or misstates facts, a reply is justified. While replies were never authorized by the uniform rules, there was no express prohibition. Now there is. Rule 28-106.204(1) now states: "No reply to the response shall be permitted unless leave is sought from and given by the presiding officer." So before you dash off that reply, get permission. If you file a reply without first obtaining leave to do so, do not be surprised if it is swiftly

continued...

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stricken, *sua sponte*. Asking permission to file a reply should be prompted only by an exceptional circumstance.

Additional requirements specify what is expected when conferring with counsel about motions. Rule 28-106.204(3) has long required that motions, other than a motion to dismiss, must state that other counsel/parties have been contacted and state whether there are objections to the motion. Non-complying motions have sometimes, but not always, been summarily denied.

Did you ever receive a voice mail message left during the lunch hour about a motion that counsel wants to file by the end of the day? Then, while you are speaking with the client on the phone, the motion is filed at 3 p.m., stating that an attempt to confer with you was unsuccessful? Unfortunately, this hypothetical is not far-fetched.

A problem at the other end of the spectrum also was common under the former rule: what happens when opposing counsel is unresponsive or unavailable or for any reason simply cannot be contacted? The following language has been added to deal with instances of unsuccessful attempts to contact counsel, and also to assure that reasonable, diligent efforts were made to communicate: "Any statement that the movant was unable to contact the other party or parties before filing the motion must provide information regarding the date(s) and method(s) by which contact was attempted." The clear signal here is that counsel should early on make repeated, timely, and good faith efforts to contact other counsel and give other counsel a reasonable time to respond. Remember, it may be necessary for other counsel to discuss the motion with the client. Likewise, professionalism requires counsel to promptly respond when asked about whether there is an objection to a motion.

Another clarifying amendment adds language to Rule 28-106.204(2) regarding the general requirement that motions to dismiss a petition must be filed within 20 days. One clarification is to identify the trigger for the 20-day period as being the "assignment of the presiding officer." The other clarification is that the 20-day window for motions to dismiss does not apply if the motion "is based upon lack of jurisdiction or incurable errors in the petition."

<u>Official Recognition</u>

A new subsection (6) has been added to the evidence rule, Rule 28-106.213, relating to official recognition:

> (6) When official recognition is requested, the parties shall be notified and given an opportunity to examine and contest the material. Requests for official recognition shall be by motion and shall be considered in accordance with the provisions governing judicial notice in Sections 90.201-.203, F.S.

Over the years, official recognition was sought by motion or by a "request." The amendment clarifies that official recognition is to be sought by way of a motion, again clearly bringing the requirements of Rule 28-106.204 into play. The amendment also codifies, but does not change, the long-existing practice of equating official recognition in administrative forums to judicial notice in a court of law under the Florida Evidence Code.

<u>Possibly More To Come?</u>

Some amendments were not adopted by the Administration Commission, and may be revised and filed at some future date. While sometimes interesting, amendments that did not happen will not be discussed here. Perhaps another day.

Meanwhile, for a complete understanding of the uniform rule amendments: "Eye-ball the rules!"

Paul H. Amundsen *is of counsel at Lewis, Longman & Walker, P.A., in Tallahassee. Paul is a member of the Executive Council of the Administrative Law Section where he serves on the Uniform Rules Committee and as Section Editor for the Florida Bar Journal. He specializes in Florida administrative law; he has practiced in that area for over 30 years and was among the first attorneys to be board-certified in State and Federal Government and Administrative Practice.*

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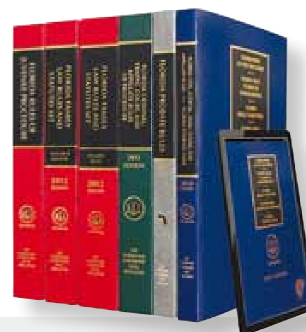

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