ADMINISTRATIVE LAW SECTION
Newsletter
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Petitions For Review: Getting The Final Word On Non-Final Orders

by Gar Chisenhall

All administrative law practitioners know they can appeal final orders, and they know how to appeal final orders. In fact, final orders rendered by state agencies usually tell prospective appellants of their right to judicial review and how to timely invoke that right. But, many administrative law practitioners may be unaware that they can also seek judicial review of non-final orders. Therefore, this article is intended to provide an introduction to petitions for review of non-final orders ("petitions for review"). As explained below, a petition for review can be a valuable tool for administrative law practitioners seeking to challenge non-final orders entered by agencies and administrative law judges. However, prospective petitioners and respondents must be aware of the substantial differences between seeking judicial review of a non-final order and the typical direct or plenary appeal. Those differences may significantly influence the decision to seek judicial review, and they will most certainly impact a petitioner's likelihood of success.

In Administrative Practice, a Petition for Review Functions Like a Petition for Writ of Certiorari.

When discussing petitions for review with my colleagues, I often refer to them as administrative law's version of a petition for writ of certiorari. That is because petitions for review are the means by which a party seeks judicial review of non-final

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From the Chair

by Daniel E. Nordby

In the final installment of each year's "From the Chair" column, it has become customary for the Administrative Law Section's outgoing chair to reflect on the Section's activities and accomplishments over the past 10-12 months. As this year also included the first regular evaluation of the Administrative Law Section by the Bar's Program Evaluation Committee (PEC) in recent memory, I have more than the usual amount of data to draw upon in presenting these comments.

I am very pleased to report that the Section received a favorable review and report from the PEC to the Board of Governors. The results of the PEC's survey of Bar members showed that the Administrative Law Section has the highest member satisfaction level of any Bar Section. No one will be surprised to learn that the Section's newsletter and CLE presentations were considered the most important benefits of Section membership. I credit the hard work of the Section's many volunteers, as well as our longstanding focus on

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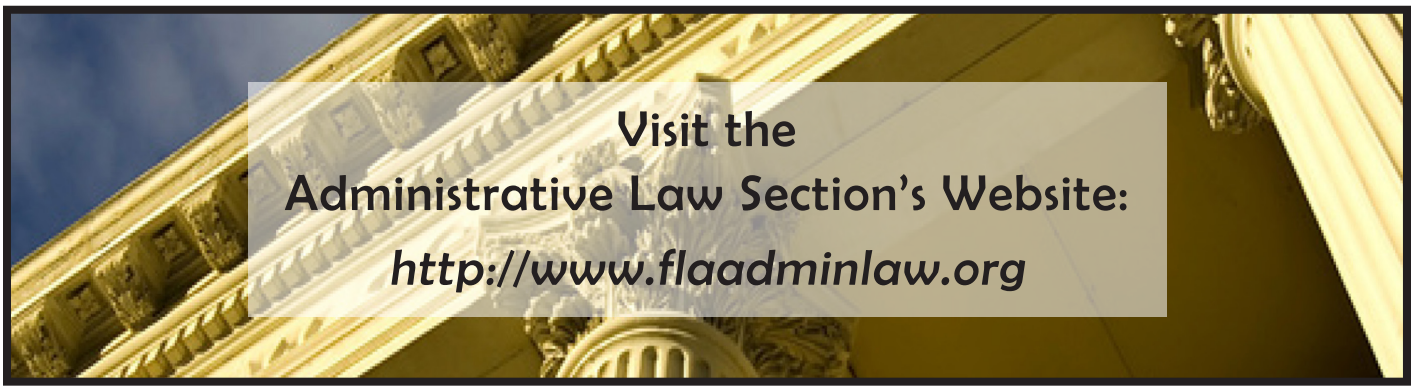
doing only a few things—but doing them well.

The Section has had an active year of continuing legal education programs. From the Pat Dore Conference in October through an April seminar on Advanced Topics in Administrative, Environmental, and Government Law, I am proud of the programs that we provided to our members. I am also convinced that there is a market for high-quality administrative law CLE courses presented at a reasonable cost. I would like to thank Bruce Lamb, Gar Chisenhall, the CLE faculty, and everyone else on the CLE committee for their efforts over the past year.

As noted above, the Administrative Law Section continues to provide high quality content in its newsletter and in its Florida Bar Journal articles. Thank you to all of our authors, to our newsletter editors Jowanna Oates and Judge Elizabeth McArthur, and to our Bar Journal editor Stephen Emmanuel.

The Section's legislation committee has had an unusually active year. In addition to monitoring legislation that may affect the Administrative Procedure Act or implicate the Section's adopted legislative positions, the Section has sought to "finish the work" of its two-year old ad hoc orders access committee by affirmatively promoting legislative reforms to increase public access to agency final orders. I would like to thank Representative Eisnaugle and Senator Soto for taking up this cause in the Legislature by sponsoring, respectively, House Bill 985 and Senate Bill 1284. The proposal has passed both chambers and awaits approval by the Governor. Thank you to Chief Judge Bob Cohen, Linda Rigot, Larry Sellers, Fred Dudley, and others who will remain nameless for their assistance on this important "pro bono" project.

With confidence that the Administrative Law Section is bound for even greater accomplishments in the year to come, I thank you for the honor of serving as your chair.



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APPELLATE CASE NOTES

by Larry Sellers and Gigi Rollini

Appellate Jurisdiction – Untimely Service of Final Order

Fernandez v. Office of Fin. Reg., 159 So. 3d 388 (Fla. 4th DCA 2015).

Reuben David Fernandez (Fernandez) appealed a final order of the Office of Financial Regulation (OFR) denying his application for a mortgage loan originator license. The final order was issued on August 14, 2013, and his notice of appeal was not filed until October 24, 2013. While his appeal was untimely, Fernandez alleged that he did not actually receive the final order until September 27, 2013, and that because he filed his appeal within 30 days of service of the final order, and it should be treated as timely. In support, OFR stipulated that Fernandez did not receive the final order until September 27, 2013.

The court dismissed Fernandez's appeal for lack of subject matter jurisdiction, noting that parties cannot stipulate to confer subject matter jurisdiction where there is none. However, the dismissal was without prejudice to Fernandez's right to petition the agency to vacate and re-enter the final order upon a determination, after an evidentiary hearing, that Fernandez did not receive a copy or have notice of the final order before the time to appeal expired.

County Charter – Conflict with Statute

Dade Cnty. Police Benevolent Ass'n v. Miami-Dade Cnty. Bd. of Cnty. Comm'rs, 160 So. 3d 482 (Fla. 1st DCA 2015).

The Dade County Police Benevolent Association (Union) appealed a final order of the Public Employees Relations Commission (PERC) concluding that Miami-Dade County (the County) did not commit an unfair labor practice when its Mayor vetoed the County Commission's resolution of an impasse under section 447.403, Florida Statutes.

The Union and the Mayor began negotiations for successor collective bargaining agreements (CBAs) for bargaining unit employees. Agreement was reached on all issues except for one, creating an "impasse." The County Commission subsequently adopted a resolution that ratified and settled the impasse. The resolution was to become effective unless vetoed by the Mayor, in which instance the County Commission could override that veto. The Mayor then vetoed the resolution pursuant to his authority under the Home Rule Amendment and Miami-Dade County Charter (Charter). At its next meeting, the County Commission did not override the Mayor's veto, but instead voted to reconsider the adopted resolution. The Commission then voted to resolve the impasse the way that the Mayor wanted it resolved, instead of as the Commission first voted to resolve the impasse.

The Union subsequently filed an unfair labor practice charge against the County with PERC. In its recommended order, the PERC hearing officer concluded that the County did not commit an unfair labor practice, relying on an earlier decision in which PERC's general counsel rejected the claim that a mayoral veto of a legislative body's resolution of an impasse is an unfair labor practice. The Union filed an exception to that conclusion, which PERC denied.

The First DCA reversed, concluding an unfair labor practice occurred when the Mayor vetoed the County Commission's resolution. The court concluded that section 447.403, Florida Statutes, clearly and unambiguously contemplates that the impasse will be resolved exclusively by the legislative body, and the chief executive officer's role is limited to that of an advocate. The court determined that the Charter was not controlling to the extent it conflicts with governing state law.

Discovery – Ability to Depose Agency Head

Office of Ins. Reg. v. Dep't of Fin. Servs., et al., 159 So. 3d 945 (Fla. 1st DCA 2015).

The Office of Insurance Regulation (OIR) filed a petition for writ of certiorari challenging a circuit court order compelling discovery from the Insurance Commissioner (Commissioner) at the behest of the Department of Financial Services (DFS) and Deloitte & Touche, LLP (Deloitte).

DFS filed a complaint against Deloitte alleging that it negligently prepared inaccurate financial statements for several insurance companies to be filed with OIR. As a result, DFS alleged, OIR improperly determined whether to take insurance companies into receivership. As part of its response, Deloitte made several attempts to subpoena the Commissioner. Likewise, DFS attempted to add the Commissioner to its trial witness list. The trial court ruled that Deloitte could depose the Commissioner and that DFS could add him to its witness list.

OIR subsequently filed a motion to quash the subpoena and also filed for a protective order from including the Commissioner on DFS's witness list. OIR argued that the Commissioner had no unique information that could not be obtained from other sources. The trial court denied the motion to quash and request for a protective order. The trial court determined that the Commissioner's testimony was "essential and necessary for a full determination of the issues raised" for two reasons: (1) the Commissioner, as the immediate supervisor of subordinate staff, was the only person who could provide the relevant testimony, and (2) all other discovery tools had been exhausted (eight OIR witnesses, including subordinates, had already been deposed).

The First DCA reversed on two grounds: (1) the information sought from the Commissioner was neither necessary to DFS's cause of action nor unavailable from other sources,

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and (2) compelling the questioning of agency heads regarding discretionary decisions would raise serious separation of powers issues.

First, before requiring an agency head to testify, a trial court must find that two conjunctive prongs are met: (1) the party seeking testimony has exhausted all discovery tools to obtain the relevant information, and (2) the testimony sought is necessary and unavailable from other sources. The court found that while the first prong may have been met, the second had not where the information sought was largely opinion testimony that would be equally available to all parties through experts.

Second, the court reiterated concerns raised in Department of Health & Rehabilitative Services v. Brooke, 573 So. 2d 363, 371 (Fla. 1st DCA 1991), regarding the questioning of an agency head that goes beyond narrow informational purposes and enters the decision-making realm. The court stressed that such questioning could commit the agency head to a less than fully investigated or evaluated position, and more generally "would constitute a serious intrusion into the executive branch of government."

Disqualification of Individual Members of Collegial Body

Biscayne Bay Pilots v. Fla. Caribbean-Cruise Ass'n, 40 Fla. L. Weekly D843 (Fla. 1st DCA, April 8, 2015).

Biscayne Bay Pilots, Inc. (Pilots), filed a petition for writ of prohibition to review the order entered by the Pilotage Rates Review Committee (Committee) denying the Pilots' motion to disqualify two Committee members from participating in the proceeding initiated by Florida Caribbean-Cruise Association to reduce certain pilotage rates.

The Committee is a collegial body comprised of seven members of the Board of Pilot Commissioners, including two cruise line executives, Thomas Burke and Enrique Miguez. The Cruise Association initiated the underlying proceeding by filing an application with the Committee for a 25 percent reduction in the pilotage rates for commercial passenger cruise ships in PortMiami. The Committee accepted the application and set the matter for a public hearing. Prior to the public hearing, the Pilots filed a motion to disqualify Commissioners Burke and Miguez from participating in the proceeding on the Cruise Association's application for a rate reduction, citing section 120.665, Florida Statutes.

The motion asserted that Commissioners Burke and Miguez could not be fair and impartial because their employers were members of the party that filed the application for the rate reduction and "no reasonable person would expect them to vote against the interests of their employers in a proceeding that has the potential of saving their employers a substantial amount of money." The Cruise Association opposed the motion, arguing that the motion was legally insufficient to warrant the disqualification of the two commissioners and asserting that the motion was an attempt to "end-run around" the statute that requires the Committee to be comprised of balanced representation from the piloting and maritime industry.

The Committee voted to deny the motion. Immediately thereafter, the Committee's legal counsel asked the individual commissioners if they intended to disqualify themselves from the proceeding, and each commissioner responded in the negative. At the conclusion of the public hearing, the Committee voted 4 to 3, with Commissioners Burke and Miguez in the majority, to approve the rate reduction requested by the Cruise Association.

The Committee entered a written order denying the motion to disqualify several weeks after the public hearing. The order did not articulate the grounds on which the denial was based. The Pilots promptly sought review of the order by filing a petition for writ of prohibition.

On review, the Pilots argued that the Committee denied the motion to disqualify on the merits and that the Committee's ruling was erroneous because the motion made a legally sufficient showing of bias and prejudice under section 120.665, Florida Statutes. The Committee and the Cruise Association contended that the Committee did not deny the motion on the merits because it correctly recognized that it lacked the authority to disqualify its individual members.

The court agreed with the Committee and the Cruise Association because even though the order denying the motion to disqualify did not articulate the ground upon which the denial was based, it was clear from the discussion preceding the vote on the motion that the denial was based on the Committee's view that it did not have the authority to disqualify its individual members.

The court agreed with the Committee that it did not have such authority because it did not see any reason for the collegial agency head to have any role in determining whether a motion to disqualify an individual member of the agency head should be granted or denied. Instead, the court determined that the better procedure was for that decision to be made by the individual that is the target of such a motion, upon review of the legal sufficiency of a timely filed motion challenging the individual's "bias, prejudice, or interest."

Here, the two commissioners stated that they did not intend to disqualify themselves. However, these oral rulings were not memorialized in a written order. Without a written order from the individual commissioners, the court concluded that it did not have jurisdiction to review their individual decisions to not disqualify themselves.

Accordingly, the court denied the petition for writ of prohibition seeking review of the Committee's order denying the Pilots' motion to disqualify, without prejudice to the Pilots' right to seek review of the written orders entered by the individual commissioners.

Due Process – Notice

Bates v. Winn, as the Comm'r of Educ., 40 Fla. L. Weekly D914 (Fla. 1st DCA, April 17, 2015).

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Bates appealed a final order revoking his educator's certificate by the Education Practices Commission, arguing that the Commission failed to afford him proper notice of his informal hearing. The Commission sent Bates a notice of his informal hearing via certified mail, but apparently Bates did not receive the notice.

On appeal, the court noted that in order for the Commission's notice of the informal hearing to have satisfied due process, that notice should have been "reasonably calculated under all circumstances" to inform Bates of the time and place of the informal administrative hearing. The court also observed that whether a particular method of notice is reasonably calculated to provide adequate notice is determined on a case-by-case basis after considering the particular facts presented in each individual case.

In this case, the court found that, while the notice of hearing was initially reasonably calculated to reach Bates, the Commission was required to take further action to insure its receipt given the following facts: (1) the Commission did not receive a signed receipt confirming receipt of the notice; (2) the Commission previously received signed receipts from Bates; and (3) Bates had consistently been communicative with the Commission regarding his case, always responding to all forms of communications from the Commission, including e-mail, until his failure to respond to the notice of hearing. Because Bates had been so responsive regarding his case, and because the Commission previously received signed receipts in response to previously certified letters, the court found that a lack of a signed receipt in response to this notice of hearing should have put the Commission on notice that Bates may not have received it. Accordingly, the court set aside the Commission's final order revoking Bates' educator's certificate and remanded for further proceedings.

Licensure – Burden of Proof

Dep't of Children & Families v. Davis Family Day Care Home, 40 Fla. L. Weekly S169 (Fla., Mar. 26, 2015).

Davis Family Day Care Home (Davis Day Care) has been licensed as a "family day care home" under section 402.313, Florida Statutes, since 2007. In 2011, Davis Day Care renewed this license and also applied for additional licensure pursuant to section 402.3131, Florida Statutes, to allow it to accommodate more children. The Department of Children and Families (DCF) subsequently notified Davis

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Day Care that it intended to deny its licensure renewal and impose administrative fines based on statutory and rule violations. DCF also notified Davis Day Care of its intent to deny the new application based on Davis Day Care's failure to comply with the relevant statutes and rules. In so doing, DCF cited its statutory disciplinary authority as the authority to deny the licensure renewal, new application, and impose fines.

Davis Day Care petitioned for a section 120.57(1), Florida Statutes, formal hearing before an ALJ. After the hearing, the ALJ recommended that the fine be imposed, but that the license renewal and the application for additional licensure both be granted on a provisional basis. In his Recommended Order, the ALJ concluded as a matter of law that DCF was required to prove the factual bases for all three of its proposed actions by the "clear and convincing evidence" standard given DCF's reliance on its disciplinary authority.

In its Final Order, DCF adopted the ALJ's recommendations to impose the fine and grant provisional relicensure; however, it rejected the recommendation to grant the new license on a provisional basis, and instead, denied the new license without prejudice to Davis Day Care reapplying after expiration of the probationary period for its existing license. In so concluding, DCF rejected that the clear and convincing evidence standard applied, and concluded instead that the competent, substantial evidence standard applied and was met.

Davis Day Care appealed the Final Order only as to the denial of its new license application, and specifically argued that the clear and convincing evidence standard applied. The Second DCA reversed and remanded for DCF to enter a final order adopting the ALJ's recommendation, but certified conflict with the First DCA's decision in Comprehensive Medical Access, Inc. v. Office of Insurance Regulation, 983 So. 2d 45 (Fla. 1st DCA 2008), regarding the proper evidentiary standard.

The Florida Supreme Court, relying on its decision in Department of Banking & Finance, Division of Securities & Investor Protection v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1966), held that the proper standard of proof for a license application is the preponderance of the evidence standard, notwithstanding DCF's "inartful" citations to its disciplinary authority as the basis for its denial.

In so concluding, the Court reaffirmed that an agency must prove its reasons for revoking a professional license or imposing an administrative fine by clear and convincing evidence. The Court, however, distinguished this from the standard governing licensure applications, for which the preponderance of the evidence burden of proof governs.

The Court couched this distinction in terms of increased agency discretion over application denials consistent with their legislative delegation of authority to regulate, as distinguishable from the presence of a vested property interest in an existing license subject to revocation or the imposition of fines. While the applicant may ultimately have the burden of persuasion, the burden of production to present evidence to show that the applicants violated certain statutes making them unfit for licensure remains with the agency.

The Court noted that it is the nature of the agency's action and the underlying rights implicated that govern the evidentiary standard to be applied regarding each proposed action.

Public Records—Discovery reviewed for trial purposes
Morris Publishing Group, LLC v. State of Florida and Dunn, 136 So. 3d 770 (Fla. 1st DCA 2015).

Morris Publishing Group, LLC and others (the Media) sought review of a trial court's order concluding that the State Attorney's Office (SAO) did not act unlawfully in delaying or withholding recorded phone conversations of a criminal defendant, Michael Dunn, without first securing a deposit from the Media to cover the costs of reviewing the recordings to redact information that is exempt/confidential under chapter 119, Florida Statutes.

The Media sought access to recorded phone conversations in which Mr. Dunn engaged while incarcerated and awaiting his first criminal trial. In September 2013, the Media made its initial public request for criminal discovery records, which are subject to inspection and copying under the Public Records Act. The records that were released included letters written by Mr. Dunn, a video, witness statements, audio recordings and crime scene photos. Many of Mr. Dunn's letters were immediately aired, some of which included potentially inflammatory racial references to fellow inmates where Mr. Dunn was jailed. After reading media accounts of these jailhouse letters, the trial judge entered an order on his own initiative, without notice to the Media, that barred public dissemination of any criminal discovery in the case without his approval. The purpose of the order was to provide the trial judge an opportunity for in-camera inspection to ensure that no exempted materials became inadvertently disclosed to the public, and to ensure that defendant's constitutional right to a fair trial was not jeopardized.

After several months, the restrictive order was lifted, and the trial court compelled the immediate release of all public records at issue, including the recorded conversations, subject to whatever "necessary payment" requirements were imposed by the Public Records Act.

As to the phone recordings, the SAO required advanced payment from the Media for the anticipated efforts to complete its public records review process. The Media refused to pay the deposit, arguing that the policy of requiring full payment to review every phone recording, including those that the SAO already had reviewed for trial purposes, violated the Public Records Act.

On appeal, the court disagreed and held that no legal duty exists to require the custodian of criminal discovery to combine its ongoing discovery review for trial with a public records request,

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so it denied the Media's request for relief. However, the court certified the following question of great public importance: "Does a custodian of criminal discovery have a legal obligation to, where possible, combine its review of discovery for trial purposes with a public records request if doing so will be economically efficient and result in less delay?"

Public Records—Security Systems
Central Fla. Regional Transp. Auth. v. Post-Newsweek Stations, Orlando, Inc., 157 So. 3d 401 (Fla. 5th DCA 2015).

Central Florida Regional Transportation Authority (LYNX) appealed a declaratory judgment entered in favor of Post-Newsweek Stations (WKMG), holding that the Public Records Act's exemptions for security systems and security-system plans do not apply to LYNX buses' camera footage.

LYNX installed a comprehensive video-surveillance security system using, in part, grant money obtained from the Department of Homeland Security. Signs in plain view on the buses indicate the cameras' presence and provide: "[F]or your safety, you may be recorded by a video-surveillance system which may also include audio recording." WKMG filed public-records requests seeking to inspect video footage captured by cameras on LYNX buses. LYNX denied the requests, asserting that the videos captured by the surveillance systems were confidential and exempt from public inspection because the videos fall within the exemptions for security systems. The trial court ruled for WKMG, holding that the video footage did not fall within any exemption to the Public Records Act.

On appeal, LYNX argued that the items were exempt under sections 119.071(3)(a) and 281.301, Florida Statutes. Section 119.071(3)(a) provides that records, information, photographs, and audio and visual presentations that reveal a security system plan are confidential and exempt under certain circumstances. Likewise, section 281.301 provides that information that either relates directly to or reveals security systems is confidential and exempt under certain circumstances.

The court held that section 281.301 provides that any records that directly relate to or reveal information about security systems are confidential and exempt from public inspection. The court agreed with LYNX that the video footage captured by the bus camera directly relates to and reveals information about a security system. The videos, which are records, reveal the capabilities--and the vulnerabilities--of the current system. The court therefore concluded that the video footage was exempt from public inspection under the Public Records Act.

Public Records—"Unlawful Refusal"
Consumer Rights, LLC v. Union Cnty., 159 So. 3d 882 (Fla. 1st DCA 2015).

Consumer Rights, LLC (Consumer Rights) appealed a final judgment of the trial court denying its claim for attorney's fees against Union County (the County) after the County failed to produce requested public records.

Consumer Rights made a public records request to the County on behalf of a "Florida Company" on October 30, 2013, seeking all of the work email addresses of all County employees. In doing so, it failed to provide any identifying or personal contact information other than the generic email address from which the request was sent. When the County failed to respond, Consumer Rights brought suit and sought injunctive relief, a writ of mandamus, and attorney's fees under the Public Records Act. The County subsequently provided all requested records prior to trial. The trial court concluded after an evidentiary hearing that the County did not act in bad faith in failing to comply with the request because the request could reasonably appear to be a form of malicious "phishing." As a result, the delay in providing the records did not rise to the level of an "unlawful refusal" as required under section 119.12, Florida Statutes, to obtain an award of attorney's fees.

On appeal, the First DCA affirmed, concluding that the County's "belated compliance" with Consumer Rights' request did not amount to the "functional equivalent of an unlawful refusal" under section 119.12. Rather, section 119.12 contains two conjunctive requirements for attorney's fees: (1) the agency must have refused to provide the records, and (2) the such refusal must be unlawful. The court focused on the first element and confirmed its previous holding in Consumer Rights, LLC v. Bradford County, 153 So. 3d 394 (Fla. 1st DCA 2014), that "a delay does not *automatically* amount to an unlawful refusal[.]"

In this case, the typical factors that may convert delay into an "unlawful refusal" were not present, e.g., if there was no good reason for the delay or if the records were not provided until after the need for them had passed. Moreover, there were additional factors that militated against such a conversion—the request was made by an unnamed agent for an undisclosed company, the email could have contained a virus, and while identifying information is not required, by simply furnishing a phone number or some other form of contact information, litigation could have been avoided altogether. Finally, the underlying constitutional right to public records found in Article I, Section 24(a) of the Florida Constitution, is one that may only be asserted by a "person," and a generic email address that does not identify its association with a "person" does not fall within this term.

In the concurrence by Judge Bilbrey, it was also noted that the case could have been resolved on the ground that the record showed the request for public records was never made to the proper custodian.

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DOAH CASE NOTES

Substantial Interest Hearings
Brandy's Products, Inc. v. Dep't of Bus. & Prof'l Regulation, Div. of Alcoholic Beverages & Tobacco, DOAH Case No. 14-3496 (Recommended Order Feb. 24, 2015).

FACTS: A tobacco distributor must pay an excise tax and a surcharge to the State of Florida when bringing tobacco products into the state or when shipping tobacco products to Florida-based retailers. Section 210.25(11), Florida Statutes, defines "tobacco products" to include "loose tobacco suitable for smoking . . ." The Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco ("the Division") administers and enforces the laws relating to the taxation of tobacco products. In 2009, the Division decided that a cigar wrapper popularly known as a "blunt wrap" is "loose tobacco suitable for smoking" and would be taxed as a "tobacco product." However, the Division's decision was not adopted as a rule, and it was not the subject of any official announcement to tobacco distributors. Brandy's Products, Inc. ("Brandy's") is a wholesale distributor of "tobacco products." By letter issued on March 1, 2013, the Division notified Brandy's that it owed $71,868.23 based on untaxed purchases of blunt wraps. Brandy's disputed the assessment and requested a formal administrative hearing.

OUTCOME: The ALJ recommended that the Division enter a final order setting aside the entire assessment because section 210.25(11), Florida Statutes, does not extend to blunt wraps, despite their tobacco content. In the course of his analysis, the ALJ noted that section 120.57(1)(e), Florida Statutes, prohibits an agency or an administrative law judge from basing "agency action that determines the substantial interests of a party on an unadopted rule." The ALJ opined that an "ALJ's interpretation of an ambiguous statute is not, strictly speaking, a statement of *general applicability* because it affects at most only the parties to the proceeding before the ALJ; therefore, the ALJ's statement regarding the meaning of the statute is not an unadopted rule." However, the ALJ added that even if the ALJ's interpretation of an ambiguous statute agreed with the agency's interpretation, the agency would still be vulnerable to a unadopted rule challenge under section 120.56(4), Florida Statutes, unless and until its interpretation was "either abandoned or adopted as a rule." The ALJ also rejected the Division's argument that its interpretation of section 210.25(11), Florida Statutes, was entitled to deference. Instead, the ALJ determined that his duty is "to provide the parties an independent and impartial analysis of the law with a view towards helping the agency make the correct decision. In fulfilling this duty, the ALJ should not defer to the agency's interpretation of a statute or rule, as a court would; rather, the ALJ should make independent legal conclusions based upon his or her best interpretation of the controlling law, with the agency's legal interpretations being considered as the positions of a party litigant, entitled to no more or less weight than those of the private party." Nevertheless, the ALJ also noted that the agency responsible for issuing a final order retains "the primary authority" to interpret statutes within its substantive jurisdiction and can reject an ALJ's interpretation in favor of one the agency deems to be more reasonable.

Hernando-Pasco Hospice, Inc. v. Ag. for Health Care Admin., et al., DOAH Case No. 14-5121 (Recommended Order March 11, 2015)

FACTS: The Agency for Health Care Administration ("AHCA") is the state agency responsible for administering Florida's certificate of need ("CON") program, by which AHCA determines whether there is a need for regulated health care facilities and services before those facilities and services can be established. The determination of need for new hospice programs is based on a numeric methodology in Florida Administrative Code Rule 59C-1.0355(4)(a). Since 1995, the numeric need formula in the rule has factored in "current deaths," defined in the rule as "the number of deaths during the most recent calendar year for which data are available from the Department of Health, Office of Vital Statistics at least 3 months prior to publication of the Fixed Need Pool." The calculation also has considered "projected deaths," defined as "deaths for the most recent calendar years available from the Department of Health, Office of Vital Statistics at least 3 months prior to publication of the Fixed Need Pool . . ." Since 2009, rule 59C-1.0355(4)(a) has been amended three times in order to incorporate by reference updated versions of the Office of Vital Statistics annual reports with death data, but the definitions of "current deaths" and "projected deaths" were not changed. On October 3, 2014, AHCA published the results of its numeric need calculations for the "fixed need pool" applicable to the October 2014 batching cycle, and the results indicated one new hospice program was needed in Pasco County. Hernando-Pasco Hospice, Inc. ("HPH") provides hospice services in Pasco County and timely notified AHCA that it used the wrong death data in the fixed need pool calculation and that the correct data would have indicated there was no need for an additional hospice program in Pasco County. The error allegedly resulted from AHCA using "current deaths" data from the 2012 Vital Statistics Annual Report and the "projected death" data from the

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Vital Statistics Annual Reports for 2010, 2011, and 2012. When AHCA disagreed with HPH's claim of error, HPH petitioned for a formal administrative hearing, and the matter was referred to DOAH.

OUTCOME: The ALJ found that death data for calendar year 2013 was available from the Office of Vital Statistics no later than May 29, 2014, and that AHCA failed to follow the clear direction in rule 59C-1.0355(4)(a) about which data should be used. Rule 59C-1.0355(4)(a) "requires the use of the 2013 death data because the 2013 data were available from the Office of Vital Statistics before the specified cut-off." The ALJ also found that use of the 2013 death data would have resulted in a determination that there was no need for an additional hospice program in Pasco County. In addition, the ALJ concluded there were multiple reasons to reject AHCA's argument that the 2013 death data could not be utilized in the fixed need pool calculation until it was incorporated by reference into rule 59C-1.0355(4)(a). For instance, the ALJ stated that AHCA's argument was contrary to the rule's clear definition of "current deaths" as an ingredient used in the need formula. Furthermore, the ALJ noted that "standards outside of a law or rule" are incorporated by reference so that an administrative body is not unlawfully delegating its rulemaking authority to another entity. In contrast, the death data at issue in the instant case are facts, and "the APA does not require agencies to promulgate historic data as rules." Thus, the ALJ concluded that even though AHCA has incorporated some older death reports in its rule, the rule language did not specify that the older reports were to be used in the methodology. Instead, the passive references to older data reports functioned as mere informative references for the convenience of interested parties. "AHCA is not required to undergo rule promulgation every time new data reports are issued by the Office of Vital Statistics in order to apply that data to the standard-setting need methodology. The death data in those reports are facts, and are not themselves standards having the force and effect of law."

Disciplinary/Enforcement Actions

Dep't of Fin. Serv., Div. of Workers' Compensation v. Mex Group Maintenance & Repair, Inc., DOAH Case No. 14-2618 (Recommended Order Feb. 13, 2015).

FACTS: The Department of Financial Services ("DFS") is the state agency responsible for enforcing, through its Division of Workers' Compensation, the statutory requirement that employers secure workers' compensation coverage for their employees. On May 1, 2014, DFS hand-delivered a Stop-Work Order alleging that Mex Group Maintenance & Repair, Inc. ("Mex Group"), had failed to provide worker's compensation coverage and had materially understated or concealed payroll. Mex Group requested a formal administrative hearing, and the case was referred to DOAH.

OUTCOME: The ALJ recommended that DFS assess a $1,213,357.30 penalty against Mex Group. In so doing, the ALJ made two points of interest to administrative law practitioners. In endnote 3 of the Recommended Order, the ALJ noted that both parties' exhibits were replete with private identifying information such as social security numbers, driver's license numbers, and bank account numbers. As a result, the ALJ reminded all of those appearing before DOAH that "they are responsible for ensuring that confidential or sensitive private information that has no bearing on the issues in a proceeding is redacted. If there is any question about whether redaction is appropriate (such as if the sensitive information is relevant to the litigation, which is not the case here), an alternative would be to move for a protective order." In endnote 4, the ALJ addressed Mex Group's attempt to introduce into evidence 17 "supplementary exhibits" immediately prior to the fourth and final day of the final hearing. Those "supplementary exhibits" had not been produced during discovery or as part of the mandatory pre-hearing exhibit exchange, but were disclosed for the first time to DFS after DFS has presented its case in chief and rested. Mex Group sought to justify admission of the "supplementary exhibits" on the grounds that the formal evidentiary hearing before DOAH was a de novo hearing. The ALJ rejected that argument because "no concept of 'de novo' could possibly justify waiting until after [DFS] rests its case and taking advantage of the fortuitous need for an additional hearing day to offer records that [Mex Group] was obligated to provide long ago . . . The suggestion was, quite frankly, astonishing."

Dep't of Health, Bd. of Med. v. Mark T. Ramsey, M.D., DOAH Case No. 14-5649PL (Recommended Order March 4, 2015)

FACTS: In July 2014, the Department of Health ("DOH") filed an amended administrative complaint alleging that Dr. Mark T. Ramsey violated section 456.072(1)(hh), Florida Statutes, by being terminated from the Professional Resources Network ("PRN"). The statute under which Dr. Ramsey was charged subjects physicians to discipline for being terminated from a treatment program for impaired practitioners due to a failure to comply with the terms of a monitoring or treatment project. Dr. Ramsey requested a formal administrative hearing and argued that DOH had no jurisdiction to discipline him because his license went null and void on February 1, 2014. Dr. Ramsey also argued that termination from PRN is not a violation of section 456.072(1)(hh), Florida Statutes, because PRN is not a treatment program.

OUTCOME: The ALJ concluded that Dr. Ramsey violated section 456.072(1)(hh), as charged, and recommended that DOH impose a $1,000 fine. The ALJ rejected Dr. Ramsey's jurisdictional argument by noting that he was a licensee at the time of the alleged violation. The ALJ also

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noted that section 456.072(2), Florida Statutes, empowers the Board of Medicine to penalize "any person" (as opposed to any licensee) guilty of violating any disciplinary ground set forth in section 456.072(1). In addition, the ALJ rejected Dr. Ramsey's argument regarding the nature of PRN by concluding that "[w]hile PRN itself does not provide treatment to impaired practitioners, the program overseen by PRN is the treatment program for impaired physicians described in section 456.072(1)(hh), Florida Statutes."

Lake Cnty. Sch. Bd. v. John Anselmo, Case No. 14-3251TTS (Recommended Order March 26, 2015).

FACTS: At all relevant times, John Anselmo was employed as a teacher in the Lake County School Board's on-line learning program. After conducting an investigation, on June 3, 2014, the School Board determined that on three separate occasions in March and April 2014, Mr. Anselmo engaged in harassing or threatening conduct that were "clear violations" of Florida Administrative Code Rule 6A-10.081 (principles of professional conduct for the education profession). The School Board issued a "Level II Written Reprimand," which warned that similar incidents "will lead to further disciplinary action up to and including termination." Also on June 3, 2014, the School Board directed Mr. Anselmo to report for a "Medical Fit for Duty Examination" with a licensed psychologist who had been furnished with police reports and other investigative documents relating to the three incidents. The examination took place on June 24, 2014, and consisted of a one-hour interview, administration of a standardized test of adult personality, and a follow-up interview lasting approximately 5 to 10 minutes. On June 25, 2014, the psychologist notified the School Board that Mr. Anselmo was "not fit to return to work in the school system." The School Board then issued a charging document notifying Mr. Anselmo that it was seeking to terminate his employment because the harassing or threatening conduct that occurred during March and April 2014 violated Florida Administrative Code Rule 6A-5.056(2) (misconduct). The School Board also alleged that the psychological evaluation demonstrated Mr. Anselmo was guilty of incompetency. Mr. Anselmo disputed the allegations, and the matter was referred to DOAH for a formal administrative hearing.

OUTCOME: The ALJ recommended that the charges be dismissed. While noting that Mr. Anselmo arguably committed acts of misconduct, the ALJ concluded "the School Board is nevertheless precluded from terminating his employment due to its earlier issuance of a written reprimand in connection with the same misconduct." As for the allegation of incompetency based on the psychological evaluation, the ALJ determined that the psychologist's opinion regarding Mr. Anselmo's fitness was "grounded almost exclusively on the very same misconduct for which [Mr. Anselmo] was reprimanded." The ALJ thus ruled that the School Board was violating "basic due process" by "attempting to accomplish indirectly (i.e., terminate [Mr. Anselmo] by channeling his previously-punished misconduct through an expert, who opines that the misconduct demonstrates unfitness) what it cannot do directly (i.e., terminate [Mr. Anselmo] for the previously-punished misconduct)." The ALJ further found that the evaluation, "which comprised a single office visit, was insufficiently comprehensive to evaluate properly [Mr. Anselmo]'s fitness to carry out his required duties."

Rule Challenges

Charles W. O'Neal, et al. v. Fla. Fish and Wildlife Conservation Comm'n, DOAH Case No. 14-5667RP (Final Order Jan. 14, 2015).

FACTS: Pursuant to Article IV, section 9 of the State Constitution, the Fish and Wildlife Conservation Commission ("the FWCC") exercises "the regulatory and executive powers of the state with respect to wild animal life." On October 3, 2014, the FWCC published notice of its intent to amend Florida Administrative Code Rule 68A-12.002, entitled "General Methods of Taking Game; Prohibitions." The proposed amendment would remove the prohibition on using silencer-equipped firearms when hunting game birds, crows, and game mammals. Petitioners filed a rule challenge petition with DOAH, alleging the proposed amendment was an invalid exercise of delegated legislative authority. Thereafter, the FWCC filed a Motion for Summary Final Order/Motion to Dismiss. In support thereof, the FWC asserted that its actions are based on its constitutional authority whenever it acts to restrict the taking of wildlife. Accordingly, the FWCC asserted its proposed action was not subject to challenge under the Administrative Procedure Act. The FWCC also cited Florida Administrative Code Rule 68A-1.008(5)(c)(1), which provides that FWCC rules derived from constitutional authority are not subject to challenge under section 120.56, Florida Statutes. However, rule 68A-1.008(5)(c)(1) also provides that FWCC rules derived from constitutional authority can be challenged through a declaratory action initiated in circuit court, an injunctive action, or (in certain circumstances) through the Bert J. Harris Private Property Rights Protection Act.

OUTCOME: The ALJ granted the FWCC's Motion to Dismiss. In reaching that conclusion, the ALJ determined that the FWCC was exercising powers derived from the constitution, and as such, was not functioning as an "agency" as defined in the APA to include governmental entities "if acting pursuant to powers other than those derived from the constitution[.]" § 120.52(1), Fla. Stat. The ALJ concluded that pursuant to rule 68A-1.008(5)(c)(1), if the Petitioners "wish to challenge the matter at hand, a means of such challenge has already been provided: Petitioners must bring their challenge directly before the circuit court." In addition, the ALJ rejected the Petitioners' argument

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that jurisdiction had been conferred on DOAH by the FWCC's use of the APA's rulemaking procedures. As the ALJ noted, subject matter jurisdiction cannot be conferred by the FWCC's acts.

Children's Hour Day School v. Dep't of Children & Families, DOAH Case No. 14-4724RX (Final Order Jan. 20, 2015).

FACTS: Children's Hour Day School ("the School") is licensed by the Department of Children and Families ("DCF") to operate a child care facility in Miami, Florida. Florida Administrative Code Rule 65C-22.010(2)(e)2.a. provides that a first violation of a Class II standard shall result in DCF issuing a formal warning letter to the child care facility stating DCF's intent to take administrative action if further violations occur. After conducting an inspection of the School, DCF issued two formal warning letters, finding that the School violated numerous Class II standards governing the operation of child care facilities. Even though the findings set forth in the letters are available to the public, DCF did not offer the School a point of entry to contest those findings. Nevertheless, the School filed a request for a formal hearing, but the hearing request was dismissed by DCF, which considered the warning letters to be "pre-disciplinary" action and not disciplinary action for which DCF would issue an administrative complaint and offer a "clear point of entry" to request an administrative hearing. Rather than appealing the Final Order that dismissed its hearing request, the School initiated a rule challenge, alleging the rule is an invalid exercise of delegated legislative authority.

OUTCOME: At the outset of his analysis, the ALJ noted that a party whose substantial interests are affected by agency action must be afforded a clear point of entry into formal or informal proceedings under chapter 120, Florida Statutes. The ALJ then determined that issuance of a formal warning letter pursuant to the DCF rule affects a licensee's substantial interests because: (1) DCF is obliged to release a copy of a warning letter to any inquiring member of the public; (2) a formal warning letter makes specific findings of misconduct; and (3) the rule contemplates that subsequent violations of the same Class II standard within a two-year period will expose a licensee to increasingly harsh penalties. The ALJ determined that even though the statute authorizing the rule does not specify that DCF must provide a point of entry to challenge a formal warning letter, the APA requires such a point of entry. The ALJ relied on Brown v. Department of Professional Regulation, 602 So. 2d 1337 (Fla. 1st DCA 1992), to conclude that the rule is an invalid exercise of delegated legislative authority because it denies licensees any point of entry into the administrative process, while purporting to make findings of violations.

Paul Still, et al. v. Dep't of Envtl. Prot., et al., DOAH Case Nos. 14-5658RP and 14-6132RP (Summary Final Order Feb. 13, 2015).

FACTS: In March 2014, the Department of Environmental Protection ("DEP") proposed to adopt Florida Administrative Code Rules 62-42.100, 62-42.200, and 62-42.300, which would establish minimum flows for the Ichetucknee and Lower Santa Fe Rivers and their associated springs. The proposed rules would also establish special review criteria for proposed water withdrawals in the area of those waterbodies. Paul Still and two environmental associations challenged the proposed rules as invalid exercises of delegated legislative authority. On September 11, 2014, DOAH issued a Final Order determining that proposed rules 62-42.100 and 62-42.200 were valid, but that the minimum flows set forth in proposed rule 62-42.300 were invalid due to vagueness. On November 7, 2014, DEP published a Notice of Change to proposed rule 62-42.300 in order to address the vagueness issue. Mr. Still filed a petition challenging the changed and unchanged portions of proposed rule 62-42.300. Mr. Still's wife subsequently filed a nearly identical petition.

OUTCOME: The ALJ determined that proposed rule 62-42.300 is a valid exercise of delegated legislative authority. In the course of doing so, the ALJ concluded that res judicata or collateral estoppel barred Mr. Still from challenging the unchanged portions of proposed rule 62-42.300. The ALJ also concluded that Mr. Still's wife was barred from challenging the unchanged portions of the proposed rule because Mr. Still had been her "virtual representative" during the initial rule challenge proceeding.

Harmony Environmental, Inc. v. Dep't of Bus. & Prof'l Regulation, Drugs, Devices, and Cosmetics Program, DOAH Case No. 14-5334RU (Final Order Feb. 26, 2015).

FACTS: Harmony Environmental, Inc. ("Harmony") is licensed by the Department of Environmental Protection as a Universal Waste Transporter Facility and a Hazardous Waste Transporter. Harmony is also licensed by the Department of Health as a Biomedical Waste Transporter. The Department of Business and Professional Regulation, Drugs, Devices, and Cosmetics Program ("DDC"), regulates prescription drugs in Florida but has no jurisdiction over the permitting of universal waste transporters and has not issued any permits or licenses to Harmony. In July 2014, a DDC employee inspected a Harmony facility and forced Harmony to quarantine non-viable pharmaceuticals that had been legally discarded and designated as Universal Pharmaceutical Waste ("UPW"). In August 2014, DDC denied Harmony's application for a restricted drug distributor/destruction permit. The denial was based on DDC's conclusion that Harmony had been acting as a restricted drug distributor/destruction establishment without a license. On November 13, 2014, Harmony filed a rule challenge petition, alleging DDC's actions were based on an unadopted rule. In response

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to an interrogatory, DDC stated that "[a] prescription drug is no longer a prescription drug when the nature of the prescription drug is altered or changed in a way that the active ingredient which causes the prescription drug to be a prescription drug is no longer active." However, the DDC statement is not set forth in any state or federal law or rule.

OUTCOME: The ALJ concluded that DDC was impermissibly relying on an unadopted rule that deemed all prescription drugs to be under DDC's jurisdiction until "the nature of the prescription drug is altered or changed in a way that the active ingredient which causes the prescription drug to be a prescription drug is no longer active." The ALJ noted that this unadopted rule expanded DDC's jurisdiction to encompass UPW, which was within the regulatory jurisdiction of different state and federal agencies. The ALJ's ruling also awarded reasonable attorney's fees and costs to Harmony.

Shelley Kay Hill, R.N. v. Dep't of Health, Bd. of Nursing, DOAH Case No. 14-4511RU (Final Order March 10, 2015).

FACTS: The Department of Health, Board of Nursing ("the Board of Nursing") is the state agency responsible for regulating the practice of nursing in Florida. Section 464.018(1)(h), Florida Statutes, provides that unprofessional conduct, as defined by rule, constitutes grounds for disciplinary action. Rule 64B9-8.005(13) provides that unprofessional conduct includes practicing beyond the scope of one's license, educational preparation, or nursing experience. Administering medication, including by injection, is considered to be within the scope of nursing practice in Florida. However, as of October 17, 2014, the Board of Nursing's website stated that the injection of Botox is not within a practical or registered nurse's scope of practice. An administrative complaint was filed against Shelley Kay Hill, a Florida-licensed registered nurse, for engaging in unprofessional conduct by practicing outside the scope of registered nursing practice by injecting Botox. Ms. Hill filed an unadopted rule challenge, alleging that the statement on the Board of Nursing's website that the injection of Botox is outside a registered nurse's scope of practice was an unadopted rule that could not be used as the basis for disciplinary action.

OUTCOME: The ALJ determined that the challenged statement was an unadopted rule, and retained jurisdiction to consider an award of attorneys' fees and costs. In the course of doing so, the ALJ rejected the Board of Nursing's argument (based on United Wisconsin Life Ins. Co. v. Dep't of Ins., 831 So. 2d 239 (Fla. 1st DCA 2002)) that Ms. Hill's unadopted rule challenge was an impermissible collateral attack because she had a remedy through the disciplinary action that had been initiated against her. The ALJ distinguished the instant case from United Wisconsin, which was described as a case in which "the issues raised by the administrative complaint arose for the first and only time as a result of United Wisconsin's actions." Under those circumstances, the appellate court concluded that the unadopted rule challenge initiated by United Wisconsin amounted to an improper collateral challenge to the disciplinary proceeding. In contrast, the statement at issue in the instant case was generally applicable to practical and registered nurses, as evident from the Board of Nursing's broad pronouncement on its website. The ALJ concluded that if United Wisconsin were "to be read so broadly as to preclude an unadopted rule challenge to such generally applicable statements just because administrative charges have also been filed, the provisions of section 120.56(4) would be eviscerated, and the unique policy goals of that statutory section would not be achieved."

Biscayne Bay Pilots, Inc. et. al. v. Bd. of Pilot Comm'rs, Pilotage Rate Review Comm., et. al. DOAH Case No. 14-5036RX (Final Order March 20, 2015)

FACTS: Section 310.141, Florida Statutes, generally requires all vessels to have a licensed state pilot or deputy pilot on board to direct a vessel's movements when entering or leaving Florida ports or when traversing navigable waters of Florida's bays, rivers, harbors, and ports. The Pilotage Rate Review Committee ("the Committee"), consisting of seven members appointed by the Governor, is responsible for setting the rates charged by the pilots. The Petitioners are groups of harbor pilots that serve each of Florida's 14 deep-water ports. On October 23, 2014, the Petitioners filed a rule challenge petition, alleging that Florida Administrative Code Rule 61G14-22.012 is an invalid exercise of delegated legislative authority. The challenged rule, which cites section 310.151(1)(c), Florida Statutes, as rulemaking authority and section 310.151, Florida Statutes, as one of the laws to be implemented, limits an ALJ to resolving disputed issues of material fact in disputes concerning pilotage rates and prohibits an ALJ from making a recommendation "as to the appropriate rate to be imposed at any port area in question."

OUTCOME: The ALJ determined that rule 61G14-22.012 is an invalid exercise of delegated legislative authority because it "prohibits an ALJ from performing duties required under section 120.57(1)(k), Florida Statutes." The ALJ agreed with the Petitioners' argument that "nothing in the laws implemented or any other statute provides an exception for ALJ's to perform their duties other than required under section 120.57(1)(k), and section 310.151(4)(a) plainly states that if a petitioner requesting a hearing raises a disputed issue of material fact, the hearing will be conducted by an ALJ at DOAH 'pursuant to [sections] 120.569 and 120.57(1).'"

South Fla. Racing Ass'n, LLC v. Dep't of Bus. & Prof'l Reg., Div. of Pari-Mutuel Wagering, DOAH Case No. 14-6129RX (Final Order March 25, 2015).

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FACTS: The South Florida Racing Association, LLC ("the SFRA"), owns a pari-mutuel wagering permit that authorizes it to conduct quarter-horse racing in Miami-Dade County. The Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("the Division") regulates pari-mutuel wagering in Florida. Pursuant to section 550.0745, Florida Statutes, the SFRA applied for a summer jai alai permit. However, the Division denied the application based on the criteria set forth in Florida Administrative Code Rule 61D-4.002. Paragraphs (1)(a) through (1)(d) of that rule require the Division to evaluate the following in reviewing permit applications: (a) potential profitability; (b) ability to preserve the State's pari-mutuel wagering revenues; (c) previous business ventures; and (d) previous and current litigation. The SFRA filed a petition alleging rule 61D-4.002 is an invalid exercise of delegated legislative authority. In support thereof, the SFRA argued that rule 61D-4.002 impermissibly fails to cite section 550.0745, Florida Statutes, among the laws being implemented. The SFRA also alleged that the criteria in the rule are vague and give the Division unbridled discretion with respect to its consideration of pari-mutuel wagering permit applications.

OUTCOME: With regard to the SFRA's assertion that rule 61D-4.002 is invalid because it does not cite section 550.0745, Florida Statutes, among the laws being implemented, the ALJ observed that "[s]ome Florida courts have held that the failure to name the statutes a rule implements should ordinarily be deemed harmless error, in the same way erroneous or incomplete economic impact statements do not render administrative rules invalid unless the deficiencies are material, and impair either the fairness of the rulemaking proceedings or the correctness of the rule." But the ALJ determined it was unnecessary to decide that particular issue because section 550.0745, Florida Statutes, does not exempt summer jai alai permit applicants from the general statute governing pari-mutuel wagering applications, and that general application statute is cited as a law implemented by rule 61D-4.002. However, the ALJ agreed with the SFRA that the application criteria in rule 61D-4.002 are vague and vest the Division with unbridled discretion. The ALJ concluded that the sections of the rule at issue "are impermissibly vague, and do not include any standards that explain how any one of the identified criteria are to be applied in the evaluation of an application. Further, there is no explanation of how the four criteria relate to one another, or are to be weighted, in the context of the [Division]'s evaluation of an application for a permit."

Dahlia Barnhart, by and through her Parent and Natural Guardian, Moriah Barnhart v. Dep't of Health, Case No. 15-1271RP (Final Order April 10, 2015).

FACTS: On February 6, 2015, the Department of Health ("DOH") published a notice of proposed rulemaking setting forth the text of six proposed rules to implement the Compassionate Medical Cannabis Act of 2014 ("the Act"). The Act provides in part that certain physicians treating patients suffering from cancer or a condition that chronically produces seizures or severe muscle spasms may order low-THC cannabis for those patients' treatment. The Petitioner filed a Petition asserting that one of the proposed rules (64-4.002) is an invalid exercise of delegated legislative authority. In support thereof, the Petitioner alleged that she is a four-year-old Florida resident diagnosed with an inoperable brain tumor, and she treats her condition with medical cannabis extracts. The Petitioner further alleged that she plans to register with the Office of Compassionate Use Registry to become a "qualified patient" for the medical use of low THC cannabis. The Petition also contained allegations regarding the

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harm that would result without an adopted rule. For instance, the Petition alleged there is a "desperate need for access to low THC cannabis" and that expedited rule promulgation was necessary because the "selected applicants will be responsible for ensuring access to ordered medication, with greater risk of public injury if there is no access to medicine." The Petition also asserted that potential applicants eligible to become dispensing organizations would be harmed by the proposed rule's "overly burdensome" application, scoring, and selection process.

OUTCOME: After affording Petitioner leave to file an amended Petition, the ALJ dismissed the Petition due to a lack of standing when Petitioner chose not to file an amended Petition. The ALJ concluded the Petitioner's allegations failed to demonstrate that she could become a "qualified patient" and thus potentially eligible for a physician's order to receive low-THC cannabis. The ALJ noted that while the Petitioner alleges that she has an inoperable brain tumor, she does not allege that her "condition falls within the narrow parameters of the Act, that is, that Petitioner has cancer or that Petitioner's medical condition chronically causes seizures or muscle spasms." Moreover, even if Petitioner had sufficiently alleged that she could be a "qualified patient," the allegations were insufficient to show that Petitioner would suffer a real or sufficiently immediate injury in fact resulting from application of the proposed rule. However, the ALJ rejected DOH's argument that a "qualified patient" could never have standing to challenge proposed rule 64-4.002. While noting that the proposed rule only addresses the application requirements, scoring, and selection process for dispensing organizations, the ALJ concluded that qualified patient status, "when adequately alleged, might, hypothetically, be sufficient as part of the predicate for standing to challenge rules implementing the Act."

Attorney's Fees

G.B., Z.L., through his Guardian K.L., J.H., and M.R. v. Agency for Persons with Disabilities, DOAH Case No. 14-4173 FC (Final Order March 24, 2015).

FACTS: In May 2013, the Agency for Persons with Disabilities ("APD") proposed to adopt rules 65G-4.0210 through 65G-4.027 in order to implement a legislative mandate for iBudgets. This mandate, in section 393.0662, Florida Statues (2010), redesigned the system for determining the amount, duration, and scope of services provided to persons with developmental disabilities funded by Medicaid under Florida's developmental disabilities waiver program. Four recipients of waiver services challenged the proposed rules, and the ALJ concluded that the proposed rules were valid. On appeal, the First District Court of Appeal reversed and held that the proposed rules contravened the iBudget statute's specific requirements. G.B. v. Ag. for Persons with Disabilities, 143 So. 3d 454 (Fla. 1st DCA 2014). The court also issued an Order granting the appellants' motion for attorney's fees and remanding the case to DOAH for a determination regarding the amount of fees to be awarded if the parties were unable to agree to an amount. The appellants had cited sections 120.595(2), 120.595(5), and 120.569(2)(e), Florida Statutes, in support of their motion for fees, but the court's Order did not address the statutory ground(s) on which the Order was based.

OUTCOME: On remand, the ALJ undertook to determine which of the statutory grounds for attorney's fees could apply, so as to consider whether the fee award was limited by a statutory cap (present in section 120.595(2), but not in sections 120.595(5) and 120.569(2)(e)). The ALJ determined that section 120.595(5), Florida Statutes, could not support an award of fees because that statute would apply only if the agency grossly abused its discretion. The ALJ concluded there was "no rational basis for finding that gross abuse of discretion was involved." First, the ALJ noted that the ultimate invalidation of the proposed rules "did not, ipso facto, establish that there was a gross abuse of [APD]'s discretion." Moreover, the ALJ's ruling in the underlying case was "some indication that [APD]'s efforts were legitimate." With regard to whether section whether section 120.569(2)(e), Florida Statutes, could apply, the ALJ determined that it would be necessary to find that the proposed rules were "interposed for any improper purpose." The ALJ concluded that APD "did not act for an improper purpose; its best efforts to follow the Legislative mandate for an iBudget simply fell short." By process of elimination, the ALJ concluded that section 120.595(2), Florida Statutes, was the only possible basis for an award of attorney's fees. That statute authorizes an award of fees up to a statutory cap of $50,000 to parties successfully challenging an agency's rules or proposed rules. Accordingly, the ALJ concluded that section 120.595(2) must have been the basis for the court's award. The ALJ therefore limited the Petitioners' award of fees to the statutory cap of $50,000. In addition, the ALJ rejected the Petitioners' argument that each of them was entitled to a separate award of $50,000. In support of his conclusion, the ALJ noted that each of the Petitioners was seeking the same relief (invalidation of the proposed rules) and it could not be argued that each Petitioner (in his or her own right) was seeking individual redress or damages.

Robert G. Dawson v. Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering, DOAH Case No. 14-5276RU (Final Order Denying Petitioner Attorneys' Fees, April 10, 2015).

FACTS: Section 120.595(4), Florida Statutes, mandates that attorneys' fees shall be awarded to the successful challenger in an unadopted rule challenge proceeding if: (a) the agency in question received notice that it was utilizing an unadopted

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rule at least 30 days prior to the filing of an unadopted rule challenge petition; and (b) the agency failed to publish a rulemaking notice addressing the statement at issue, within 30 days after the agency received notice that it was utilizing an unadopted rule. On January 29, 2015, the ALJ issued a Final Order concluding that part of a manual published by the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("the Division"), was an unadopted rule. On February 20, 2015, the Division filed a motion asking the ALJ to deem Mr. Dawson ineligible to recover attorneys' fees because he had not provided the Division with notice that the Division was utilizing an unadopted rule, as required by section 120.595(4). Mr. Dawson argued in response that the Division had received the required notice through several different means. A hearing was held on the motion, at which Mr. Dawson attempted to elicit testimony to support his argument that the Division received notice. For instance, Mr. Dawson cited a conversation with a Division attorney who had not been assigned to the underlying case. While the Division attorney testified that Mr. Dawson's attorney had mentioned something about an unadopted rule, he could not recall any more detail about the conversation. Mr. Dawson's attorney also testified that she had a conversation with the Division's attorney who was assigned to the disciplinary case against Mr. Dawson that gave rise to the unadopted rule challenge underlying case, and that she told the Division's attorney that the Division may have been utilizing "illegal procedures." Mr. Dawson also argued that the January 29, 2015, Final Order conclusively determined that he was entitled to attorneys' fees because it provided that "[j]urisdiction is retained for the purpose of determining, if necessary, the amount of reasonable attorneys' fees and costs to be awarded the Petitioner for his successful challenge under section 120.56(4)." Because the Division did not appeal the Final Order, Mr. Dawson asserted that his entitlement to fees could no longer be questioned. Finally, Mr. Dawson argued that the Division waived its ability to contest an award of attorneys' fees because the Division did not raise the alleged lack of notice during the underlying proceeding.

OUTCOME: The ALJ determined that Mr. Dawson failed to demonstrate by a preponderance of the evidence that the Division was on notice that its manual may constitute an unadopted rule. The testimony "shows that the phrase 'unadopted rule' or 'illegal procedures' was either said to persons who Mr. Dawson could not reasonably have considered as authorized to receive notice on behalf of the agency, or stated unclearly in the midst of discussion of other topics." As for the argument that DOAH had already determined that Mr. Dawson was entitled to attorneys' fees, the ALJ concluded that the language cited by Mr. Dawson could be "improved," but "it can, and should, be interpreted to retain jurisdiction at [ ] DOAH to consider issues that might result in the award of no fees at all, specifically including the requirement for advance notice that is in dispute here." The ALJ also rejected Mr. Dawson's assertion that the Division had waived its ability to contest an award of attorneys' fees by failing to raise the lack of notice as an issue during the underlying proceeding. In doing so, the ALJ noted that "[w]hile the Uniform Rules permit an answer to a petition, one is not even required, and failure to deny the allegations of an administrative petition through responsive pleading does not automatically admit them." Nevertheless, the ALJ noted that "it would have been professional and helpful for [the Division] to have identified this issue as part of the prehearing stipulation or at hearing . . ."

Mr. Dawson has appealed the Final Order Denying Petitioner Attorneys' Fees to the Fourth District Court of Appeal, where it has been assigned case number 4D15-1438.

Non-Final Orders

Medical Cannabis Trade Ass'n of Fla., LLC; Master Growers, P.A.; and Baywood Nurseries Co., Inc. v. Dep't of Health, DOAH Case Nos. 15-1693RP and 15-1694RP (Non-Final Order April 14, 2015).

FACTS: Proposed rules 64-4.001 and 64-4.002 of the Florida Administrative Code would provide definitions and an application process for licensing organizations that would dispense low-THC cannabis. The Medical Cannabis Trade Association of Florida, LLC ("MCTA") initiated a rule challenge on March 24, 2015, seeking to invalidate the proposed rules. Due to the expedited timeframe associated with rule challenges, DOAH scheduled a final hearing for April 23, 2015. After MCTA failed to fully and timely respond to the Department of Health's ("DOH") discovery requests, DOH filed a Motion to Compel on April 9, 2015. The requested discovery pertained in part to MCTA's standing to challenge the proposed rules. For instance, DOH asked MCTA to identify all of its members, whether its members satisfy the statutory criteria for becoming a dispensing organization, and which of its members will apply to become a dispensing organization. MCTA responded by moving for a protective order to prevent inquiries at a deposition of MCTA's corporate representative into the identity of MCTA's members. In support thereof, MCTA asserted that disclosure of its members' identities would violate their right to privacy and have a chilling effect on their rights to associate and advocate their point-of-view.

OUTCOME: By Order issued on April 14, 2015, the ALJ granted DOH's Motion to Compel and required complete responses to be produced by 9:00 a.m. on April 15, 2015. The ALJ also denied MCTA's Motion for Protective Order by requiring MCTA to produce its designated corporate representative to testify about certain topics by 9:00 a.m. on April 15, 2015. On April 14, 2015, MCTA voluntarily dismissed its rule challenge.

Agency Snapshot: Florida Public Service Commission

by Theresa Lee Eng Tan

Commission's Mission Statement: To facilitate the efficient provision of safe and reliable utility services at fair prices.

Background:

The Florida Public Service Commission ("Commission") was originally created by the Florida Legislature in 1887 to regulate the rates charged by Florida's railroads for passengers and freight service. As Florida's population grew and its industry diversified, the Commission's jurisdiction expanded. At one time, the Commission regulated the rates charged by railroads, motor carrier transportation companies, and airlines. Today, the Commission exercises regulatory authority over investor-owned electric, natural gas, telephone, water, and wastewater utilities in one or more of three key areas: (1) rate base/economic regulation; (2) competitive market oversight; and (3) monitoring of safety, reliability, and service. The Commission exercises limited regulatory authority over municipal and rural electric cooperatives.

The Commission carries on its work through two primary functional units: The Office of the Executive Director and the Office of the General Counsel. These Offices are charged with implementing chapters 350, 364, 366, 367, 368 and 427, Florida Statutes, and sections 403.064, 403.501-403.539, and 403.9401-403.9425, Florida Statutes. The Commission's administrative rules are located in rule division 25 of the Florida Administrative Code.

The Commission is headed by five Commissioners. Commissioners are nominated by the Florida Public Service Commission Nominating Council, appointed by the Governor, and confirmed by the Senate. The Commission Chairman is elected by a majority vote of the Commissioners to serve as chair for a period of two years. The Chairman is the chief administrative officer of the Commission, presiding at all hearings and conferences when present, setting Commission hearings, and performing those duties prescribed by law. A majority of any Commission panel constitutes a quorum, and the Commission cannot take formal action in the absence of a quorum. A majority vote of the quorum determines Commission action.

The Commission conducts most of its regulatory business at its regularly scheduled agenda conferences, which can be identified on the Commission's calendar and website. At these conferences, the Commission reviews staff recommendations for dockets on the agenda. Depending on the procedural status of the dockets, the Commission may entertain comments from the parties and the public. The Commission's order may adopt, reject, or modify the staff recommendations. Orders issued by the Commission are available on its website at: http://www.psc.state.fl.us/dockets/orders/. Commission final orders involving the rates or service of electric, gas, or telephone companies are appealed directly to the Florida Supreme Court. Commission final orders related to water and wastewater are appealed to the First District Court of Appeal. In addition, under the Federal Telecommunications Act of 1996, some Commission decisions implementing federal law are reviewable by complaint in the U.S. District Court for the Northern District of Florida.

Commissioners:
Chairman Art Graham
Commissioner Lisa Polak Edgar
Commissioner Julie Immanuel Brown
Commissioner Ronald A. Brisé
Commissioner Jimmy Patronis

Executive Director:
Braulio L. Baez
Office of Executive Director
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
(850) 413-6068

The Office of the Executive Director advises the Commission on all technical and policy matters under the Commission's jurisdiction and in coordination with the Office of the General Counsel, serves as the Commission's liaison with federal and state agencies as well as the Florida Legislature. Also, the Office of the Executive Director has authority over all divisions and offices, except the Office of the General Counsel. Two Deputy Executive Directors, technical and administrative, assist the Executive Director in planning and operational activities.

Agency Clerk:
Carlotta Stauffer
Office of Commission Clerk
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
(850) 413-6770

The Office of Commission Clerk is responsible for accepting official filings, maintaining the official case files, coordinating the Commission's records management program, and issuing all commission orders and notices. The hours of operation are from 8:00 a.m. to 5:00 p.m., Monday through Friday, except for legal holidays. For information on dockets and filings, please refer to http://www.psc.state.fl.us/dockets or call the Office of the Commission Clerk. The Commission also encourages electronic filings, provided that certain conditions are met, through its website https://secure.floridapsc.com/e-filings/efiling.aspx.

General Counsel:
Charlie Beck
Office of the General Counsel
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
(850) 413-6199

The General Counsel is responsible for all legal advice provided to the Commission and all legal matters

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under the Commission's jurisdiction. The General Counsel supervises the attorneys and staff in the Office of General Counsel and advises the Commission on ethics law issues and other non-regulatory matters. The Office of General Counsel, in coordination with the Office of the Executive Director, serves as the Commission's liaison with federal and state agencies as well as the Florida Legislature and political subdivisions of the state. In the course of evidentiary proceedings before the Commission, the Office of the General Counsel and its sections are responsible for presentations of staff positions in the proceedings, including cross examination of witnesses and presentation of staff testimony.

Number of Lawyers on Staff: 20

Kinds of Cases: Utility Regulation and Telecommunications Arbitration

The Office of the General Counsel is divided into three sections: (1) Appeals, Rules, and Mediation Section (APP); (2) Economic Regulation Section (ERS); and (3) Regulatory Analysis Section (RAS). The Appeals, Rules, and Mediation Section is responsible for defending Commission orders on appeal, defending Commission rules challenged before the Division of Administrative Hearings ("DOAH"), and representing the Commission before state and federal courts. APP supports technical divisions in making filings with, or presentations to, other federal, state or local agencies. APP advises in the promulgation of rules, and attends or conducts rulemaking hearings at the direction of the Commission. It also offers mediation services to parties to Commission proceedings. The Economic Regulation and Regulatory Analysis Sections are responsible for legal issues related to electric, natural gas, water and wastewater industries. The Regulatory Analysis Section also handles legal issues related to wholesale concerns on wireline telecommunications. ERS and RAS are responsible for conducting discovery, presenting staff positions, presenting any staff testimony, and cross-examining other parties' witnesses in matters involving evidentiary hearings before the Commission or an Administrative Law Judge. In conjunction with the appropriate technical staff, the Office of General Counsel prepares recommendations to the Commission and prepares written orders memorializing Commission decisions.

APA Interaction:

The Commission is subject to the Administrative Procedure Act (chapter 120) and is generally subject to the Uniform Rules of Procedure. However, the Commission has a number of specific exemptions from the Uniform Rules, so a practitioner must be sure to consult rule chapters 25-22 and 25-40, Florida Administrative Code. In addition, the Commission has several agency specific procedural provisions in section 120.80, Florida Statutes. While the Commission has the authority to send cases to DOAH for hearings before an Administrative Law Judge, the vast majority of chapter 120 proceedings are heard by the five-member Commission or by a panel of two or more Commissioners.

Practice Tips:

The Commission has several unique procedural practices: (1) the Commission uses prefiled written testimony in cases heard by the Commission or a Commission panel; (2) the Commission has strict rules for the classification and handling of confidential materials; and (3) the Commission makes available options for the reconsideration of final Commission orders. Questions about these or any other procedural matters may be directed to any member of the General Counsel's office.

For a more in-depth article on practicing before the Commission, please refer to Theresa Lee Eng Tan & Adam J. Teitzman's chapter on the Public Service Commission in Florida Administrative Practice, Ch. 10 (10th ed. 2015).

Judicial performance feedback sought from Bar members

The Judicial Administration & Evaluation Committee is encouraging all Bar members to participate in the Confidential Judicial Feedback Program developed by the committee and approved by The Florida Bar Board of Governors.

The purpose of the Confidential Judicial Feedback Program is to promote judicial self-improvement and enhance the quality of our judiciary as a whole. Attorneys are asked to evaluate the judge's demeanor, knowledge, fairness, and other factors, but not to discuss issues of their specific cases. The commenting attorney's identity is kept confidential and the comments are provided only to the judge who is the subject of the review. All feedback is and remains confidential pursuant to Florida Rule of Judicial Administration 2.051(c)(4).

There are separate forms for trial court judges and appellate court judges. Feedback may be provided two ways" by competing the forms online at www.floridabar.org/JudicialFeedback or by downloading the forms at www.floridabar.org/JAEC and following the instructions.

Law School Liaison

Spring 2015 Update from the Florida State University College of Law

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

This column features honors and accomplishments of our students and highlights the programs the College of Law hosted this spring.

We are delighted to report that our Environmental Law Program has again been ranked in the top 20 in the United States by *U.S. News & World Report*, for the eleventh year in a row.

Spring 2015 Events

Special Program on Florida Administrative Law

On April 6, 2015, Brent McNeal, Deputy General Counsel, Division of Vocational Rehabilitation and the Division of Blind Services, Florida Department of Education; Colin Roopnarine, General Counsel, Office of Financial Regulation; and Suzanne Van Wyk, Administrative Law Judge, Florida Division of Administrative Hearings, participated in a special panel discussion at the College of Law on key issues in administrative law in Florida.

Spring 2015 Colloquium

The Spring 2015 *Colloquium* honored seven J.D. students for their outstanding papers:

- Sarah Logan Beasley, *Growing Good Neighbors: Urban Farming Zoning in Tallahassee, Florida*
- Devan Desai, *Surging Costs: An Analysis of the Stafford Act's Financial Inadequacies*
- Chris Hastings, *Implementing a Carbon Tax in Florida Under the Clean Power Plan: Policy Considerations*
- Adrienne Kendall, *Removing the Psychological Barriers to Climate Change Adaptation Through Land Use Planning: The Road to Adaptation Implementation*
- Simone Savino, *A Taxing Endeavor: Local Government Protection of Our Nation's Coasts in the "Wake" of Climate Change*
- Theodore Stotzer, *Rising Tides: A Survey of Current Sea Level Rise (SLR) Adaptation Approaches and Suggestions Moving Forward*
- Courtney Walmer, *Governing Hydraulic Fracturing Through State-Local Dynamic Federalism: Lessons from a Florida Case Study*

Spring 2015 Distinguished Lecture

Katrina Wyman, Sarah Herring Sorin Professor of Law, New York University School of Law, presented her paper "The Recovery in U.S. Fisheries" in her Spring 2015 *Distinguished Lecture*; the lecture may be viewed at the following website: http://mediasite.capd.fsu.edu/Mediasite/Play/9edc998fafd349c19ff24d8a5c30cf4f1d.

Spring 2015 Environmental Forum

The Spring 2015 *Environmental Forum*, entitled "What Would Milton Friedman Do About Climate Change?," featured former Congressman Bob Inglis of Energy & Enterprise Initiative (E&EI); Professor Nathan Richardson, University of South Carolina School of Law; Eli Lehrer, president and co-founder, R Street Institute; and Dr. Jeff Chanton, Professor of Oceanography at Florida State University. Professor Shi-Ling Hsu moderated the *Forum,* which may be viewed at: http://mediasite.capd.fsu.edu/Mediasite/Play/fb6c56fc4fd844538f546c2a3d7a300e1d.

Environmental Certificate and Environmental LL.M. Enrichment Series

The Environmental Certificate and Environmental LL.M Enrichment Series welcomed our final two distinguished speakers for this spring: Jeff Wood, Partner, Balch and Bingham (April 2, 2015); and Katrina Kuh, Associate Professor of Law and Associate Dean for Intellectual Life, Hofstra University, Maurice A. Deane School of Law (April 8, 2015).

Recent Student Achievements

- Sarah Logan Beasley is writing a draft case note on the 9th Circuit's decision in Alaska Community Action on Toxics v. Aurora Energy Services for the ABA-SEER Water Quality and Wetlands Committee. Ms. Beasley will begin a clerkship with Judge Mark E. Walker, U.S. District Court for the Northern District of Florida, in the Fall of 2017.
- Sarah Logan Beasley and Stephanie Schwarz were named semifinalists in The Jeffrey G. Miller Pace National Environmental Law Moot Court Competition. They were coached by Segundo Fernandez of the Oertel, Fernandez, Bryant & Atkinson, P.A. law firm in Tallahassee.
- Chris Hastings has accepted an offer to publish his student note, entitled *TSCA Reform and the Need to Preserve State Chemical Safety Laws*, in volume 30 of the Journal of Land Use & Environmental Law.
- Simone Savino was recently nominated to receive recognition through the City, County, and Local Government Law Section's Law Student Award Program as Top Local Government Scholar for the 2014-2015 school year.
- Stephanie Schwarz wrote a case summary for the ABA SEER in the Fall of 2014 on Houston Unlimited, Inc., v. Mel Acres Ranch.
- Robert Volpe published an article: The Role of Advanced Cost Recovery in Nuclear Energy Policy, 15 SUSTAINABLE DEV. L. & POL'Y 28 (2015). Robert will begin working for Hopping Green & Sams upon graduation this spring.

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orders entered by agencies and administrative law judges from the Division of Administrative Hearings. See §120.68(1), Fla. Stat. (2014) (providing that "[a] preliminary, procedural, or intermediate order of the agency or of an administrative law judge of the Division of Administrative Hearings is immediately reviewable if review of the final agency decision would not provide an adequate remedy.").

My characterization of petitions for review is also appropriate because petitions for review are governed by the same procedural rules that apply to certiorari petitions. Fla. R. App. P. 9.190(b)(2) (providing that "[r]eview of non-final agency action under the Administrative Procedure Act, including non-final action by an administrative law judge, and agency orders entered pursuant to section 120.60(6), Florida Statutes, shall be commenced by filing a petition for review in accordance with rules 9.100(b) and (c)."). In fact, the committee notes to rule 9.100 indicate that the rule "provides the procedures necessary to implement" section 120.68(1), Florida Statutes.

Accordingly, a proceeding to review non-final agency action is an original proceeding that is commenced by filing a petition (along with the applicable filing fee) with the district court of appeal having jurisdiction. See Fla. R. App. P. 9.100(b) (providing that "[t]he original jurisdiction of the court shall be invoked by filing a petition, accompanied by any filing fees prescribed by law, with the clerk of the court having jurisdiction."). As is the case with notices of appeal in direct or plenary appeals, a petition for review can be filed with the appellate court having jurisdiction over "the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law." §120.68(2)(a), Fla. Stat. (2014).[1]

Rule 9.100 sets forth additional requirements that apply to petitions for review. For instance, "all parties to the proceeding in the lower tribunal who are not named as petitioners shall be named as respondents." Fla. R. App. P. 9.100(b)(1). Also, while the agency official or administrative law judge responsible for the non-final order at issue shall not be named as a respondent, rule 9.100(b)(3) requires that he or she be served with a copy of the petition for review. Furthermore and perhaps most importantly, a petition for review "shall be filed within 30 days of rendition of the order to be reviewed." Fla. R. App. P. 9.100(c)(3). See also Blu-Med Response Sys. v. Dep't of Health, 993 So. 2d 150, 152 (Fla. 1st DCA 2008) (holding that "[t]o the extent Blu-Med petitions for review of nonfinal agency action, its petition was not filed within 30 days of rendition of the orders of September 5 and 6, 2008, and therefore this court's jurisdiction was not timely invoked."); Krumm v. Dep't of Health, 764 So. 2d 929 (Fla. 1st DCA 2000) (dismissing due to a lack of jurisdiction because the petition seeking judicial review of an emergency suspension order was filed 33 days after the emergency order's rendition).

As for a petition for review's format, rule 9.100(g) mandates that the petition "shall not exceed 50 pages in length and shall contain: (a) the basis for invoking the appellate court's original jurisdiction; (b) the facts on which the petitioner relies; (c) the nature of the relief sought; and (d) argument with appropriate citations to authority. In addition, the petition for review must be accompanied by an appendix conforming to rule 9.220 of the Florida Rules of Appellate Procedure. Fla. R. App. P. 9.100(g). That appendix serves as "the record" for the original proceeding and should contain everything necessary to describe the relevant aspects of what transpired below and to demonstrate that the petitioner is entitled to relief. Fla. R. App. P. 9.100(g) (mandating that "[i]f the petition seeks an order directed to a lower tribunal, the petition shall be accompanied by an appendix as prescribed by rule 9.220, and the petition shall contain references to the appropriate pages of the supporting appendix."); Fla. R. App. P. 9.100(i) (providing that the lower tribunal shall not transmit a record unless ordered to by the district court of appeal).

If a petition for review appears to be facially meritorious, then a district court of appeal will issue an order requiring the respondent to explain why the petitioner is not entitled to relief. Fla. R. App. P. 9.100(h) (providing that "[i]f the petition demonstrates a preliminary basis for relief, a departure from the essential requirements of law that will cause material injury for which there is no adequate remedy by appeal, or that review of final administrative action would not provide an adequate remedy, the court may issue an order" requiring the respondent to explain why relief should not be granted). The district court of appeal's order will establish a time by which the response must be filed, and the response is limited to 50 pages. If the petitioner's appendix does not include documents that a respondent wants to cite in its response, then the respondent has the option of submitting its own appendix. Fla. R. App. P. 9.100(j) (providing that "[w]ithin the time set by the court, the respondent may serve a response, which shall not exceed 50 pages in length and which shall include argument in support of the response, appropriate citations of authority, and references to the appropriate pages of the supporting appendices.").

Following the response, a petitioner has 20 days to serve a reply, limited to 15 pages, along with a supplemental appendix. However, submission of a reply is strictly optional. Fla. R. App. P. 9.100(k) (providing that "[w]ithin 20 days [following a response] or such other time set by the court, the petitioner may serve a reply, which shall not exceed 15 pages in length, and supplemental appendix.").

A District Court of Appeal Is Not Bound by How an Attorney Characterizes a Petition.

A practitioner could encounter a situation in which it is unclear whether a petition for review or a petition for an extraordinary writ (such as mandamus or prohibition) is the appropriate means of seeking relief. Fortunately, a district court of appeal has the ability (but not the obligation) to treat a petition as if the correct remedy is being sought. See Ag. for Health Care Admin. v. Murciano, No. 1D14-3836 (Fla. 1st DCA, April 29, 2015) (treating

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a petition for writ of mandamus as a petition for review); Dep't of Corr. v. Smith, 980 So. 2d 606, 607 (Fla. 1st DCA 2008) (same); Tieger v. Sch. Bd. of Palm Bch. Cnty., 717 So. 2d 172, 173 (Fla. 4th DCA 1998) (same). See also Fla. R. App. P. 9.040(c) (providing that "[i]f a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought; provided that it shall not be the responsibility of the court to seek the proper remedy."). Furthermore, a district court of appeal can even treat a notice of appeal as a petition for review if a party erroneously seeks a direct or plenary appeal of a non-final order. See Wade v. Dep't of Children & Families, 57 So. 3d 869, n. 2 (Fla. 1st DCA 2011) (noting that "[i]n accordance with Florida Rule of Appellate Procedure 9.040(c), we have considered treating the notice of appeal as a petition for review of non-final agency action under section 120.68(1).").

Accordingly, there are no adverse consequences if a party files a petition for review when a petition for mandamus or prohibition would have been the appropriate remedy, or vice versa. However, a party could lose any ability to seek judicial review by waiting more than 30 days after rendition of a non-final order to seek a writ of mandamus or prohibition when a petition for review was the appropriate remedy. While there are no strict deadlines for seeking relief via a petition for writ of mandamus or prohibition, a petition for review must be filed within 30 days following the non-final order's rendition. Fla. R. App. P. 9.100(c).

Appellate Courts Evaluate Petitions for Review Under the Same Standard Applied to Certiorari Petitions.

In addition to the procedural similarities discussed above, it is well-established that a petition for review (just like a certiorari petition) must demonstrate that the petitioner will suffer harm that cannot be remedied via a plenary appeal. As stated by the First District Court of Appeal in Holmes Regional Medical Center, Inc. v. Agency for Health Care Administration, 731 So. 2d 51, 53 (Fla. 1st DCA 1999), "[s]ection 120.68(1) creates a narrow exception to the general rule that appellate review must await rendition of the final order. Interlocutory review is not available as a matter of course in an administrative proceeding merely because the parties wish to resolve an important issue before the final hearing. Rather, the opportunity to review a nonfinal order exists only in those cases in which the court must address an issue immediately to protect a substantial right that would be lost in the interim." (internal citations omitted). See also Charter Medical-Jacksonville, Inc. v. Cmty. Psychiatric Ctrs. of Fla., Inc., 482 So. 2d 437 (Fla. 1st DCA 1985) (dismissing a petition for review because the petitioner failed to show "that review of final action would provide an inadequate remedy."); Fla. Fish & Wildlife Conservation Comm'n v. McGill, 823 So. 2d 236, 238 (Fla. 1st DCA 2002) (denying the petition for review because the petitioner "had, and has, an adequate remedy by cross-appeal of the final order . . ."); CNL Resort Hotel, L.P. v. City of Doral, 991 So. 2d 417, 419 (Fla. 3d DCA 2008) (stating "our threshold concern is whether there is jurisdiction to review the ALJ's non-final order. We conclude that this Court has jurisdiction over the ALJ's order because final agency review of the decision would not provide CNL an adequate remedy.").

Petitions for review are often used to challenge non-final orders compelling discovery of privileged or confidential information, and district courts of appeal will grant the petitions if the petitioners will suffer harm that cannot be remedied through an appeal of a final agency order. See Verizon Bus. Network Serv., Inc. v. Dep't of Corr., 960 So. 2d 916, 917 (Fla. 1st DCA 2007) (holding there was no showing of irreparable harm because "the disputed documents are identified in a privilege log and were reviewed in-camera by the ALJ. Thus, the issue can be meaningfully addressed on appeal and an appropriate remedy fashioned if it is concluded that the ALJ's ruling was in error."); Dep't of Transp. v. OHM Rehab. Servs. Corp., 772 So. 2d 572, 573 (Fla. 1st DCA 2000) (noting that "[a]n order compelling discovery over a claim that the evidence is privileged is generally reviewable under section 120.68(1), because the harm cannot be remedied on review of the final order."); Menke v. Broward Cnty. Sch. Bd., 916 So. 2d 8, 12 (Fla. 4th DCA 2005) (ruling that "[b]ecause the order of the administrative law judge allowed the respondent's expert access to literally everything on the petitioner's computers, it did not protect against disclosure of confidential and privileged information. It therefore caused irreparable harm, and we grant the [petition for review] and quash the discovery order under review."); Prudential Ins. Co. of Amer. v. Dep't of Ins., 694 So. 2d 772 (Fla. 2d DCA 1997) (granting a petition for review of a non-final administrative order that required the petitioner to produce documents deemed to be work product); Dep't of Rev. v. WHI Ltd. Partnership, 754 So. 2d 205 (Fla. 1st DCA 2000) (granting a petition for review of an order requiring the discovery of confidential information); Dep't of Transp. v. Plummer, 774 So. 2d 945 (Fla. 1st DCA 2001) (granting a petition for review of an order compelling the Department of Transportation "to provide confidential information regarding employees tested under Florida's Drug-Free Workplace Act.").

Nevertheless, a party can use a petition for review to challenge non-final orders that do not pertain to discovery. See Dep't of Health & Rehab. Servs. v. Barr, 359 So. 2d 503 (Fla. 1st DCA 1978) (granting a petition seeking review of an administrative law judge's order denying the Department's motion to dismiss a rule challenge petition); Fiat Motors of No. Amer., Inc. v. Calvin, 356 So. 2d 908 (Fla. 1st DCA 1978) (granting a petition to review an order by the Division of Motor Vehicles in which the Division assumed jurisdiction to determine if the petitioner unfairly canceled a dealership franchise); Fortune Life Ins. Co. v. Dep't of Ins., 569 So. 2d 1325 (Fla. 1st DCA 1990) (granting a petition for review because the Department did not follow the

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procedures set forth in the APA when it prohibited the petitioner from utilizing a certain type of life insurance policy); Int'l Truck & Engine Corp. v. Capital Truck, Inc., 872 So. 2d 372 (Fla. 1st DCA 2004) (quashing a non-final order abating further action on administrative causes of action filed by the petitioners and respondents); Nat'l Freight, Inc. v. Dep't of Transp., 483 So. 2d 742 (Fla. 1st DCA 1986) (reviewing a non-final order "notifying petitioner that the department will treat petitioner's nonconforming semitrailers as nonlicensed, pending administrative proceedings arising from the department's decision not to renew petitioner's permits to operate."); Altee v. Duval Cnty. Sch. Bd., 990 So. 2d 1124 (Fla. 1st DCA 2008) (quashing an order entered by an administrative law judge that relinquished jurisdiction to the school board for entry of a final order of dismissal); Bd. of Med. v. Mata, 561 So. 2d 364 (Fla. 1st DCA 1990) (quashing an order entered by an administrative law judge that declined the Board's remand after the administrative law judge had submitted a recommended order).

In fact, a party seeking judicial review of an emergency suspension order must utilize a petition for review. See Fla. R. App. P. 9.190(b)(2) (mandating that judicial review of an emergency suspension order entered pursuant to section 120.60(6), Florida Statutes, must be sought via a petition for review); Nath v. Dep't of Health, 100 So. 3d 1273 (Fla. 1st DCA 2012) (granting a petition for review in part, quashing the emergency suspension order to the extent it suspended the petitioner's license to practice acupuncture, and remanding for further proceedings).

In Addition to Demonstrating Irreparable Harm, a Petition for Review Must Show That the Non-Final Order Departed from the Essential Requirements of the Law.

The case law also indicates that a petition for review (just like a certiorari petition) must also demonstrate that the non-final order at issue departed from the essential requirements of the law. See Fla. Power & Light Co. v. Fla. Public Serv. Comm'n, 31 So. 3d 860, 863 (Fla. 1st DCA 2010) (noting that "our scope of review on appeal over a non-final order is analogous to and no broader than review by common law certiorari. Thus, Petitioners must demonstrate that the orders on review depart from the essential requirements of the law and cause material injury that cannot be remedied on appeal.") (internal citations omitted); Dep't of Fin. Servs. v. Fugett, 946 So. 2d 80, 81 (Fla. 1st DCA 2006) (holding that an administrative law judge departed from the essential requirements of the law by *sua sponte* deciding the issue of default after the final hearing and without giving the parties an opportunity to present evidence and/or argument); Eight Hundred, Inc. v. Fla. Dep't of Rev., 837 So. 2d 574, 576 (Fla. 1st DCA 2003) (holding that an administrative law judge departed from the essential requirements of the law by ruling that the accountant-client privilege had been waived without holding an evidentiary hearing and without receiving any evidence to support the respondent's claim); Prudential Ins. Co., 694 So. 2d at 774 (holding that the order at issue departed from the essential requirements of the law by compelling Prudential to disclose work product without the Department making the required showing of need and inability to obtain the factual information by other means); Menke v. Broward Cnty. Sch. Bd., 916 So. 2d 8, 9-10 (Fla. 4th DCA 2005); Valliere v. Fla. Elections Comm'n, 989 So. 2d 1242, 1243 (Fla. 4th DCA 2008).

This requirement is very significant because a departure from the essential requirements of the law is much more than a simple legal error that an appellant must establish in order to prevail in a direct or plenary appeal. See Allstate Ins. Co. v. Kaklamanos, 843 So. 2d 885, 889 (Fla. 2003) (stating that "the departure from the essential requirements of the law necessary for the issuance of a writ of certiorari is something more than a simple legal error."). In other words, a district court of appeal will not grant relief simply because a lower tribunal erred. Instead, the appellate court will only grant a petition for review if the error is sufficiently egregious to constitute a departure from the essential requirements of the law. See generally Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 525 (Fla. 1995) (noting that "[a] decision made according to the form of law and the rules prescribed for rendering it, although it may be erroneous in its conclusion as to what the law is as applied to facts, is not [a departure from the essential requirements of the law]"); Williams v. Oken, 62 So. 3d 1129, 1133 (Fla. 2011) (stating "the district courts of appeal should not be as concerned with the mere existence of legal error as much as with the seriousness of the error.").

Therefore, a party aggrieved by an agency's or administrative law judge's non-final order should realize that an error that would result in a reversal via a direct or plenary appeal may not result in reversal if review is sought via a petition for review. See United Auto. Ins. Co. v. Palm Chiropractic Ctr., Inc., 51 So. 3d 506, 509 (Fla. 4th DCA 2010) (denying a certiorari petition because "the 'mere legal error' in this case is not a departure from the essential requirements of the law remediable in a second tier certiorari."); Custer Med. Ctr. v. United Auto. Ins. Co., 62 So. 3d 1086, 1092 (Fla. 2010) (stating that "the district court's exercise of its discretionary certiorari jurisdiction should depend on the court's assessment of the gravity of the error and the adequacy of other relief. A judicious assessment by the appellate court will not usurp the authority of the trial judge or the role of any other appellate remedy, but will preserve the function of this great writ of review as a 'backstop' to correct grievous errors that, for a variety of reasons, are not otherwise effectively subject to review."); Cnty. of Volusia v. City of Deltona, 925 So. 2d 340, 343 (Fla. 5th DCA 2006) (noting that an appellate court "may not grant certiorari merely because it disagrees with the circuit court's evaluation of the evidence. Certiorari is not used to grant a second appeal or redress mere legal error; rather, it provides a safety

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net to correct a miscarriage of justice when no other remedy is available.") (internal citation omitted).

Unfortunately, there are no hard and fast rules about what amounts to a departure from the essential requirements of the law. See Heggs, 658 So. 2d at 528 (stating that "[s]ince it is impossible to list all possible legal errors serious enough to constitute a departure from the essential requirements of the law, the district courts must be allowed a large degree of discretion so that they may judge each case individually. The district courts should exercise this discretion only when there has been a violation of [a] clearly established principle of law resulting in a miscarriage of justice."). In my own practice, I would consider any violation of a "clearly established" or "black letter" principle of law to be a departure from the essential requirements of the law and potentially subject to judicial review via a petition for review. Therefore, in my opinion, if reasonable people could disagree over whether a lower tribunal erred, then there was no departure from the essential requirements of the law. See Kaklamanos, 843 So. 2d at 890 (stating that "clearly established law" can "derive from a variety of legal sources, including recent controlling case law, rules of court, statutes, and constitutional law."). Also, a lower tribunal's consideration of a question of first impression is unlikely to be considered a departure from the essential requirements of the law. See Nader v. Dep't of Highway Safety & Motor Vehicles, 87 So. 3d 712, 723 (Fla. 2012) (noting that "certiorari jurisdiction cannot be used to create new law where the decision below recognizes the correct general law and applies the correct law to a new set of facts to which it has not been previously applied. In such a situation, the law at issue is not a clearly established principle of law.").

In evaluating whether a non-final order by an agency or an administrative law judge departed from the essential requirements of the law, cases involving petitions for certiorari are instructive because they are also judged by that standard. See generally Charlotte Cnty. v. General Dev. Utils., Inc., 653 So. 2d 1081, 1084 (Fla. 1st DCA 1995) (considering a non-final order issued by the Public Service Commission and stating that "the statutory authority to review non-final administrative action is analogous to and no broader than the right of review by common law writ of certiorari.").

Agencies Face Uncertainty Regarding the Means of Challenging Non-Final Orders.

If an administrative law judge issues a non-final order requiring an agency to disclose privileged information, then the agency can certainly seek judicial review via a petition for review. That also applies to any other non-final order issued by an administrative law judge when the ruling departs from the essential requirements of the law and the alleged harm is irreparable and cannot be remedied via a direct appeal. However, what is an agency's method of relief if it is aggrieved by a conclusion of law within an administrative law judge's recommended order that is outside the agency's substantive jurisdiction? The Administrative Procedure Act prohibits agencies from rejecting such conclusions law. See §120.57(1)(*l*), Florida Statutes (2014) (providing that "[t]he agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction.").

That was the situation facing the Board of Dentistry in Barfield v. Department of Health, 805 So. 2d 1008 (Fla. 1st DCA 2002). The appellant was a licensed dentist in California and Georgia who applied to the Board of Dentistry for a Florida license. Id. at 1009. However, the Board of Dentistry denied the application after the appellant failed the clinical portion of the Florida dental license examination. Id. The appellant challenged the denial, and the Board of Dentistry referred the case to DOAH for a formal administrative hearing. Id. The ALJ ultimately issued a Recommended Order containing a conclusion of law that the grading sheets from the appellant's failed examination were hearsay that could not support a finding of fact as to what happened during the examination. Id. The Department of Health filed exceptions and argued that the grading sheets were admissible under the public-records exception to the hearsay rule. Barfield, 805 So. 2d at 1010. The Board of Dentistry then issued a Final Order deeming the grading sheets to be admissible under the business or public records exceptions to the hearsay rule and concluding that the ALJ erred by excluding them from evidence. Id. The appellant appealed to the First District Court of Appeal and argued that the Board of Dentistry had no substantive jurisdiction over evidentiary matters. Id. The appellate court agreed with the appellant but ultimately held that the grading sheets were admissible under the business records exception and that the appellant's application should be denied. Id. at 1012.

In dicta, the majority opinion in Barfield acknowledged that the decision leaves agencies with uncertainty over how to seek judicial review of administrative law judges' conclusions of law that are outside the agencies' substantive jurisdiction. The court proposed that an agency could enter a "final order under protest" and then appeal "from its own order as a party adversely affected . . ." Barfield, 805 So. 2d at 1013. The court also proposed that an agency could utilize a petition for review. Id. Implicit in that proposal is the proposition that the agency faces irreparable harm because it cannot use its final order to reject a conclusion of law outside its substantive jurisdiction.

Unfortunately for agencies, neither option proposed by the Barfield majority opinion is completely satisfying. Issuance of a "final order under protest" has not become a well-established means of seeking judicial review. Indeed, no Florida appellate opinion other than Barfield has utilized the term "final order under protest." Thus, an agency would be justifiably worried that an appeal from its own order would be deemed

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invalid. See generally Ag. for Health Care Admin. v. Mount Sinai Med. Ctr. of Greater Miami, 690 So. 2d 689, 692 (Fla. 1st DCA 1997) (speculating that "if AHCA is forced to issue a final order without an administrative hearing, it is unlikely that the agency could obtain judicial review of its own order."). In contrast, a petition for review is a well-established means of seeking judicial review. However, the substantial drawback is that an agency would not necessarily prevail even if it could demonstrate that an administrative law judge erred. As discussed above, the agency would only prevail if it could demonstrate that: (1) it will suffer irreparable harm that cannot be remedied via a direct appeal; and (2) the ruling at issue amounts to a departure from the essential requirements of the law.

Despite a request for a legislative solution in the Barfield majority opinion, the Legislature has yet to address this uncertainty facing agencies. Barfield, 805 So. 2d at 1013 (stating "we respectfully commend to the legislature the adoption of a specific appellate remedy available to an agency that considers itself aggrieved by an ALJ's conclusions of law over which it does not have 'substantive jurisdiction.'"); G.E.L. Corp. v. Dep't of Envtl. Prot., 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004) (stating "[w]e acknowledge, as did the Court in Barfield, that uncertainty exists regarding the avenues of review available to parties and agencies aggrieved by an ALJ's erroneous legal ruling that is not within the agency's substantive jurisdiction to correct. However, it is not for us to say whether we agree with the wisdom of the limited scope of review prescribed by section 120.57(1)(*l*) or whether we wish that it were more expansive. 'It is not the prerogative of this court to melt this statute and recast it in a mold of our choosing.'") (quoting Jordan v. State, 801 So. 2d 1032, 1034 (Fla. 5th DCA 2001)).

Conclusion

Administrative law practitioners must be aware that they can use a petition for review to challenge a non-final order issued by an agency or an administrative law judge. However, in deciding whether to use this tool, practitioners must take into account the very high standard applied to such petitions by district courts of appeal. As for a party having to respond to a petition for review, it is absolutely critical to utilize that standard by emphasizing that the petition must demonstrate not only that the lower tribunal erred, but that its ruling departed from the essential requirements of the law in a way that is irremediable on appeal from the subsequent final order.

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Endnote:

[1] Unlike a direct or plenary appeal which seeks judicial review of a final order and is commenced by filing a notice of appeal invoking a court's appellate jurisdiction, the filing of a petition for review initiates an original proceeding in an appellate court in the same manner as a petition for a writ of mandamus, prohibition, quo warranto, certiorari, or habeas corpus. Many practitioners incorrectly refer to original proceedings as "appeals." But, original proceedings and plenary appeals invoke different aspects of an appellate court's jurisdiction and are governed by different procedural rules. See generally Steinberg v. Becker, 920 So. 2d 1239, 1240 (Fla. 5th DCA 2006) (stating that "[a] certiorari proceeding is an original proceeding, not an appeal."); Nellen v. State, 226 So. 2d 354, 355 (Fla. 1st DCA 1969) (citing a treatise for the proposition that "[w]hile certiorari is used in the exercise of a superior court's supervisory jurisdiction, it is not to be confounded with its appellate jurisdiction . . ."). Compare Fla. R. App. P. 9.100(a) (providing that "[t]his rule applies to those proceedings that invoke the jurisdiction of the courts . . . for the issuance of writs of mandamus, prohibition, quo warranto, certiorari, and habeas corpus . . .") with Fla. R. App. P. 9.110(a) (providing in pertinent part that Rule 9.110 applies to administrative appeals to a district court of appeal as provided by general law).