Administrative Law Section Newsletter

Vol. XXXV, No. 4 **Jowanna N. Oates and Elizabeth W. McArthur, Co-Editors** **June 2014**

Appellate Case Notes

by Larry Sellers and Gigi Rollini

Administrative Finality

Okaloosa County, et al. v. Department of Juvenile Justice, 131 So. 3d 818 (Fla. 1st DCA 2014) (Opinion filed Feb. 7, 2014)

In administrative proceedings to address the cost-sharing procedures between the State and its counties for secure juvenile detention pursuant to section 985.686, Florida Statutes, an administrative law judge ("ALJ") concluded that the Department misinterpreted the statutory scheme for fiscal year 2008-2009. The Department filed exceptions contesting the ALJ's determination regarding the agency's interpretation of section 985.686, Florida Statutes, and the final order granted those exceptions.

After entry of the final order, while the case was on appeal, the First District Court of Appeal issued an opinion in a separate case that rejected the Department's interpretation of section 985.68, Florida Statutes. This decision was acknowledged by the Department in the pending appeal, and the Department advised the First District of its intent to adopt the ALJ's recommended order. The First District reversed the Department's order granting exceptions to the recommended order and remanded for the Department to adopt the recommended order.

One of the counties involved in the appeal, however, sought separate relief relating to the assessment made by the Department in the cost-sharing scheme. After the Department conducted its annual reconciliation for fiscal year 2008-2009, it notified each county of the resulting reconciliation, and provided the procedures to challenge the assessments in the

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From the Chair

by Amy W. Schrader

This past year as Section chair has been a wonderful experience and I am so grateful to all of you who have made my job such a pleasure! As always, our newsletter team has done a spectacular job of keeping us all informed of recent appellate opinions, DOAH orders, and "hot topics" in administrative law. I believe the consistent quality of our newsletter publication is one of the Section's strongest assets, and would like to especially thank Judge Elizabeth McArthur, Jowanna Oates, Gar Chisenhall, Larry Sellers, and Gigi Rollini for your many hours of dedication to the cause. This year we also continued the Section's tradition of providing quality CLE programs through our Practice Before DOAH and Advanced Administrative and Government Practice seminars. I am very thankful to Bruce Lamb, Judge Suzanne Van Wyk, and all of those members who participated as speakers and organizers for another successful year.

This year, I am also extremely proud of our efforts as a Section to

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reach out to law students and newer attorneys as we strive to raise the level of practice in the area of administrative law. As an adjunct professor at the FSU College of Law, I called on many of our agency attorneys to be resources for students studying Florida administrative law. I was overwhelmed by the positive responses and time our members took with these students to provide them with insight and perspective into how agencies function and what it is like to be an agency attorney. Based on these interviews, the students were able to prepare high-quality presentations on twenty different state agencies and governmental bodies.

In addition to assisting with student presentations, our law school liaison committee, chaired by Patty Nelson, met with law students in informal luncheon sessions to discuss careers in administrative law. I can assure you that the law students were very appreciative of the opportunity to interact with attorneys in their desired areas of practice and I encourage the Section to continue these valuable mentoring efforts in the upcoming year.

Our Section's young lawyers' committee also held the first "Table for 8" luncheon at the Midtown Caboose in Tallahassee on April 17, 2014. Thank you to committee co-chair, Christina Arzillo, for organizing this wonderful gathering, which was attended by six attorneys in practice less than three years, as well as Judge Lynne Quimby-Pennock; AHCA Clerk Richard Shoop; and myself. Hopefully, this is the first of many opportunities for the more seasoned of our members to meet with newer administrative law attorneys in a casual and relaxed setting. If you are interested in attending a future "Table for 8" luncheon, please email Christina Arzillo at Christina.Arzillo@myfloridalicense.com.

We have much to look forward to in the coming year—including the return of the ever-popular Pat Dore Conference this fall. I would like to invite all of our members to attend the Section's annual reception in conjunction with the Florida Bar Convention on Thursday, June 26, 2014, from 6:00 p.m. to 7:00 p.m. The annual reception is a wonderful opportunity to network with your colleagues in administrative law. Best wishes to our chair-elect, Daniel Nordby, on his upcoming year steering our crew!

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

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DOAH Case Notes

Substantial Interest Hearings
Agency for Health Care Admin. v. Hal M. Tobias, DOAH Case No. 13-3818MPI (Recommended Order Feb. 24, 2014; Final Order March 27, 2014).

FACTS: Following a final determination that the Agency for Health Care Administration ("AHCA") was entitled to recover Medicaid overpayments from a Medicaid provider, AHCA sought to assess its actual investigative, legal, and expert witness costs against the provider pursuant to section 409.913(23)(a), Florida Statutes. That statute authorizes AHCA to recover all of the costs associated with recovering Medicaid overpayments and does not expressly require that the costs be reasonable. After the parties were unable to stipulate to the amount of costs, an evidentiary hearing was held at DOAH, at which Respondent disputed the reasonableness of the costs claimed by AHCA.

OUTCOME: The ALJ found that some of the claimed costs were unreasonable, and opined that if reasonableness is not implicit in section 409.913(23)(a), then unreasonable costs could still be disallowed by concluding they were not causally linked to the investigation and prosecution of the underlying case. Ultimately and despite expressing uncertainty over whether the statute is within AHCA's substantive jurisdiction, the ALJ concluded that AHCA should be free to determine whether costs assessed pursuant to section 409.913(23)(a) must be reasonable.

In its Final Order, AHCA did not expressly interpret the statute as invited by the ALJ. Instead, AHCA concluded that "notwithstanding" its authority to recover all investigative, legal, and expert costs pursuant to section 409.913(23)(a), AHCA would exercise its discretion and elect not to seek payment of the costs the ALJ found to be unreasonable.

Amerisure Mutual Ins. Co. v. Dep't of Fin. Servs., Div. of Workers Comp., DOAH Case No. 13-0865, DFS Case No. 130411-12-WC (Final Order Feb. 13, 2014).

FACTS: The Special Disability Trust Fund ("SDTF") and the Workers' Compensation Administration Trust Fund ("WCATF") are funded largely by annual assessments paid on a quarterly basis by workers' compensation insurers, based on the premiums the insurers receive. At the inception of a workers' compensation insurance policy, the premium paid is an estimate, with the actual premium amount dependent on the number and classification of workers covered during the policy term, as determined by an audit. If the actual premium is lower, the insurer returns the excess. For purposes of SDTF and WCTF assessments, insurers report "net" premiums deducting premium refunds from estimated premium receipts. If an insurer returns more premium than it receives for a particular quarter, it has a negative net premium and owes no assessments for that quarter. Amerisure, a workers' compensation insurer, had positive net premiums for the first two quarters of 2008 and paid assessments to the SDTF. However, Amerisure had negative net premiums for the final two quarters of 2008 and no assessments were paid for those two quarters. Because premium refunds to policyholders during the final two quarters of 2008 resulted in an overpayment, Amerisure received a credit or offset of $99,119.66 against future SDTF assessment payments. Amerisure's experience for purposes of the WCATF was very similar and resulted in a credit or offset against future WCATF assessment payments of $3,178.47. For all of 2009, Amerisure did not owe or pay any assessments to the SFTF or the WCATF due to negative net premiums. Amerisure subsequently received a quarterly report from DFS indicating that Amerisure's accumulated carry-over credit against SDTF assessments was $379,235.27, and its accumulated carry-over credit against WCATF assessments was $19,399.95 as of December 31, 2009. However, in the next DFS report as of March 31, 2010, the carry-over credits accumulated during 2009, as reported in the year-end report, were deleted without explanation, and Amerisure was not given notice of its right to request an administrative hearing to challenge the deletion of the 2009 credits. After paying assessments from late 2010 through July 2012 that would have been offset by the eliminated carried-over credits, Amerisure applied for a refund on September 26, 2012. DFS issued a Notice of Intent to Deny Applications for Refund, and Amerisure petitioned for an administrative hearing. The ALJ ultimately found that the elimination of carry-over credits that accumulated during 2009 was based on an unadopted rule. Accordingly, the ALJ recommended that DFS enter a final order reinstating the deleted carry-over credits from 2009. (See DOAH Case Notes in the March 2014 Newsletter for the full summary of the Recommended Order).

OUTCOME: DFS rendered a Final Order on February 13, 2014, in which it rejected the ALJ's recommendation and concluded that the Recommended Order would create an unauthorized state tax subsidy for Amerisure. In doing so, DFS confirmed that Amerisure had overpaid the SDTF by $99,119.66 and the WCATF by $3,178.47 in 2008. DFS further stated those overpayments were correctly applied against Amerisure's 2010 assessments. However, DFS rejected the ALJ's determination that Amerisure earned a refund or credits during 2009. According to DFS, no refund was available for 2009 because Amerisure (in contrast to 2008) paid no assessments to the SDTF or the WCATF that year. Rather than being the product of an unadopted rule, DFS concluded this outcome was dictated by the plain language of section 624.5094, Florida Statutes. As for the December 31, 2009, quarterly report indicating

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Amerisure had accumulated credits from 2008 and 2009, DFS stated its employees acted "without statutory authority and in derogation of Section 120.55(1)(a)4, Florida Statutes" by supplying Amerisure with a quarterly assessment form that purported to identify credits.

Amerisure has appealed the Final Order to the First District Court of Appeal, and the case is proceeding under case number 1D14-873.

Dep't of Envtl. Protection v. Mark F. Germain, et al, DOAH Case No. 12-4008EF (Final Order Feb. 14, 2014).

FACTS: Section 376.308, Florida Statutes, imposes strict liability on the owners of petroleum-contaminated properties. However, for property purchased after July 1, 1992, there is an "innocent purchaser" defense providing that the purchaser may be able to avoid liability if he or she made all appropriate inquiry into the previous ownership and use of the property.

Mark Germain is a Florida-licensed attorney who owned the subject property located in Leesburg, Lake County, Florida. A gas station had been operated on the property from the 1920s through the late 1980s. When the gas station ceased operations, three underground gasoline storage tanks were filled with concrete and abandoned in place. Testing conducted in 2004 and 2005 revealed that the property was contaminated with petroleum and that the contamination had spread to a neighboring property. The reports describing those results were filed with Seminole County. Mr. Germain purchased the property in 2006 and knew that a gas station had operated there for several years. He was also aware that contamination had been detected on neighboring property. Mr. Germain's pre-purchase investigation of the property included conducting a visual inspection and speaking with neighbors. He also searched the Department of Environmental Protection's ("DEP") website and viewed a document indicating a cleanup status of "no contamination." However, Mr. Germain did not contact the agencies responsible for regulating petroleum underground storage tanks, and he did not communicate with any knowledgeable employees of those agencies about possible contamination on the subject property. On September 19, 2012, DEP issued a Notice of Violation with proposed fines, alleging Mr. Germain violated rule 62-770.600(1) by failing to initiate a site assessment within 30 days of discovering petroleum contamination. Mr. Germain's request for an administrative hearing was forwarded to DOAH. Since DEP sought to impose administrative penalties, section 403.121(2)(d), Florida Statutes, provides that the ALJ issues a final order on all matters.

OUTCOME: With regard to Mr. Germain's argument that he could not be liable because he no longer owns the property and did not cause the contamination, the ALJ concluded that section 376.308 "would lose all effectiveness if an owner could escape liability by simply transferring his property after the commencement of an enforcement action." As for the applicability of the "innocent purchaser" defense, the ALJ concluded that Mr. Germain had failed as a matter of law to conduct all appropriate inquiry. In the course of reaching that conclusion, the ALJ found that good commercial practice required consultation with an environmental attorney or an environmental consultant who would have located the reports and other public records indicating the subject property was contaminated. Moreover, the ALJ concluded Mr. Germain was not absolved of liability because he lacked specialized knowledge regarding the regulation of petroleum underground storage tanks. As a lawyer, Mr. Germain was familiar with the practice of associating with professionals having specialized knowledge in order to achieve a client's objectives. In purchasing the subject property, Mr. Germain failed to "undertake the reasonable steps" of consulting with an environmental lawyer or an environmental consultant. Accordingly, the ALJ issued a Final Order requiring Mr. Germain and the other respondents to remove all petroleum contamination at the subject property. The ALJ also ordered Mr. Germain to pay a $5,000 fine.

Mr. Germain has appealed the ALJ's Final Order to the Fifth District Court of Appeal.

Gerald Kreucher vs. Dep't of Mgmt. Servs. Div. of State Group Ins., DOAH Case No. 13-4644 (Recommended Order March 13, 2014).

FACTS: During open enrollment in 2012, Mr. Kreucher, a state employee, elected to continue optional life insurance coverage. He followed the instructions in an on-line form to calculate his monthly premium, applying the cost factor for the age band covering ages 55 to 59, as he was 59 years old at the time. The resulting monthly premium for the coverage he selected was $81.08. The on-line form disclosed that premiums are based on age, and that "[r]ates increase with age and all rates [are] subject to change." However, there was no indication that the monthly premium amount was subject to change during the plan year if the insured had a birthday that put the employee in a different age band. For the first two months of 2013, the expected amount of $81.08 a month was deducted from Mr. Kreucher's salary. However, beginning in March 2013, the monthly premium deducted from his pay increased from $81.08 to $148.36, without notice explaining the reason for the increase. Mr. Kreucher wrote to the People First Service Center and requested a refund of the funds deducted from his pay in excess of $81.08 a month. His request was denied, and the denial notice stated that the increase was a "Significant Cost Increase Qualifying Status Change event." The denial notice did not identify what the "qualifying status change event" was. However, the timing and amount of the increased premium corresponded with Mr. Kreucher's 60th birthday and the rate charged for the age band covering ages 60 to 64. After unsuccessfully appealing to the Division of State

Group Insurance ("the Division"), Mr. Kreucher requested an administrative hearing to contest the denial and he represented himself in the hearing.

OUTCOME: The ALJ found that the payroll deduction was accomplished pursuant to the requirements of the Division's published Salary Reduction Cafeteria Plan ("Plan"), which follows the requirements for cafeteria plans in federal law. Mr. Kreucher relied on the following provision in the Division's Plan: "The salary reduction for each pay period is an amount equal to the annual premium divided by the number of pay periods in the plan year[.]" The ALJ found that "[n]othing placed [Mr. Kreucher] on notice that upon achieving his 60th birthday, his premium would automatically increase to the next premium category. . . . Absent some express notification that [his] 60th birthday would trigger a different premium, he was entitled to rely on the representation that for the plan year, his premium would be $81.08 per month." The ALJ noted that rules regulating the activities of insurers and their agents "make it clear that notice must be clearly stated to a purchaser when and if there will be changes to the premium." The ALJ found that the general statement in the on-line form that "rates increase with age and are subject to change" was reasonably construed as simply explaining the use of age bands, with higher rates established for higher age bands. The ALJ also pointed out that the Plan specifically defined "qualifying status change events," for which changes in the middle of the plan year were allowed, and that a change in age was not one of the defined "qualifying status change events." Accordingly, the ALJ found that, contrary to the Division's position in its denial notice, a change in age is not a "qualifying status change event." The ALJ recommended that the Division refund the excess payroll deductions of $605.52.

Sunsouth Bank v. Dep't of Health, DOAH Case No. 13-2795 (Recommended Order March 21, 2014); DOH Rendition No. 14-344-FOF-HSE (Final Order April 10, 2014).

Facts: Charles Paulk borrowed money from Sunsouth Bank ("the Bank") in 2004 and secured the loan by giving the Bank a mortage lien on a parcel of land in Jackson County. At some point after 2004, the land was divided into two lots. One lot contained substantial improvements such as a house, boathouse, and a dock. The other lot was approximately .28 acres in size with no improvements. In 2010, Mr. Paulk sold the lot with substantial improvements, and the Bank agreed to shift its lien to the unimproved lot. When Mr. Paulk began having difficulty repaying the loan, the Bank agreed to take a deed to the unimproved lot in lieu of foreclosure. After the Bank acquired title to the unimproved lot, a third party offered to purchase it if the Bank could obtain a septic permit. The unimproved lot was too small to satisfy statutory requirements for a septic permit, but the Bank invoked section 381.0065(4)(h)1, Florida Statutes, which allows a party to petition the Department of Health ("DOH') for a variance. DOH's Bureau Chief for Onsite Sewage Programs determined the Bank's variance request should be denied because any perceived hardship resulted from the Bank's own actions. The Bank responded by petitioning for a formal hearing.

Outcome: The ALJ found that the Bank "intentionally participated in and benefitted from the transaction that resulted in the hardship posed by the small lot size that it now owns and for which it seeks a variance." Because section 381.0065(4)(h)1.a. provides that no variance should be granted if the hardship was caused intentionally by the applicant, the ALJ recommended that DOH deny the Bank's application for a variance. The ALJ also supported his recommendation by citing Elwin v. City of Miami, 113 So. 2d 849, 852 (Fla. 3d DCA 1959) for the proposition that "[a] self-imposed or self-acquired hardship (such as by purchasing property under existing zoning and then applying for a variance) is not the kind of hardship for which variance should be granted."

DOH rendered a Final Order on April 10, 2014, adopting the Recommended Order and denying the variance.

Bid Protests

Cushman & Wakefield of Fla., Inc. v. Dep't of Mgmt. Servs., et al., DOAH Case Nos. 13-3894BID and 13-3895BID (Recommended Order Jan. 24, 2014); DMS No. 14-0006 (Final Order Feb. 5, 2014).

FACTS: On March 18, 2013, the Department of Management Services ("DMS") issued an invitation to negotiate ("ITN") to re-procure the expiring tenant broker contracts that assist state agencies in private sector leasing transactions. DMS then chose to negotiate with five of the 13 vendors that had responded to the ITN. After completion of the negotiations, DMS published its request for best and final offers ("BAFOs"). In order to increase potential savings, DMS lowered the commission rates for lease transactions below the rates initially set forth in the ITN. DMS decided to award the contracts to two vendors rather than the three allowed by section 255.25(3)(h)1., Florida Statutes, so that the two vendors would make up the compensation from lower commission rates by earning commissions on more transactions. After considering the five BAFOs, DMS's negotiations team met and determined that two vendors, CBRE, Inc. and Vertical Integration, represented the best value for the State. During this meeting, DMS's Bureau Chief of Leasing noted that CBRE's prices for performing independent market analyses and broker opinions of value were high. Nevertheless, she planned to try to convince CBRE to lower its prices during the ensuing contract execution phase. A disappointed vendor, Cushman & Wakefield ("Cushman"), protested DMS's decision to award contracts to Vertical and CBRE.

OUTCOME: With regard to Cushman's assertion that DMS had no authority to award the contracts because it chose two vendors rather

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than the three authorized by section 255.25(3)(b)1, Florida Statutes, the ALJ noted that the statute authorizes "up to" three vendors, and concluded that DMS's decision to pick two vendors was rationally based on the goal of driving down the commission costs for the State. The ALJ also rejected Cushman's argument that it was improper for DMS to ask CBRE to lower its prices after the negotiation phase had ended. The ALJ concluded that action was consistent with the general intent of chapter 287, contemplating that agencies should always attempt to negotiate lower pricing.

On February 5, 2014, DMS rendered a Final Order adopting the ALJ's Recommended Order in its entirety.

Non-Final Orders

Francine Brown and Gerald Brown v. Advanced Diagnostic Resources, DOAH Case No. 13-4044MA (Non-final Order March 14, 2014).

FACTS: Section 766.207, Florida Statutes, provides for voluntary, binding arbitration of medical negligence claims. Each arbitration panel consists of three arbitrators with an ALJ as the chief arbitrator. On October 16, 2013, Advanced Diagnostic Resources ("ADR") and Francine and Gerald Brown requested arbitration of the damages resulting from an ADR employee inadvertently administering an excessive dose of Benadryl to Ms. Brown. While liability was not at issue, Ms. Brown alleged in support of her claim for damages that her overall activity level and social activities had been significantly reduced due to her injuries. On November 27, 2013, ADR served "Internet Social Media Interrogatories" on Ms. Brown, requiring her to identify all social media web sites and message boards she had utilized during the year prior to the accident. The interrogatories also required her to disclose the user names and passwords she had utilized in order to access those web sites and message boards. As an alternative to disclosing her user names and passwords, Ms. Brown was offered the option of providing copies of all the content or data stored in her accounts.

Ms. Brown objected to the interrogatories by asserting ADR had failed to demonstrate they were reasonably calculated to lead to the discovery of admissible evidence. In support of that assertion, Ms. Brown noted cases from other jurisdictions holding that one seeking to discover an opposing party's social media information must identify information on the public portion of the opposing party's social media sites contradicting the claims being asserted in the litigation.

ADR responded by arguing the information posted on Ms. Brown's social media sites was relevant because she had put her pre-accident activities at issue by alleging she was significantly less active since the accident and no longer socialized with friends because of depression and anxiety related to her injuries.

OUTCOME: The ALJ issued a non-final order on March 14, 2014, concluding that the social media material sought by ADR was discoverable. Accordingly, Ms. Brown was ordered to produce all requested social media materials which were not privileged. If Ms. Brown claimed privilege as to any of the requested social media materials, then she was instructed to forward the material claimed to be privileged to the ALJ for an in camera review.

REMINDER: LET US KNOW OF NOTEWORTHY NON-FINAL ORDERS

The last summary in this quarter's DOAH Case Notes is the first time a noteworthy non-final order was called to the attention of the DOAH Case Notes Team. We remind our readers that we need your help to alert us to non-final orders that you believe are worth sharing because of a significant, novel, or noteworthy issue of administrative practice or procedure. Please send the DOAH case number, the name of the case, and the date/name of the non-final order to garnett.chisenhall@dbpr.state.fl.us. Also, please describe why you believe the order is noteworthy.

CHANGES TO THE DOAH CASE NOTES TEAM

Addition . . .

Welcome to the newest member of the DOAH Case Notes Team:

Christina Arzillo has been a senior attorney with the Department of Business and Professional Regulation, Division of Real Estate, since September 2011. Christina's responsibilities include prosecuting cases at the Division of Administrative Hearings. Christina is a volunteer at Legal Services of North Florida and a co-chair of the Administrative Law Section's ad hoc committee for young lawyers.

and Subtraction . . .

Melinda Butler, a member of the original DOAH Case Notes Team (see April 2013 Newsletter), has resigned. Thank you for your contributions, Melinda!

Agency Snapshots

Division of Administrative Hearings

by Lisa Shearer Nelson

When most people think of DOAH, they think of administrative law judges handling administrative disputes pursuant to section 120.57(1), Florida Statutes. In reality, DOAH comprises two distinct programs: the adjudication of administrative disputes by administrative law judges (ALJs)(the APA side) and the adjudication of workers' compensation disputes by judges of compensation claims (JCCs). The Administration Commission (Governor and Cabinet) appoints the Director of the Division who also serves as Chief Judge. Robert S. Cohen has served as Chief Judge since 2003. Chief Judge Cohen appoints the Deputy Chief Judge, the ALJs, and the Clerk of the Division. The Deputy Chief Judge for Compensation Claims and all of the JCCs are nominated by a judicial nominating commission and appointed by the Governor.

On the APA side, there are currently 33 ALJs, including Chief Judge Cohen and Deputy Chief Judge Maloney. Most of the ALJs are assigned to three geographical districts: the Northern District (Li Nelson, Scott Boyd, Diane Cleavinger, Gary Early, Bruce McKibben, June McKinney, Pete Peterson, Barbara Staros, Larry Stevenson, Suzanne Van Wyk, and Dave Watkins); the Middle District (Larry Johnston, Linzie Bogan, Thomas Crapps, Elizabeth McArthur, John Newton, Joyous Parrish, William Quattlebaum, and Lynne Quimby-Pennock); and the Southern District (John Van Laningham, Claude Arrington, Edward Bauer, Mary Li Creasy, Robert Meale, Todd Resavage, Darren Schwartz, Cathy Sellers, and Jessica Varn). In addition, Don Alexander and Bram Canter handle many of the environmental cases and Susan Kirkland handles all of the cases involving NICA claims.

On the JCC side, there are 17 district offices throughout the state, with 32 JCCs. The Deputy Chief Judge for the JCCs is David Langham. Located within the JCC district offices are the video hearing rooms used by the ALJs for many of DOAH's hearings, and the ALJs are very grateful for the support they receive from the staff in these offices.

Both programs use an e-filing system for the filing of documents, and as of July 2011, section 120.52(5), Florida Statutes, requires attorneys to be e-filers. Registration for e-filing is simple and may be accomplished through the eALJ Electronic Filing link or the eJCC Electronic Filing link on the bureaus' respective websites.

Agency websites:
http://www.jcc.state.fl.us
https://www.doah.state.fl.us

Head of the Agency:
Robert S. Cohen, Director and Chief Judge
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
850-488-9675

Agency Clerk:
Claudia Llado
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
850-488-9675

Public Records Requests

Public records requests can be directed to Claudia Llado, Agency Clerk, or documents from the official records dockets may be reproduced by downloading documents from the official dockets available on the ALJ and JCC websites.

Hours of Operation:
Monday - Friday, 8:00 a.m. to 5:00 p.m.

Types of Cases:

ALJs hear a wide variety of cases where there is intended agency action where there is a dispute of material fact. Those cases where the ALJ has recommended order authority include cases for the Florida Commission on Human Relations involving allegations of discrimination; professional license applications and disciplinary proceedings; automobile franchises; certificates of need, exemptions from employment disqualification; health care facility regulation; environmental permitting; bid protests, and many others. In addition, DOAH has final order authority over cases such as those involving attorney's fees awards; rule challenges; continued involuntary commitment (Baker Act) hearings; child support enforcement; exceptional education; medical malpractice arbitration; and NICA proceedings.

JCCs hear cases where there is a dispute over workers' compensation benefits.

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Florida Department of Transportation

by Kimberly Clark Menchion

The Florida Department of Transportation ("FDOT") was created by the Legislature in 1969 when its responsibilities were transferred from the State Road Department. The Department is headed by its Secretary, a gubernatorial appointee. FDOT's primary statutory responsibility is to coordinate the planning and development of a safe, viable, and balanced state transportation system serving all regions of the state, and to assure the compatibility of all components, including multimodal facilities. A multimodal transportation system combines two or more modes of movement of people or goods.

Florida's transportation system includes roadway, air, rail, sea, spaceports, bus transit, and bicycle and pedestrian facilities. The total mileage for the State Highway System is approximately 18,377 miles. Florida has an approximately 2700 mile rail system which is predominantly privately owned with the exception of SunRail (62 miles) and Tri Rail (81 miles). Florida also has fifteen seaports.

Head of the Agency:
Ananth Prasad, Secretary
605 Suwannee Street
Tallahassee, FL 32309-0458

Ananth Prasad was appointed Secretary of FDOT in 2011. Secretary Prasad previously served as the Assistant Secretary for Engineering and Operations for the agency. Prasad rejoined FDOT in July 2010 after a brief two-year stint as a vice president of a construction-services firm. Prasad has 22 years of experience in the transportation industry, including 20 years with FDOT where he previously held the positions of the Chief Engineer and Director of Construction. He was responsible for implementing various innovative contracting techniques, including public-private partnerships.

Agency Clerk:
Patricia Parsons
(850) 414-5265
Email: Trish.Parsons@dot.state.fl.us

Hours for Filings:
8:00 a.m. - 5:00 p.m.
Filings may be sent to the following address:
Florida Department of Transportation
Clerk of Agency Proceedings
605 Suwannee Street, MS 58
Tallahassee, Florida 32399
Fax: (850) 414-5264

General Counsel
Jerry Curington
(850) 414-5270
Email: Jerry.Curington@dot.state.fl.us

FDOT's general counsel is Jerry Curington. He joined FDOT in 2011 and previously served as the general counsel for the Department of Children and Families, chief trial counsel and head of the civil division for the Office of the Attorney General, deputy general counsel in the Executive Office of the Governor, and in private practice with several Florida firms.

Number of lawyers on staff: 72 statewide, including 26 in Tallahassee.

Kinds of cases: The agency's administrative cases include rule challenges, administrative litigation involving: access management; environmental permitting; permitting and licensure of outdoor advertising; contractor and consultant qualifications; and federal requirements for transportation projects. The agency also represents itself in bid protests, personnel and contract matters, eminent domain, and construction litigation. In addition to litigation, the administrative law section provides legal analysis for proposed legislation, assistance with policy development, and advisory support.

Agency Perspective: Kathleen Toolan was appointed chief of administrative law in 2013. Previously, she served as assistant general counsel in the administrative law section of FDOT for five years. Her prior experience includes both private practice and eleven years with Florida's Department of Environmental Protection. There are six additional attorneys who are a part of the administrative law section, all of whom are located in Tallahassee. Outdoor advertising represents a significant portion of FDOT's administrative litigation and its importance is unparalleled, as ten percent of the agency's federal funding, estimated at $163 million dollars, is tied to the effective control of the program. Access management is a unique component of FDOT's administrative matters involving the regulation of driveway connections to the State Highway System. Disputes regarding environmental impacts associated with transportation projects also represent a critical component of the agency's administrative matters and involve both federal and state administrative challenges.

Law School Liaison

Spring 2014 Update from the Florida State University College of Law

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

The Florida State University College of Law is delighted that the latest *U.S. News & World Report* ranked our Environmental Program number 14 in the nation. We are pleased to provide this update on this semester's events for the Administrative Law Section Newsletter.

Events

The College of Law has had a very busy spring. In February, we hosted a significant conference on the future of environmental law with a particular focus on the capacity of agencies to address current policy challenges in the absence of new legislation. Entitled *Environmental Law Without Congress: An Interdisciplinary Conference on Environmental Law*, this important Conference, organized by Professor Hsu, featured leading environmental law scholars from throughout the United States.

The College of Law's Spring 2014 Environmental Forum on the Apalachicola-Chattahoochee-Flint River System explored the legal, scientific, and policy issues associated with the State of Florida's recently filed, and ongoing, effort to have the United States Supreme Court equitably apportion the waters of the System. Participants in the Forum included: Jonathan A. Glogau, Florida Office of the Solicitor General; Ted Hoehn, Florida Fish and Wildlife Conservation Commission; and Matthew Z. Leopold, General Counsel, Florida Department of Environmental Protection. Sarah Spacht introduced the program and Professor Markell served as moderator.

A third significant event this spring was the College of Law's program on hydraulic fracturing. Organized by Professor Hannah Wiseman, "*The Evolving Law of Hydraulic Fracturing and Unconventional Oil and Gas*" featured Timothy Riley and Richard Brightman of Hopping Green & Sams, Dale Calhoun of G. David Rogers and Associates, Floyd R. Self of Gonzalez Saggio & Harlan, and Professor Wiseman.

The College of Law also welcomed three distinguished faculty members to campus for workshops this semester: Bob Ellickson, Walter E. Meyer Professor of Property and Urban Law, Yale Law School; John Nagle, John N. Matthews Professor, University of Notre Dame Law School; and Oren Perez, Professor of Law, Bar-Ilan University.

A final significant event this semester was our Spring 2014 Environmental Colloquium. The Colloquium honored our Environmental LL.M. students and several outstanding J.D. students and provided them with the opportunity to present their papers on environmental topics. Student participants and their topics are listed below:

- Alex Brick, *A Summary of Relevant Legal Issues for the Florida Solar Photovoltaic Business*
- James Parker-Flynn, *Resource Production Limits: Implementing Upstream Regulation of Fossil Fuels*
- George Reynolds, Nollan *and* Dolan *2.0:* Koontz v. St. Johns Water Management District *and Its Consequences*
- Kurt Schrader, *Coastal Risk Mitigation and Adaptation in Florida—The Problematic Incentives of Insurance Cross-Subsidy Schemes*
- Jeremy Susac, *Balance Energy Florida & The Role of Exporting LNG in the Newly-Drawn State of Saudi-America*
- Jake Whealdon, *An Argument for the Implementation of a Carbon Tax Under Section 111(d) of the Clean Air Act*
- Claire Armagnac, *Worse than the Tourists: Non-Native Invasive Species in Florida, Lionfish, Pythons, and What New Laws and Federal Funding Can Do to Help*
- Shannon Dolson, *Finding A Way Back Into Darkness: Regulating Light Pollution in Florida and Beyond*
- Lauren Bothers, *Florida's Growing Problem: Addressing the Threat of Invasive Exotic Plants to Florida's Natural Areas in the Face of Climate Change*

We hope you will join us for one or more of our programs. For more information, please consult our web site at: http://www.law.fsu.edu, or please feel free to contact Professor David Markell, at dmarkell@law.fsu.edu.

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annual reconciliation. Only twelve counties exercised their right to challenge the assessments in the annual reconciliation.

In a subsequent letter, however, the Department advised all of the counties that it concluded its analysis of the challenges to the annual reconciliation, and had made adjustments not just for the twelve challenging counties, but for thirty-eight counties in total. The Department advised all such counties that an administrative petition would have to be filed to challenge the new assessments.

Orange County filed a petition, challenging the Department's successive adjustment to the annual reconciliation. Orange County also challenged the procedural and evidentiary basis for the initial annual reconciliation, and sought to have it redone.

The First District agreed with the ALJ that the initial annual reconciliation constituted final agency action for all counties that had not contested the reconciliation, and that the Department lacked statutory authority to recalculate the amounts set forth in its annual reconciliation for counties that had not filed challenges. The court specifically held that the doctrine of administrative finality applied to preclude Orange County's belated challenge to the initial annual reconciliation, thereby requiring reinstatement of the amounts set forth in the initial annual reconciliation letter.

Disciplinary Proceedings

Christian v. Department of Health, Board of Chiropractic Medicine, 39 Fla. L. Weekly D537 (Fla. 2d DCA 2014) (Opinion filed Mar. 12, 2014)

Disciplinary proceedings were initiated against Dr. Christian, a licensed chiropractor. The ALJ found that Dr. Christian had committed two violations of Florida law governing the practice of chiropractic medicine, and the Department of Health, Board of Chiropractic Medicine adopted the ALJ's recommended findings in its final order.

Dr. Christian appealed to the Second District Court of Appeal, which concluded that one of the violations the ALJ found that Dr. Christian had committed was not charged in the administrative complaint. Specifically, while the ALJ found that the Department had established by clear and convincing evidence that Dr. Christian failed to describe hyperabduction test results accurately on one occasion, the administrative complaint contained no factual allegations regarding hyperabduction testing. As the Second District explained, section 120.60(5), Florida Statutes, requires that an administrative complaint must afford "reasonable notice to the licensee of facts or conduct which warrant the intended action."

The second violation, which was alleged, asserted that Dr. Christian violated section 460.413(1)(m), Florida Statutes, and rule 64B2-17.0065, F.A.C., "[b]y failing to record or maintain daily treatment notes that justified the totality of the care provided" to a patient. Section 460.413(1)(m), Florida Statutes, states that a chiropractor may be disciplined for "[f]ailing to keep legibly written chiropractic medical records . . . that justify the course of treatment." Rule 64B2–17.0065 states that "[t]he medical record shall be legibly maintained and shall contain sufficient information to identify the patient, support the diagnosis, justify the treatment and document the course and results of treatment accurately."

Dr. Christian contended that these provisions require only that the daily records, taken as a whole, justify the treatment provided, and do not require daily or per-visit justification to be documented.

While recognizing the deference that appellate courts afford to an agency's construction of a rule the agency is charged with enforcing and interpreting, the Second District agreed with Dr. Christian. Although section 460.413(1)(m) requires a chiropractor to keep medical records that justify the course of treatment, the court held that this "does not require that the chiropractor justify that course of treatment on every single visit where treatment is being provided as part of an ongoing treatment plan." Likewise, rule 64B2–17.0065(3) simply provides that a chiropractor must keep a medical record that, on whole, justifies the course of treatment, and does not require "that the notes for a particular day must again justify the treatment provided."

There being no support for either violation, the Second District reversed the final order with directions to dismiss the administrative complaint.

Petition for Enforcement of Agency Action

Kontos v. Menz, 39 Fla. L. Weekly D371 (Fla. 2d DCA 2014) (Opinion filed Feb. 14, 2014)

Dr. Emanuel Kontos sought review of the final judgment of the circuit court that purported to enforce an administrative order entered in a retaliatory discharge case brought by Victoria Menz pursuant to provisions of the Pinellas County Code.

Menz brought a retaliatory discharge action against Kontos, her former employer, under section 70-54 of the Pinellas County Code. This provision generally prohibits an employer from retaliating against an employee because the employee filed a discrimination complaint or opposed a discriminatory practice, and it essentially tracks the language in section 760.10(7), Florida Statutes (2009). After an evidentiary hearing, the ALJ entered a recommended order finding in favor of Menz. Neither party filed exceptions and the ALJ entered a final order in favor of Menz, awarding her $37,410 for lost wages. Kontos did not appeal the final order.

Kontos failed to pay the award and Menz filed a "petition for enforcement" in the circuit court pursuant to section 70-78(b) of the Pinellas County Code, which authorized the filing of such petitions in a court of competent jurisdiction. The circuit court accepted jurisdiction over the petition based solely on this section of the county code, and it ultimately entered an order enforcing the petition. Kontos appealed.

Although neither party raised the issue of whether the circuit court had jurisdiction to consider Menz's petition for enforcement, the appellate court *sua sponte* questioned whether

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Pinellas County could confer jurisdiction on the circuit court to hear petitions for enforcement. The appellate court concluded that the county could not, but found that its attempt to do so was harmless. The appellate court determined that the "grant" of jurisdiction in the local code does not violate the constitution because such jurisdiction was already granted to the circuit court by section 120.69, Florida Statutes. This provision of the APA authorizes either the agency or a "substantially interested person" to file a petition for enforcement. The appellate court found that the failure to reference section 120.69 was a pleading deficiency that did not divest the circuit court of jurisdiction to entertain the petition. Accordingly, the appellate court found no constitutional jurisdictional infirmity in the entry of the final judgment on appeal. However, the appellate court found that the provisions in the local code that purport to prescribe the scope of review by the circuit court and the procedures to be used during that review, encroached on the powers of the legislature and the supreme court to enact substantive and procedural law. But the appellate court found that the use of these procedures did not result in harm to either party in this case, so it affirmed the order despite any constitutional infirmity.

Public Records

Lilker v. Suwannee Valley Transit Authority, 133 So. 3d 654 (Fla. 1st DCA 2014) (Opinion filed Mar. 14, 2014)

Mr. Lilker filed suit to compel the Suwannee Valley Transit Authority and its records custodian ("the Authority") to provide public records he had requested a few months earlier. The Authority admitted that the records were subject to disclosure, and following an evidentiary hearing, was ordered to provide them to Mr. Lilker. The trial court, however, declined to award Mr. Lilker attorney's fees and costs under section 119.12, Florida Statutes, on the basis that the Authority's failure to provide the public records before Mr. Lilker filed suit was not "an unlawful and willful refusal" to comply with chapter 119, Florida Statutes.

The First District Court of Appeal concluded that the trial court erroneously imposed a "willfulness" requirement for fees and costs. The First District clarified that the proper question before the court on Mr. Lilker's request for attorney's fees and costs under section 119.12, Florida Statutes, was whether the Authority "unlawfully refused to produce records," not whether any such refusal was "willful."

The First District went on to clarify that unlawful refusal under section 119.12 includes not only an affirmative refusal to produce records, but also, an "unjustified delay" in producing them.

Because the trial court did not clearly decide whether the Authority's actions amounted to "unlawful refusal," the First District reversed and remanded to the trial court for resolution of the issue under the proper standard.

Statutory Construction

Amalgamated Transit Union Local 1593 v. Hillsborough Area Regional Transit, 39 Fla. L. Weekly D717 (Fla. 2d DCA 2014) (Opinion filed Apr. 4, 2014)

Amalgamated Transit Union Local 1593 appealed a decision by the Public Employees Relations Commission (PERC) regarding the proper application of the impasse provisions in Florida's public employee collective bargaining law.

The Union is the collective bargaining agent representing the bus drivers, street car operators and other workers employed by the Hillsborough Area Regional Transit Authority (HART). In June 2010, the Union and HART began negotiating a new contract. The parties reached agreement on 71 articles, but could not agree on six others. HART declared an impasse on these articles. PERC appointed a special magistrate to conduct a hearing and to recommend resolutions of the issues. The Union accepted all of the recommendations, but HART rejected the recommendations on three issues.

HART scheduled a legislative body hearing to resolve the three issues that remained at impasse. On the day of the scheduled hearing, the parties reached a tentative settlement. The Union sent a proposed contract incorporating the new tentative agreement to its members with a recommendation to ratify, but the members rejected it.

The Union sought to return to the bargaining table, but HART refused. Instead, over the Union's objection HART rescheduled the legislative body hearing, and the legislative body resolved the issues in HART's favor. HART then sent the Union a proposed contract to ratify. When the Union refused to conduct a ratification vote, HART imposed the articles resolved by the legislative body.

The Union then filed charges with PERC alleging that HART committed an unfair labor practice by refusing to resume negotiations after the failed ratification vote, conducting a legislative body impasse hearing instead of resuming bargaining, and unilaterally altering terms and conditions by implementing the articles resolved at the impasse hearing. HART countered with an unfair labor practice charge premised on the Union's failure to hold a ratification vote on the agreement tendered by HART.

PERC appointed a hearing officer to hear the charges. The hearing officer found for the Union on all charges. HART filed exceptions, and PERC issued a final order granting several of the exceptions. It concluded that HART did not commit an unfair labor practice and it dismissed the Union's charge. The Union appealed.

The appellate court found that PERC's resolution of this case was at odds with a prior decision involving Sarasota County, where PERC had disapproved the legislative body's similar actions. The appellate court recognized that it is obliged to give deference to an agency's interpretation of a statute that it is charged with implementing, but noted that it need not do so when the agency erroneously interprets the statute or when it "suddenly change[s] its interpretation with little or no explanation."

Here, PERC did not expressly recede from its holding in the prior case; rather, it sought to explain away that prior precedent, in part based on policy grounds. PERC declared that requiring HART to resume negotiations with the Union "would frus-

trate and undermine the legislative intent through a potentially never ending cycle of negotiations leading to impasse, another special magistrate hearing, scheduling of the legislative body hearing, post-impasse acceptance by negotiators, rejection by the bargaining unit employees and a return to bargaining."

The court found the explanation unavailing, holding that even when an agency is pursuing the policy objectives underlying the statutory scheme it is charged with enforcing, the agency may not disregard or expand upon the terms of the statutes themselves—particularly where, as here, the statutes implicate constitutional rights and therefore must be narrowly applied. Accordingly, the court reversed the order and directed PERC to approve the hearing officer's recommended order and to impose remedies consistent with those PERC effected in the Sarasota County case.

Timeliness

Trisha's One Stop, Inc. v. Office of Financial Regulation, 130 So. 3d 285 (Fla. 1st DCA 2014) (Opinion filed Jan. 29, 2014)

Trisha's One Stop, Inc., appealed a final order of the Office of Financial Regulation (OFR) that imposed a fine of $15,000 and revoked its license to operate a "money services business" pursuant to Chapter 560, Part III, Florida Statutes.

OFR filed an administrative complaint that alleged multiple violations and proposed to enter a final order "imposing an administrative fine of $15,000, the entry of a Cease and Desist Order, and taking any other appropriate action against Respondent's license issued pursuant to Chapter 560." The administrative complaint gave clear notice of a point of entry, stating that the failure to respond within 21 days would be deemed a waiver of all rights to a hearing "and a final order will be entered without further notice."

Trisha's One Stop failed to file a petition in response to the administrative complaint, which it received by certified mail on December 5, 2012. Accordingly, on January 25, 2013, OFR entered the subject final order without a hearing. The final order incorporated the facts alleged in the complaint by reference and adopted them as the facts supporting the agency's action. The final order ordered Trisha's One Stop to pay a $15,000 fine and revoked its license.

The court found that because Trisha's One Stop failed to timely file a petition for hearing in response to the administrative complaint, the facts alleged were deemed the facts of the case. As such, the court concluded that this failure was a "green light" for OFR to decide the case based on the facts alleged in the complaint and to impose any appropriate penalty.

The court distinguished this case from those where the agency relied on facts not pleaded in the complaint or the respondent was not advised that the result of a failure to appear could be default. Here, OFR relied on the facts pleaded in the complaint. The administrative complaint alleged four distinct violations, advised Trisha's One Stop that the statute authorized imposition of a fine up to $10,000 per violation and suspension or revocation of a license, and that OFR "will enter a final order imposing any statutory penalties authorized by Chapter 560, Florida Statutes, which may include revocation or suspension of Respondent's license as a money services business in this state and the imposition of an administrative fine." The complaint also notified Trisha's One Stop that the failure to respond within 21 days of receipt of the complaint "shall be deemed a waiver of all rights to a hearing, and a Final Order will be entered without further notice." Trisha's One Stop nonetheless failed to file a timely petition for hearing. Accordingly, the court affirmed the final order.

Unadopted Rule Challenge

Florida Quarter Horse Track Ass'n, Inc. v. Department of Business and Professional Regulation, 133 So. 3d 1118 (Fla. 1st DCA 2014) (Opinion filed Feb. 7, 2014)

The Florida Quarter Horse Track Association, Inc., intervenor in the proceeding below, sought review of the final order determining that the Division of Pari-Mutuel Wagering's conduct in treating barrel match racing as an authorized form of quarter horse racing for purposes of issuing pari-mutuel permits and licenses under chapter 550, Florida Statutes, evidenced its generally applicable policy that was a "rule" that had not been adopted pursuant to the rulemaking process in section 120.54, Florida Statutes.

On appeal, the Association argued that rather than interpreting the statute, the agency simply had applied the statute and its existing rules to issue the license authorizing barrel match racing as a pari-mutuel event. The Association also argued that the unadopted rule challenge was, in reality, a collateral attack on the agency's disposition of a section 120.57(1), Florida Statutes, challenge to issuance of the license. Both arguments had been rejected by the ALJ in the unadopted rule challenge below.

In a brief opinion, the appellate court affirmed, quoting the ALJ's final order:

> A policy which allows pari-mutuel wagering to be conducted on a previously unrecognized activity by deeming that activity to be "quarter horse racing" is without question a statement of general applicability having the force and effect of law. Florida administrative law does not allow an agency to establish such a policy stealthily by the issuance of expedient licenses; this is equally true whether the policy is highly controversial or widely praised. To be legal and enforceable, a policy which operates as law must be formally adopted in public, through the transparent process of the rulemaking procedure set forth in section 120.54. In sum, the Division's policy of licensing the conduct of pari-mutuel wagering on [barrel match racing], on the ground that [barrel match racing] is legally equivalent to quarter horse racing, constitutes an unadopted rule. As such, it violates section 120.54(1)(a).

quoting *Florida Quarter Horse Racing Ass'n vs. Department of Business and Professional Regulation*, Case No. 11-5796 (Fla. DOAH May 6, 2013).

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