ADMINISTRATIVE LAW SECTION

Newsletter

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The 2016 Amendments to the APA: Say Goodbye to *United Wisconsin*--and More

by H. French Brown, IV and Larry Sellers

During the 2016 session, the Florida Legislature considered a number of bills affecting the Administrative Procedure Act (APA) and the practice of administrative law. Several measures passed that will have an effect on the precedential value of previous court rulings. A comprehensive APA bill fought back from a veto last year to emerge triumphantly. Another bill clarifies the timing requirement for an agency's evaluations of a proposed rule's economic impacts. Legislation was passed to expedite the dispensing of medical marijuana and likely influences pending litigation. The annual "tax package" contains provisions that also may impact recent litigation revolving around tobacco tax regulation, among other things. Other bills died, but may be back in the future, including one that would have created a sunset review process for agency rulemaking authority. Here's a quick summary.

PASSED

House Bill 183 Allows Rule Challenges Associated with Section 120.57, Florida Statutes, Proceedings

Relating to Administrative Procedures (CS/CS/CS/HB183)

After previous attempts[1] -- including a veto last year[2] -- the Legislature

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From the Chair

by Richard J. Shoop

In my previous chair's columns, I have thanked all the hard-working members of the executive council, and highlighted the Section's accomplishments during my term as chair. Indeed, the only person that I have not yet thanked (at least to the best of my recollection) is our section administrator, Calbrail Bennett, who has been a big help to both me and the Section during this past term. Calbrail saved the Section a lot of money on the venue for one of its meetings, as well as on the venue for the Advanced Topics in Administrative, Environmental and Government Law CLE that was held in Tallahassee this past April. Plus, she has been exceptionally patient with me, in spite of my last-minute demands. So thank you, Calbrail, for all your help to the Section.

For my final chair's column, however, I want to instead highlight some concerns that I have in regard to the future of the Section. These concerns are based on the knowledge and experience I have gained during the course of my term as chair. They are based solely on my observations and opinions, so take them with a grain of salt. I am not trying to discount the work of the executive council, or be the Chicken Little of the Administrative Law Section. Rather, I am mentioning these concerns in the hope that our membership will become even more involved in the work of the Section, and take more ownership in the Section itself. After all, the $25 a year you pay in dues gives you a voice in what the Section does and the direction in

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which it heads. It's up to you to use it.

The first concern I have is that the Section's membership is not showing any signs of increasing. The Bar itself has surpassed 100,000 members and continues to add over 3,000 members a year, yet the Section's membership has remained stagnant at just under 1,200 members for the past few years. The Section's stagnation in membership is puzzling to me, especially since a recent Bar survey found that we have the highest membership satisfaction of any section. I know there are more than 1,200 attorneys who practice administrative law in Florida. The Section's long-term viability depends on its ability to attract and retain new members. While the members of the Section's executive council are aware of this issue and will be working on new ways to increase membership during the upcoming term, the burden is not theirs to bear alone. Every one of us as members has a responsibility to tout the benefits of membership in the Administrative Law Section to anyone who will listen. If every member of the Section succeeded in getting one new person to join the Section this year, our membership would double. I challenge you to make that your goal for the upcoming year.

The second concern I have is that the Section is not providing enough benefits to its young lawyer members. The Section acknowledged the importance of having young lawyer members by creating a young lawyers committee during the 2013-2014 term. Since then, the young lawyers committee has organized some very good activities, such as the bi-monthly Tables for 8 that are held in Tallahassee. However, I believe that the Section has to put a greater emphasis on providing more resources, such as education and mentoring, to its young lawyer members. That burden should not fall solely on the executive council members or the young lawyers committee. All of us who are seasoned members of the Section should reach out to the young lawyer members we know, find out what resources they would like the Section to offer, and help the Section provide those resources to them. By doing so, we will insure that the Section will grow for many years to come as the young lawyer members become more active in the Section and give back to it through service, either as committee members or executive council members. The young lawyer members will shape the future of the Section. How that future looks will depend on how much effort you spend on influencing them as they shape it.

The third concern I have is that the costs of the Section's CLEs are rising—not only the cost to the Section for producing the CLEs, but also the cost to members for attending such CLEs. Additionally, it seems that no matter how successful a CLE appears to be in terms of attendance and aftermarket sales, the Section makes little, if any, profits off of it. Indeed, the Section has suffered losses on most of its recent CLEs. If the Section continues to sustain losses on its CLEs, its long-term financial health will be impacted. The Section needs input from its membership as to what CLEs the Section should provide, as well as in what format these CLEs should be provided. The Section's CLE committee is willing to put on webinars in addition to, or in lieu of, live productions, but has struggled greatly to get speakers or topics in order to do so, and the webinars it did produce during the past term had low attendance and sales. I understand that it is both difficult and costly to attend a live CLE. If the Section's members prefer live CLEs over webinars, then the Section needs their input and their support, so that it can create high quality CLEs that will not be a financial burden on the Section.

The last concern I have is that there continues to be a shortage of articles for both the Section's Newsletter and the *Florida Bar Journal*. The Section's Newsletter and *Journal* editors have to constantly beg and plead for articles from the Section's membership. I believe that the Section's most valuable asset is its Newsletter, and we as members of the Section have a responsibility to help maintain its quality. Our incoming chair, Jowanna N. Oates, has challenged every executive council member to write at least one article this coming year. I am going to go even further. I challenge every member of the Section to write an article for either the Section's Newsletter or the *Florida Bar Journal*. I want our Newsletter and *Journal* editors to be so inundated with articles that they will have more than enough for years to come. I have personally written three *Journal* articles and two Newsletter articles in my career, and will continue to write more articles until someone tells me to stop. It's not hard to write an article, so if I can write one, you can too. All you need to do is volunteer. The Section's editors will even give you topic ideas if you don't know what to write on. So get to it.

I do not want my concerns to outweigh all the accomplishments the Section had during the 2015-2016 term. It has indeed been a great year, and I am truly humbled and honored to have served as a chair of the Section, and to have served for the past several years alongside the other members of the executive council, who are among the most distinguished administrative law practitioners in the state. It has definitely been the highlight of my professional career. I am only submitting my concerns to you in the hope that the Section's membership will do their part to make sure that the Section's past accomplishments are mere stepping stones to bigger and better things. The Section has the potential for greatness, and I want to see that potential realized. If anything I have said in this column or my past columns has inspired you to serve the Section, please do so. Please do not let the fear of failure prevent you from becoming more involved in the work of the Section. As professional surfer Laird Hamilton, in his 17 Commandments for Living, states ever so bluntly: "We are each our own greatest inhibitor. People don't want to do new things if they think they're going to be bad at them or people are going to laugh at them. You have to be willing to subject yourself to failure, to be bad, to fall on your head and do it again, and try stuff that you've never done in order to be the best you can be." That reasoning has held true for me, both in my career and in my personal life. So, as I end my term as chair, I challenge you to overcome your inhibitions, to take a risk, to do something you have never done before so that the Section can become the best it can be. I guarantee you will not regret it, and, most likely, you will greatly enjoy it. Thank you for allowing me to serve as your chair for the 2015-2016 term. I will continue to serve the Section in whatever capacity I can, and invite you to do the same.

APPELLATE CASE NOTES

by Tara Price, Gigi Rollini, and Larry Sellers

Administrative Orders—Annual Reconciliation of Juvenile Detention Facility Assessments

Pinellas County v. Department of Juvenile Justice, 188 So. 3d 894 (Fla. 1st DCA 2016).

Broward County v. Department of Juvenile Justice, 41 Fla. L. Weekly D435d (Fla. 1st DCA Feb. 18, 2016).

These two cases involve each county's appeal from a final order of the Department of Juvenile Justice (DJJ) that was entered on remand from an earlier appeal involving DJJ's determination of the county-by-county reconciliation of juvenile detention facility utilization for the 2008-2009 fiscal year. After initially issuing opinions in December 2015, the court granted the counties' motion for clarification and rehearing, withdrew the previous opinions, and issued new opinions that granted relief to the counties and quashed a footnote in DJJ's final order.

Facts/Procedural History. DJJ calculated the 2008-2009 fiscal year county-by-county juvenile detention facility utilization and issued its proposed assessments in December 2009, which included credits for several counties. DJJ provided a procedure to challenge the assessments, including petitioning for an evidentiary hearing at the Division of Administrative Hearings (DOAH), which Pinellas and Broward Counties followed. In March 2010, DJJ proposed an adjustment of numerous assessments, including those for Pinellas and Broward Counties. That same month, Pinellas County acknowledged the adjusted amount as a credit in addition to its December credit amount, and claimed a total credit due exceeding $1.3 million. Broward County did not acknowledge the adjusted amount.

Following an evidentiary hearing, the ALJ concluded that DJJ in its December 2009 proposed assessment failed to calculate "actual costs" and thus deviated from the requirements of section 985.686(5), Florida Statutes. The ALJ found that Pinellas County had accepted DJJ's proposed adjustment amount in March 2010, and issued a recommended order that, in part, reinstated the March 2010 adjusted credit for Pinellas County. But the ALJ determined that Broward County did not accept the March 2010 adjusted credit, and thus was entitled to an accounting of its actual costs for providing predisposition juvenile detention during the 2008-2009 fiscal year.

DJJ entered a final order, wherein it rejected the ALJ's recommended order and reinstated the reconciliation amounts it announced in December 2009 for both Pinellas and Broward Counties.

Pinellas and Broward Counties, among others, appealed in *Okaloosa County v. Department of Juvenile Justice*, 131 So. 3d 818 (Fla. 1st DCA 2014). For a discussion of *Okaloosa County*, see page 1 of the June 2014 Administrative Law Section Newsletter. The court reversed DJJ's final order—after DJJ had conceded that it misinterpreted the reconciliation statute—and remanded to DJJ with instructions to adopt the ALJ's recommended order "in its entirety."

On remand, DJJ adopted the recommended order, reinstating the amounts announced in March 2010 for Pinellas County and, following a revised assessment based on actual costs, a new credit amount for Broward County. DJJ, however, also added a footnote that stated, "[n]o monies were appropriated for Fiscal Year 2014/2015 to credit counties" and that for counties who were "continu[ing] to pursue credits or refunds for past fiscal years," "[o]nly the Legislature has the power to cure such complaint." Pinellas and Broward Counties separately appealed DJJ's addition of this footnote, arguing that DJJ failed to fully adopt the recommended order because it did not apply the counties' respective credits toward their future cost-sharing obligations.

Pinellas County—December 2015 opinion (withdrawn). The court issued an opinion recognizing that the parties briefed the "method by which the Department can credit Pinellas County . . . for their overpayments" and discussed it "at great length" during oral argument. Nonetheless, the court refused to rule on the issue, holding that its instructions on remand in the *Okaloosa County* case pertained only to the DOAH recommended order, which was "limited to correcting the juvenile cost-sharing calculations for FY 2008/09; it made no recommendation concerning credits for or reimbursements of overpayments." As DJJ adopted the entirety of the recommended order, DJJ's "action or inaction" with regard to Pinellas County's future cost-sharing obligation were "not ripe" for the court's consideration. Judge Kelsey dissented.

Broward County—December 2015 opinion (withdrawn). The court referred to the facts and procedural posture of the case as stated in the *Pinellas County* decision. It then specifically acknowledged that DJJ, in its final order following remand, provided Broward County with a revised assessment based on actual costs. The court concluded that "the gravamen of Broward County's complaint" was DJJ's failure to apply its 2008-2009 fiscal year credits toward its future cost-sharing obligation. Based on the reasoning espoused in the *Pinellas County* decision, the court held that Broward County's appeal was "simply not ripe for . . . consideration" in the current appeal. Judge Kelsey dissented.

Pinellas County—February 2016 opinion. The court granted the county's motion for clarification and rehearing, withdrew its December 2015 opinion, and issued a new opinion that quashed the

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above-mentioned footnote. The court held that DJJ's footnote violated section 985.686(5), Florida Statutes, and Florida Administrative Code Rule 63G-1.008, and failed to comply with the court's mandate. The court specifically directed DJJ "to apply the appropriate amount of credit (or debit) to Appellant's account after calculating and accounting for actual costs" and stated that "all such credits (or debits) due shall carry forward, and be applied to invoices after the fiscal year at issue, until the credit (or debit) is applied in total."

Broward County—February 2016 opinion. The court denied the county's motion for rehearing as moot, withdrew its December 2015 opinion, and issued a *per curiam* reversal with a citation to the *Pinellas County* opinion.

Administrative Law—FRS Retirement Benefits for Public Employees
Campbell v. State Board of Administration, 184 So. 3d 579 (Fla. 2d DCA 2016).

Judge Kimberly Campbell appealed the State Board of Administration's (SBA) final order denying her request for renewed membership in the Florida Retirement System (FRS) because the SBA determined that, as a retiree, Judge Campbell was ineligible for reenrollment within FRS.

Judge Campbell was a member of the FRS when she worked as an assistant state attorney from January 2001 until September 2003. In 2006, she withdrew her FRS funds. In 2009, the Legislature amended chapter 121, Florida Statutes, to prohibit retirees from participating in the FRS if they are elected or appointed to FRS-eligible positions on or after July 1, 2010. In 2012, Judge Campbell was elected circuit court judge. She attempted to reenroll in FRS based on section 121.052, Florida Statutes, which states that membership in the FRS is "compulsory" for certain elected officials, including circuit court judges. The SBA, however, determined that Judge Campbell was a "retiree" under section 121.4501(2)(k), Florida Statutes, because she was a former FRS member who had terminated her employment and withdrawn her FRS funds. Thus, because section 121.122(2) prohibits retirees from reenrolling in FRS after July 1, 2010, the SBA denied Judge Campbell's attempted reenrollment.

Judge Campbell filed a petition for hearing with the SBA, and the SBA referred Judge Campbell's petition to DOAH. The ALJ agreed with the SBA's analysis, and the SBA entered a final order denying Judge Campbell reenrollment in the FRS. Judge Campbell appealed the SBA's final order, arguing that (1) the definition of "retiree" in section 121.4501(2)(k) applied to only investment plan members and not elected officials such as herself, for whom participation was compulsory; and (2) chapter 121 was unconstitutional because it deprived Judge Campbell of her right as an elected official to renewed FRS membership.

The court acknowledged that section 121.052(3) stated that FRS membership was compulsory for certain elected officials. But the court found that Judge Campbell's arguments were contrary to the provision in section 121.053(3)(a) that prohibits retirees who are "elected or appointed for the first time to an elective office" on or after July 1, 2010, from reenrolling in FRS membership. The court held that Judge Campbell did not have a vested right to reenroll in FRS based on future employment, and thus, the Legislature was free to alter her expectation that she could reenroll in FRS if she returned to work for the state. The court recognized that the Legislature's change affected former employees like Judge Campbell, who were employed only a short time and accumulated a small benefit during their former service. Nonetheless, the court held that the SBA was bound by the statutes and had no discretion to consider special circumstances such as Judge Campbell's. In closing, the court noted that Judge Campbell's "only remedy appears to be legislative."

Challenging Policies as Unpromulgated Rules
Saunders v. Department of Children and Families, 185 So. 3d 1298 (Fla. 1st DCA 2016).
Looney v. Department of Children and Families, 185 So. 3d 1303 (Fla. 1st DCA 2016).
Newman v. Department of Children and Families, 185 So. 3d 1303 (Fla. 1st DCA 2016).

These three cases each involve a Medicaid participant's challenge of a hearing officer's final order that: (1) affirmed a decision by the Department of Children and Families (DCF) regarding the participant's financial responsibility under a Medicaid program; and (2) refused to address whether DCF's treatment of the participant was based on an unpromulgated rule. The court reversed the hearing officer's final orders and remanded the cases to the hearing officer for a determination on whether DCF relied upon an unpromulgated rule when it calculated the Medicaid participants' financial responsibilities.

Each appellant participated in the Medicaid Institutional Care Program, which provides certain individuals with reimbursements for nursing home care expenses. Each qualifying individual must contribute a portion of his or her gross income toward nursing home care, and the contribution amount is calculated by DCF, after determining whether the participant is eligible for any deductions. Federal regulations authorize deductions for nursing home expenses incurred before the patient becomes eligible for Medicaid. Federal regulations, however, also permit the states to impose reasonable limitations on deductions.

The Agency for Health Care Administration (AHCA) manages Florida's Medicaid program, which is governed by a plan submitted to, and approved by, the Center for Medicare and Medicaid Services (CMS). DCF, however, determines a patient's Medicaid eligibility. CMS approved an amendment to Florida's Medicaid program plan in 2013 that limited the nursing home expenses eligible as deductions to

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those expenses incurred no earlier than three months before the patient applied for benefits under the Medicaid Institutional Care Program. DCF, following CMS's approval of the new plan, directed its caseworkers to implement the three-month limitation and updated DCF's public assistance policy manual to include the three-month limitation. DCF did not, however, promulgate a rule on the three-month limitation on nursing home expenses.

Thomas Saunders entered a nursing home in March 2013. In July 2014, Mr. Saunders owed the nursing home more than $68,000. He filed for Medicaid benefits that same month. DCF approved Mr. Saunders' application, set his Medicaid eligibility date as July 1, 2014, and set his required monthly contribution at $2,115.08. Mr. Saunders requested that DCF reduce his monthly contribution to zero until he paid off his nursing home debt, which Mr. Saunders argued were his unreimbursed nursing home expenses incurred since June 2013. DCF did not grant Mr. Saunders' request, and Mr. Saunders requested a hearing before DCF's hearing officer to challenge DCF's denial of his request to reduce his required monthly contribution.

Mr. Saunders argued that DCF could not apply a three-month limitation on prior nursing home expenses without formal rulemaking. DCF argued, and the hearing officer agreed, that DCF applied the three-month limitation in accordance with the CMS-approved state Medicaid plan and DCF's policy manual. The hearing officer then concluded that she lacked jurisdiction to determine whether DCF's application of the three-month limitation was an unpromulgated rule because (1) Mr. Saunders was required to raise his unpromulgated rule argument in a section 120.56, Florida Statutes, proceeding; and (2) the hearing officer was not an administrative law judge.

The court rejected the hearing officer's final order on two grounds. First, the court held that Mr. Saunders was not required to raise this argument in a section 120.56 proceeding because "section [120.56] is not the exclusive means for a party to argue that an agency action occurred pursuant to an unpromulgated rule . . . ." Rather, section 120.56(4)(f) explicitly states that it "does not prevent a party whose substantial interests have been determined by an agency action from bringing a proceeding pursuant to s[ection] 120.57(1)(e)." Because Mr. Saunders' substantial interests were affected by DCF's denial of his request in reliance on a policy unadopted as a rule, Mr. Saunders was entitled to raise a rule challenge under section 120.57(1)(e). Further, the court noted that even if Mr. Saunders had brought a challenge under section 120.56, his proceeding would have been stayed because DCF began rulemaking procedures shortly after Mr. Saunders challenged DCF's denial of his request to lower his monthly payments. Conversely, under a section 120.57 proceeding, Mr. Saunders was entitled to immediate relief, and not subject to a stay during rulemaking procedures, because agencies are prohibited from relying on unpromulgated rules to determine a person's substantial interests.

Second, the court held that the hearing officer had jurisdiction to hear Mr. Saunders' unpromulgated rule argument. Section 409.285, Florida Statutes, allows DCF's hearing officers to hear appeals of decisions by DCF to limit or deny public assistance benefits, and Florida Administrative Code Rule 65-2.042(3) allows hearing officers to preside over appeals from DCF's actions in Medicaid proceedings. Because all the rights under chapter 120 are available to an appellant in a section 409.285 proceeding, Mr. Saunders could raise, and the hearing officer could determine, Mr. Saunders' unpromulgated rule argument.

The court held the same for William Looney in Case No. 1D15-1960 and Christel Newman in Case No. 1D15-2099.

Statutory Definitions

Brandy's Products, Inc. v. Department of Business and Professional Regulation, 188 So. 3d 130 (Fla. 1st DCA 2016).

Brandy's Products, Inc. (Brandy's), appealed the Department of Business and Professional Regulation's (DBPR) final order, which concluded that cigar wraps, or "blunt wraps," as they are more commonly known, are subject to taxation as "tobacco products" because they constitute "loose tobacco suitable for smoking" under section 210.25(11), Florida Statutes.

DBPR informed Brandy's in March 2013 that it owed approximately $72,000 in taxes, surcharges, penalties, and interest on the blunt wraps Brandy's distributed to Florida retailers from 2009 until 2011. DBPR formerly had not been taxing blunt wraps, but began in July 2009 as it became aware of their widespread distribution. Brandy's challenged DBPR's assessment, and a formal administrative hearing was held at DOAH.

The ALJ examined Brandy's blunt wraps, which are made of tobacco, wood pulp, and other materials, and are designed for use as the outer wrapper of a homemade cigar. The ALJ determined that a blunt wrap was "a cohesive, uniform product" that is "cut to a specific, predetermined shape." Further, the ALJ found that when a person looked at a blunt wrap, he or she would not see any loose tobacco. The ALJ issued an order recommending that DBPR not assess the "tobacco products" tax on blunt wraps because "a blunt wrap is no more loose tobacco than a piece of writing paper is loose wood." DBPR rejected the ALJ's recommended order and issued a final order directing Brandy's to pay the assessment. Brandy's appealed.

The court first noted that neither Brandy's nor DBPR disputed that the ALJ's factual findings were supported by competent, substantial evidence. Thus, the court determined that the only matter on appeal was whether the product described by the ALJ falls within the statutory definition of "tobacco products" as a matter of law. DBPR conceded that the only part of the definition of tobacco products under which a blunt wrap could

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qualify was "loose tobacco suitable for smoking." The court held that the phrase "loose tobacco suitable for smoking" was clear and unambiguous and did not include blunt wraps. As the ALJ found that blunt wraps were a bound, cohesive, and uniform product, blunt wraps could not fit within the meaning of the statutory phrase "loose tobacco."

DBPR argued that the definition of "loose tobacco suitable for smoking" should be broadly construed, considering that loose tobacco product was contained inside the blunt wraps. The court, however, rejected this argument because: (1) tax statutes are to be construed narrowly, in favor of the taxpayer; and (2) DBPR's argument would ignore the presence and the meaning of the word "loose" within the definition. The court directed DBPR instead to make its policy arguments to the Legislature and noted that the Legislature in 2015 and 2016 considered bills amending the definition of tobacco products to include blunt wraps, but those statutory changes were never enacted.

Public Records Act—Entitlement to Attorney's Fees
Board of Trustees v. Lee, 41 Fla. L. Weekly S146a (Fla. Apr. 14, 2016).

The Board of Trustees, Jacksonville Police & Fire Pension Fund (Board) appealed an opinion of the First District Court of Appeal, which held that a prevailing party is entitled to an award of statutory attorney's fees if a trial court determines that the agency violated the Florida Public Records Act, even if the agency's violation was not knowing or willful.

Curtis W. Lee submitted a written public records request to the Board, which attempted to impose a number of conditions before allowing him access to the public records. Mr. Lee refused the conditions and was denied access. Mr. Lee then sought declaratory relief under section 86.011, Florida Statutes, and alleged that the Board had unlawfully imposed conditions and fees prior to allowing him to access the public records. The trial court found that two of the Board's conditions—an hourly photocopying fee and an hourly "supervision" fee—were unlawful under section 119.07. The trial court's order was affirmed on appeal. *See Board of Trustees v. Lee*, 110 So. 3d 443 (Fla. 1st DCA 2013) (*per curiam* affirmed).

Mr. Lee then moved for attorney's fees under section 119.12, Florida Statutes. The trial court denied his motion, ruling that attorney's fees were not warranted because the Board had not acted knowingly, willfully, or with a malicious intent when it violated the Public Records Act. Mr. Lee appealed and the appellate court reversed, holding that attorney's fees are required under the statute when an agency acts in violation of the public records laws, regardless of whether the agency's actions were reasonable, knowing, willful, or carried a malicious intent. The Board appealed to the Florida Supreme Court.

The Florida Supreme Court accepted the case to address a conflict among the district courts. The First and Second District Courts of Appeal have held that an agency that violated the law is not spared from paying attorney's fees under section 119.12 because it acted in good faith, while the Third, Fourth, and Fifth District Courts of Appeal have held that the statute requires a trial court to find that an agency has acted unreasonably or in bad faith before a prevailing party is entitled to attorney's fees.

The Florida Supreme Court affirmed the First District Court of Appeal's decision, and held that an award of attorney's fees is mandatory after a trial court has determined that an agency violated the Public Records Act. When it comes to awarding attorney's fees, whether an agency acted reasonably or in good faith is immaterial.

In so holding, the court examined the language of section 119.12, which states that a trial "court shall assess and award, against the agency responsible, the reasonable costs of enforcement including reasonable attorney's fees" when "a civil action is filed against an agency to enforce" the Public Records Act and "the court determines that such agency unlawfully refused to permit a public record to be inspected or copied." The court noted that a former version of the statute required a prevailing party to show that the agency "unreasonably refused" access to the public record. In 1984, the Legislature changed "unreasonably refused" to "unlawfully refused," which the court noted "shifted the focus away from whether a refusal was reasonable to whether it was unlawful." Thus, the court held that the statute requires trial courts to determine whether an agency's refusal was lawful or unlawful, not whether an agency's refusal was unlawful but perhaps excusable because it was not knowing, willful, or malicious. The court also found compelling that the Legislature used qualifiers, such as knowing, willful, or malicious, in other parts of the Public Records Act, and thus, could have used those same qualifiers in section 119.12, had the Legislature so desired.

Public Records Act—Exemption for Student "Education Records"
Knight News, Inc. v. University of Central Florida, 41 Fla. L. Weekly D897 (Fla. 5th DCA Apr. 8, 2016) (on reh'g).

Knight News, Inc. (KNI) appealed from adverse orders entered on sixteen counts of its seventeen-count complaint filed against the University of Central Florida Board of Trustees and the university's president, Dr. John C. Hitt (UCF). In its complaint, KNI sought declaratory, injunctive, and mandamus relief to remedy UCF's alleged failure to comply with several public records requests filed by KNI and UCF's refusal to open certain student conduct board hearings to the public. The requests at issue centered on documents regarding alleged hazing incidents and student government officials charged with malfeasance in the performance of their duties, or misconduct relating to their election or appointment to their position.

To the extent the trial court failed

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to require UCF to "unredact" the names of student government officers alleged to have engaged in misconduct as set forth in certain "impeachment affidavits," the appellate court concluded the trial court erred. The court wrote only to address UCF's obligation to produce records that would identify students who were the subject of allegations of hazing misconduct or students who were the subject of allegations of misconduct related to their performance, election, and/or appointment as student government officers.

The court looked to section 1006.52(1), Florida Statutes, which created an exemption from the Public Records Act for students' "education records," as defined in the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, and the federal regulations issued pursuant thereto. FERPA defines "education records" as "those records, files, documents, and other materials which--(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A).

In addition to protecting "education records," the court explained that FERPA also works to protect any personally identifiable information contained in an "education record" from improper disclosure, citing *Rhea v. Dist. Bd. of Trs. of Santa Fe Coll.*, 109 So. 3d 851, 856 (Fla. 1st DCA 2013). In the case law construing FERPA, federal courts have concluded that while student disciplinary records are generally "education records" subject to the protections afforded under FERPA, FERPA permits the release of certain student disciplinary records and information where the alleged misconduct constitutes a crime of violence or a nonforcible sex offense.

Under this interpretation, the personally identifiable information contained within documents regarding alleged hazing incidents qualified as student disciplinary records subject to FERPA'S protections. The court concluded that the trial court properly denied KNI's request for that information.

However, the court concluded the names of the student government officers charged with malfeasance in the performance of student government duties or alleged to have engaged in misconduct with regard to their election or appointment to their position did not qualify as protected "personally identifiable information" under FERPA because student government officers have implicitly consented to the dissemination of that information given Florida's statutory scheme concerning university student governments. This includes section 1004.26, Florida Statutes, which requires internal procedures relating to elections, appointments, and discipline of student government officers, and authorizes their removal by majority vote of participating students in a referendum.

On this basis, the court held that such information concerning misconduct by student government officers is not protected from disclosure under FERPA.

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DOAH CASE NOTES

Substantial Interest Hearings

Daniel Banks v. Dep't of Health, Office of Compassionate Use, DOAH Case No. 15-7267 (Recommended Order Feb. 26, 2016); DOH Case No. 2015-0669 (Final Order May 2, 2016).

FACTS: San Felasco Nurseries, Inc. (San Felasco), filed an application with the Department of Health, Office of Compassionate Use ("OCU") to become approved as a low-THC cannabis dispensing organization. One of the statutory requirements is that all owners and managers of the applicant must pass Level 2 background screening, meaning they have no disqualifying offenses in their background. San Felasco's application identified its owners and managers, including Daniel Banks (Petitioner), who would be the research and development director. OCU notified Petitioner that he failed to pass his background screening on the ground that, in Kansas in 2004, Petitioner had pled nolo contendere to the illegal possession of a controlled substance (phenobarbital), a crime OCU deemed similar to a disqualifying offense under Florida law. Section 435.04(2), Florida Statutes, includes as a disqualifying offense a plea of nolo contendere "to an offense prohibited under any of the following provisions of state law or similar law of another jurisdiction[;]" paragraph (ss) identifies chapter 893, Florida Statutes, relating to drug abuse prevention and control, if the offense was a felony. Petitioner timely disputed that his offense in Kansas was a disqualifying offense under the background screening law.

OUTCOME: The ALJ recommended that OCU enter a final order finding that Petitioner does not have a disqualifying offense under the Level 2 background screening standards. While the ALJ concluded the crime to which Petitioner pled no contest in Kansas was essentially identical to a crime under section 893.13(6)(a), the ALJ noted a pivotal difference between the criminal laws of the two states: the degree of penalty. That is, in Florida, the crime constituted a felony, whereas in Kansas it was only a misdemeanor. The ALJ noted that it was not entirely clear whether the qualifier "only if the offense was a felony" means that the offense must be a felony under Florida law, or that the offense must be a felony in the other jurisdiction. The ALJ construed the statute to mean the latter, reasoning that the possession of phenobarbital in Florida is already a felony and including the phrase "only if the offense was a felony" could logically be intended to look to the other jurisdiction's "similar law" and whether it was a felony. Construed this way, the Kansas misdemeanor crime for illegal possession of phenobarbital cannot be similar to Florida's felony crime for illegal possession of phenobarbital.

In its Final Order, however, the Department of Health (DOH) did not address the ALJ's recommended findings or conclusions, or the exceptions that it said were filed by both Petitioner and Respondent. Instead, in a Findings of Fact section, the Final Order referred to testimony in the hearing record indicating that Petitioner "was, in fact, to be retained as a consultant for the Nursery, not as an owner or manager." The Final Order also recited the fact that OCU received a letter from San Felasco's owner on or about April 4, 2016, "verifying that Mr. Banks had never been and would not be an owner or manager of the Nursery." That letter was filed with the DOH Agency Clerk "as part of the record of this matter" on April 19, 2016. Based on those findings, DOH concluded that it had no authority to subject Petitioner to a Level 2 background screening, because "[a] 'consultant' is not an owner or a manager." DOH dismissed the Petition for Administrative Hearing and the exceptions filed by both parties as moot.

Public Health Trust v. Dep't of Health and Kendall Healthcare Group, Ltd., d/b/a Kendall Regional Medical Center, DOAH Case No. 15-3171 (Recommended Order Feb. 29, 2016).

FACTS: The Department of Health ("DOH") is the agency responsible for licensing and regulating trauma centers in Florida. The Legislature has imposed a cap on the number of trauma centers that may operate in Florida, and DOH has determined that trauma service area 19 (which consists of Miami-Dade and Monroe Counties) can have no more than three trauma centers. The Public Health Trust of Miami-Dade County, Florida, d/b/a Jackson South Community Hospital ("JSCH") applied during the 2014-16 application cycle for verification as a Level II trauma center. After conducting the statutorily required provisional review to determine whether JSCH's application was complete and had the critical elements required for a trauma center, DOH notified JSCH on April 30, 2015, that its application was denied. JSCH requested a formal administrative hearing, and DOH referred this matter to DOAH.

OUTCOME: The ALJ recommended that DOH issue a final order approving JSCH's application to operate as a provisional trauma center, based on the evidence proving that JSCH was in substantial compliance with the trauma center standards adopted by DOH rule. In so doing, the ALJ rejected several DOH arguments regarding the nature of the administrative hearing and the role of the ALJ.

DOH argued that the ALJ could not consider any information about JSCH that was not set forth in the application denied by DOH. In support of its argument, DOH compared the instant case to a bid protest proceeding which disallows any post-deadline submissions that supplement the bid. That practice ensures that no bidder gains

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an unfair advantage over another. The ALJ rejected that rationale by noting that, in contrast to the situation in a bid protest, there is no limit to the number of provisional trauma centers that can exist in a particular trauma service area. The possibility of head-to-head competition between applicants would only arise if the number of provisional trauma centers found eligible for selection by DOH exceeded the number allowed in a particular trauma service area, which was not the case there. The ALJ also rejected DOH's argument because denial of JSCH's application was merely proposed agency action and would not become final until JSCH had exercised its right to challenge that proposed action through an administrative hearing. Therefore, an ALJ can consider information that was not contained in the initial submission to DOH.

With regard to the merits of the JSCH application, DOH contended that the statutory test for "substantial compliance" with critical elements of the trauma center standards is equivalent to absolute or nearly perfect compliance with every critical element which an applicant must demonstrate as a condition of provisional licensure. In rejecting this argument, the ALJ concluded that "substantial compliance is better understood here as an instruction to give the Standards, not a hypertechnical reading that elevates form over substance, but a sensible, pragmatic construction which keeps in mind that a hospital is a complex system whose strengths and weaknesses are unlikely to be fully and fairly represented in the trauma center application, as lengthy as it is."

DOH also argued that the ALJ should defer to its interpretation of the trauma center statutes. While the ALJ noted that judicial deference is owed to an agency's interpretation of a statute the agency is charged with administering, the prudential doctrine of judicial deference does not constrain administrative law judges. Unlike the judiciary, ALJs are participants in the decision-making processes that lead to administrative interpretations of statutes and rules. Accordingly, the ALJ's 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. He also pointed out that after the formal administrative hearing, section 120.57(1)*(l)*, Florida Statutes, enables the agency to reject an ALJ's statutory interpretation if the agency concludes that its interpretation is as or more reasonable than the ALJ's.

Alicia Chilito, M.D. v. Dep't of Health, DOAH Case No. 15-3568 (Recommended Order Feb. 29, 2016); DOH Case No. 2015-0124 (Final Order May 2, 2016).

FACTS: Alicia Chilito ("Chilito"), a licensed physician, filed an application to renew her license with the Department of Health ("DOH") on January 5, 2015. On January 20, 2015, a DOH employee (who did not have authority to make a final, binding decision) informed Chilito by telephone that her application "was being denied" because the Florida Medicaid program had previously terminated Chilito as a provider. That statement was made even though the DOH employee in question could only recommend that Chilito's application be denied, and four other DOH employees could reject that recommendation. On April 17, 2015, DOH issued a notice to Chilito that her renewal application was denied. Chilito challenged the denial of her license renewal, arguing that she was entitled to the renewal of her license by default pursuant to section 120.60(1), Florida Statutes, which generally requires agencies to approve or deny licensure applications within a 90-day timeframe. DOH responded in part by arguing that Chilito's phone conversation with the DOH employee was a sufficient denial under the law. Further, DOH argued that Chilito was not entitled to a default license because she did not notify the agency clerk of her intent to obtain a license by default.

OUTCOME: The ALJ recommended that DOH issue a final order determining that Chilito's license renewal application is approved pursuant to section 120.60(1), and directing the agency clerk to issue Chilito's default license upon proper notification. The ALJ found that the DOH employee's statement was not relaying a final determination by the agency and was not itself a final or binding determination on behalf of the agency. Therefore, because no denial was issued before the expiration of the 90-day period, Chilito was entitled to a license by default. The ALJ also concluded that there is no statutory time limit by which Chilito must apply to the agency clerk for a license by default and that just because Chilito had not yet invoked her right to issuance of a default license does not mean that she is not entitled to such license.

DOH's Final Order adopted the ALJ's Recommended Order in all material respects.

Estella Magri v. AMS Aviation, DOAH Case No. 15-3836 (Recommended Order Feb. 29, 2016).

FACTS: In September 2013, Estella Magri ("Magri"), a sheet metal mechanic for AMS Aviation ("AMS"), filed a sexual harassment complaint against her supervisor. On October 4, 2013, a disciplinary memo was issued against Magri, citing poor performance. On October 10, 2013, Magri and several other AMS employees were laid off. The AMS employees who were laid off, including Magri, were told to call or text their supervisors regularly to see if any work would be available. AMS employees were commonly laid off for periods of a week to a month. During the course of her layoff, Magri contacted her supervisor several times and was informed that there may be work for her on October 21. On October 25, after not being called into work, Magri visited her supervisor, who informed her that he did not have the authority to call her into work and that he was under the impression that the managers did not want her to return. Magri then contacted one of the managers,

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and he told her to find another job. On October 16, 2014, Magri filed a charge with the Florida Commission of Human Relations ("FCHR"), alleging that AMS discriminated against her based on her sex and in retaliation for reporting the alleged sexual harassment. FCHR found that the charge was untimely filed because it was more than 365 days from the adverse employment action (i.e., October 10, 2013, when Magri was laid off). Magri appealed this determination.

OUTCOME: The ALJ recommended that FCHR decline jurisdiction with regard to the sexual harassment charge but accept jurisdiction with regard to the discrimination and retaliation charge. The ALJ reasoned the Magri's October 25 conversation with her supervisor was the first indication that she had been fired rather than temporarily laid off, and her charge was filed with FCHR 357 days later. The ALJ further reasoned that the concept of equitable tolling applied in this circumstance due to the supervisor's misrepresentations that work may be coming to Magri.

Tony L. Phillips, v. Dep't of Bus. & Prof. Reg., Constr. Industry Licensing Bd., DOAH Case No. 15-5003 (Recommended Order Mar. 10, 2016).

FACTS: Tony L. Phillips ("Petitioner"), applied to the Department of Business and Professional Regulation, Construction Industry Licensing Board ("Board"), for a building contractor's license as a foreman with four years of active construction experience, pursuant to section 489.111(2)(c)2., Florida Statutes. The aforementioned statute provides in pertinent part that an applicant is eligible for licensure by examination if he or she "has a total of at least four years of active experience as a worker . . . or as a foreman who is in charge of a group of workers[.]" At the hearing before the Board on the application, two of the seven Board members questioned whether the Petitioner had control over the "means and methods" of construction of the projects cited in his application for which he claimed experience as foreman. The Board denied Petitioner's license application, and he requested an administrative hearing to contest the denial. In addition, because section 489.111(2)(c)2. does not use the term "means and methods," the Petitioner alleged that the Board relied upon non-rule policy in formulating its decision to deny his application.

OUTCOME: The ALJ found that "means and methods" is a term of art in the construction industry, referring to the plans for executing the work on a particular project, including scheduling different aspects of a project and directing the work of a construction crew. The ALJ found that having control of the "means and methods" of construction is integral to the job of a construction foreman.

Although the ALJ found that the Board maintained a statement of general applicability that an applicant must have control over the "means and methods" of construction to meet the foreman experience required under section 489.111(2)(c)2., the ALJ concluded there was no unadopted rule because the statement did not, in and of itself, create rights, require compliance, or otherwise have the direct and consistent effect of law. Instead, "[t]he term is apparent to members of the industry from a literal reading of the statute." Accordingly, the ALJ recommended that the Board deny the Petitioner's application, and that the denial would not be based on an unadopted rule.

Walton Manors Street Systems, Inc., v. Dep't of Trans., DOAH Case No. 15-1321 (Final Order Mar. 10, 2016).

FACTS: The Department of Transportation ("DOT") issued a denial notice to Walton Manor regarding its applications for outdoor sign permits, citing land use and zoning deficiencies. Walton Manor contested the denial in an administrative hearing. In a Recommended Order issued on January 22, 2016, the ALJ found, as a matter of fact, that the parcel at issue was appropriate for commerce, industry, or trade. In addition, the ALJ concluded that deference must be accorded to a local government's zoning determination. As a result, the ALJ recommended granting the applications and issuing the permits.

OUTCOME: DOT rejected the ALJ's factual findings as either inappropriately labeled conclusions of law over which it has substantive jurisdiction or ultimate facts infused with policy considerations for which it has special responsibility, and rejected the ALJ's conclusion that DOT must defer to local governments' zoning determinations. Although DOT found that whether a parcel is appropriate for a particular use is a matter of law and that no deference must be given to the local government's determination, DOT nevertheless entered a Final Order granting the applications and issuing the permits.

Disciplinary/Enforcement Actions

Palm Beach County Sch. Bd. v. Anitra Grant-Straghn, DOAH Case No. 14-5823TTS (Rec. Order Feb. 3, 2016).

FACTS: The Respondent was a teacher at Atlantic High School in Delray Beach during the 2013-14 school year. Four days after a student ("R.M") directed a racial slur toward her son, the Respondent confronted R.M. in another teacher's classroom on March 10, 2014, and allegedly slapped his face in front of other students. The student witnesses provided unsworn written statements about the altercation on March 10 and 11, 2014. The Superintendent for the Palm Beach County School Board ultimately recommended to the School Board that the Respondent be suspended without pay for seven days. The Respondent challenged that proposed action, and the matter was referred to DOAH for a formal administrative hearing. In order to prove its case, the School Board relied on the verbal and written statements by R.M. and the student witnesses that the Respondent slapped R.M.

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OUTCOME: The ALJ determined that the verbal and written statements by R.M. and the student witnesses were hearsay and did not fall under any of the relevant exceptions to the hearsay rule. For example, the ALJ concluded that the excited utterance exception did not apply because the written statements were narrative descriptions of the altercation rather than excited utterances. Because the narrative nature of the statements indicated that the students had time to reflect on what had occurred, the statements did not have the reliability attributed to statements made while the declarant is under the stress or excitement caused by a particular event. As for the state-of-mind exception, the ALJ concluded that the students' statements did not describe their state of mind, their emotions, or their physical sensations. Instead, those statements described an event the students had witnessed, and section 90.803(3), Florida Statutes, expressly excludes "[a]n after-the-fact statement of memory or belief to prove the fact remembered or believed" from the state-of-mind exception. The ALJ also concluded that the business records exception did not apply because the students had "no business duty to make the statements and were not acting within the ordinary course of business in making the statements." Accordingly, the ALJ concluded that the School Board failed to carry its burden of proving that Respondent slapped R.M., and the ALJ recommended that the School Board dismiss the charges against the Respondent.

Fla. Elections Comm'n v. Conserve and Protect Florida's Scenic Beauty, Case No. 15-5994FEC (Final Order March 22, 2016).

FACTS: The Florida Elections Commission ("the Commission") enforces the State's election and campaign financing laws. One of those laws (section 106.07(1), Florida Statutes) requires a candidate or political committee's campaign manager to file monthly reports detailing all contributions and expenditures during a calendar month that were not otherwise reported. If there are no reportable contributions or expenditures during a particular month, then the report for that period is waived. However, the candidate or political committee "shall notify the filing officer in writing on the prescribed reporting date that no report is being filed on that date." As for section 106.07 and other statutes enforced by the Commission, section 106.25(3), Florida Statutes, provides that "a violation shall mean the willful performance of an act prohibited by this chapter or chapter 104 or the willful failure to perform an act required by this chapter or chapter 104."

Conserve and Protect Florida's Scenic Beauty ("Conserve and Protect") is a political committee organized for the purpose of sponsoring and supporting a constitutional initiative to conserve and protect Florida's scenic beauty. On September 17, 2015, the Commission entered an Order of Probable Cause charging Conserve and Protect with four counts of failing to provide timely notification that no contribution/expenditure report would be filed. During the subsequent formal administrative hearing at DOAH, Conserve and Protect's treasurer credibly testified that the untimely notifications were due to his "temporary inattention" and were "not intentional."

OUTCOME: Because the Commission failed to prove that Conserve and Protect willfully failed to provide notification that no reports would be filed for the periods in question, the ALJ issued a Final Order dismissing the Order of Probable Cause. With regard to whether the subject of any disciplinary action acted willfully, the ALJ opined that "in some cases there may be a paucity of direct evidence of willful intent, but substantial circumstantial evidence. In such cases, willfulness may be inferred from the totality of the facts in a given case." As for what types of circumstantial evidence would support a finding of willfulness when the Commission is seeking to enforce the election code or campaign finance law, the ALJ concluded that "demonstrable financial or political gain from the failure to comply with the 'who gave it, who got it' law, could rise to the level to which an inference of willful conduct could be derived. In addition, evidence of serial non-compliance might, under the proper circumstances, support an inference of willfulness." No evidence of that nature was present in this case.

Rule Challenges

N. Fla. Horsemen's Ass'n, Inc. v. Dep't of Bus. & Prof'l Reg., Div. of Pari-Mutuel Wagering and Fla. Quarter Horse Racing Ass'n, Inc., DOAH Case No. 15-4359RP (Final Order Jan. 29, 2016).

FACTS: The Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("the Division"), is the state agency that regulates pari-mutuel wagering. On June 30, 2015, the Division published notice of proposed rules 61D-2.024 through 61D-2.029. One purpose of the proposed rules is "to provide for uniform rules for the control, supervision, and direction of all applicants, permittees, and licensees for the holding, conducting, and operating of all race tracks, race meets and races held in this state . . ." Certain provisions of the proposed rules would establish racetrack and race standards and effectively eliminate barrel racing and flag drop racing as pari-mutuel wagering events by: (a) prohibiting a race course from requiring the racing animal to change its course in response to obstacles on the racing surface; and (b) requiring all races (other than harness and steeplechase races) to start by use of a box or starting gate. The North Florida Horsemen's Association, Inc. ("NFHA"), represents the majority of the quarter horse owners and trainers at Gretna Racing, LLC ("Gretna"), where NFHA's members engage in barrel match and flag drop racing. On July 30, 2015, NFHA filed a petition alleging that the proposed rules were an invalid exercise of delegated legislative authority.

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OUTCOME: The ALJ concluded that the sections of the proposed rules that would establish racetrack and race standards did not enlarge, modify, or contravene the Division's rulemaking authority. In doing so, the ALJ noted that section 550.0251(3), Florida Statutes, requires the Division to "adopt reasonable rules for the control, supervision, and direction of all applicants, permittees, and licensees and for the holding, conducting, and operating of all racetracks, race meets, and races held in this state." However, the ALJ invalidated other portions of the proposed rules which would have governed: (1) how racetracks determine whether jockeys have demonstrated riding ability; (2) the color of jockey uniforms; (3) protective equipment for jockeys; and (4) publication of a racehorse's past runnings.

Florida Bee Distribution, Inc. d/b/a Tobacco Express Distributors, et al. v. Dep't Bus. & Prof'l Reg., Div. of Alcohol Beverages and Tobacco, DOAH Case Nos. 15-6108RU and 15-6148RU (Final Order March 3, 2016).

FACTS: The Department of Business and Professional Regulation, Division of Alcoholic Beverages & Tobacco (the "DABT"), is the agency responsible for administering and enforcing Florida laws related to taxation of tobacco products other than cigarettes and cigars ("other tobacco products"). After Micjo, Inc. v. Department of Business and Professional Regulation, Division of Alcoholic Beverages & Tobacco, 78 So. 3d 124 (Fla. 2d DCA 2012), the DABT taxed other tobacco products based on the "wholesale sales price," which excluded any federal excise taxes and shipping charges reflected in the invoice price. However, in mid-2013, the DABT determined that if a domestic tobacco manufacturer paid federal excise taxes when it produced the product, then the "wholesale sales price" includes non-tobacco charges such as federal excise taxes and shipping charges. In contrast, for foreign manufacturers who do not pay federal excise taxes, the "wholesale sales price" did not include federal excise taxes and shipping charges. In short, the DABT's concept of "wholesale sales price" varied depending on whether the tobacco was manufactured foreign or domestically. Petitioners, licensed tobacco product distributors, challenged DABT's application of the tax on other tobacco products, as an unadopted rule.

OUTCOME: The ALJ concluded that Petitioners demonstrated that DABT's policy concerning the inclusion of federal excise taxes and shipping charges in the wholesale sales price for some distributors for purposes of calculating the tax on other tobacco products is a statement of general applicability that is an unadopted rule in violation of section 120.54(1)(a), Florida Statutes.

The DABT has appealed the Final Order to the First District Court of Appeal, where the case is pending as case number 1D16-1064.

Bid Protests

Douglas Gardens V, Ltd. v. Florida Housing Finance Corp. & La Joya Estates, Ltd., DOAH Case No. 16-0418BID (Recommended Order Feb. 29, 2016).

FACTS: Douglas Gardens V, Ltd. ("Douglas Gardens"), and La Joya Estates, Ltd. ("La Joya"), submitted applications in response to a Request for Applications 2015-112 (the "RFA") issued by the Florida Housing Finance Corporation ("FHFC"), seeking developers who could build multifamily housing. The RFA gave priority to the highest ranked eligible application for multifamily housing for the elderly in Miami-Dade County, but provided that if no one applied to build in Miami-Dade County, then the highest ranking eligible application for multifamily housing for the elderly in Broward County would be selected. Although both La Joya and Douglas Gardens submitted applications to build multifamily housing for the elderly, La Joya proposed to build in Miami-Dade County, while Douglas Gardens proposed to build in Broward County. La Joya's application was the only application submitted for Miami-Dade County and was ultimately awarded funding.

Douglas Gardens filed a protest and argued in the administrative hearing that La Joya was inappropriately awarded 18 points after submitting the wrong version of the required Survey Certification Form. However, the difference between the form submitted by La Joya and the required form was immaterial to the application and solicited the same information from the applicants. Although the RFA allowed FHFC to waive "Minor Irregularities" in the application, the RFA also provided, "If the Applicant provides any prior version of the Surveyor Certification form, the form will not be considered." La Joya's form error was not noticed by the FHFC review committee, but at the administrative hearing, FHFC argued that the form La Joya submitted should not have been scored for consistency purposes. La Joya argued that FHFC's scoring of the form was appropriate because FHFC had the authority to waive the error as a "minor irregularity."

OUTCOME: The ALJ recommended that FHFC issue a final order finding La Joya eligible for funding and dismissing Douglas Gardens' protest and petition for administrative hearing. In support of this recommendation, the ALJ found that La Joya's form error was a "minor irregularity" because the difference in the forms did not provide La Joya with a competitive advantage over other applicants. Not only did the two forms require the same information of all applicants, but the difference between the forms was not even noticed by the experienced review committee. The ALJ also noted that policy concerns such as consistency in scoring were not affected because the contents of both forms were the same for scoring purposes.

Law School Liaison

Spring 2016 Update from the Florida State University College of Law

by David Markell, Steven M. Goldstein Professor

This column highlights recent accomplishments of our College of Law alumni, students, and faculty. It also features the programs the College of Law has hosted this spring.

We are delighted 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 twelfth year in a row.

Spring 2016 Events

Spring 2016 Distinguished Lecturer

Carol Rose, Gordon Bradford Tweedy Professor Emeritus of Law and Organization and Professorial Lecturer in Law, Yale Law School, was the spring's Distinguished Lecturer.

Faculty Enrichment Luncheon Speaker

Bernard Bell, Professor of Law and Herbert Hannoch Scholar, Rutgers School of Law, presented his paper, entitled "Access to Information, Political Participation, and the Privileges and Immunities Clause," during a faculty workshop.

Guest Lecturers

Brent McNeal, Deputy General Counsel, Division of Vocational Rehabilitation and the Division of Blind Services, Department of Education; Ellen Wolfgang Rogers, Staff Director, Senate Environmental Protection and Conservation Committee; Judge Suzanne Van Wyk, Division of Administrative Hearings; and Christina Shideler, Assistant General Counsel, Department of Economic Opportunity, guest lectured in Professor Markell's Legislation & Regulation course in March.

Judge Bram Canter, Division of Administrative Hearings, guest lectured to Professor Markell's Administrative Law class.

Energy Road Show

The Young Lawyers Council of the Energy Bar Association presented a special program for College of Law students entitled Energy Road Show: Career Possibilities and Current Trends in Energy Law. Speakers included Richard Brightman, shareholder, Hopping Green & Sams; Diana Caldwell, Staff Director, Senate Committee on Regulated Industries; J.R. Kelly, Public Counsel, Office of Public Counsel; Cindy Miller, former senior counsel at the Florida Public Service Commission; Angela Morrison, partner, Berger Singerman; Lisa Edgar, Commissioner, Florida Public Service Commission; and Floyd Self, partner, Berger Singerman.

Networking Nosh Luncheon

Michael Gray, United States Department of Justice Environment and Natural Resources Division, spoke with students about opportunities with the Department of Justice. He also participated in the College of Law's Environmental, Energy and Land Use Law Spring 2016 Colloquium.

Environmental, Energy and Land Use Law Spring 2016 Colloquium

The Spring 2016 Colloquium honored seven J.D. students for their outstanding papers.

- Britton Alexander, *Cleaning Up the Clean Power Plan: Wavering Deference to the Environmental Protection Agency*
- John Baker, *Oil and Reform a la Mexicana: On Mexico's Past Troubles, Present Challenges, and Future Expectations*
- Sarah Logan Beasley, *Hydraulic Fracturing Fluid in Our Food System: Emerging Issues Related to Recycling Wastewater for Agricultural Purposes*
- Steffen LoCascio, *The Apalachicola-Chattahoochee-Flint River Dispute: Atlanta vs. Apalachicola, Water Apportionments' Real Version of David vs. Goliath*
- Sarah Marshall, *The Clean Water Act's TMDL Requirements: Could Prosecution of TMDL Violators Be A Possible Solution To Non-point Source Pollution?*
- Jazz Tomassetti, *We're All in This Together: A Fair Share Approach to Renewable Energy*
- Travis Voyles, *Clearing up Perceived Problems with the Sue-and-Settle Issue in Environmental Litigation*

Information on upcoming events is available at http://law.fsu.edu/academics/jd-program/environmental-energy-land-use-law/environmental-program-events. We hope section members will join us for one or more of these events.

Recent Student Achievements

- Stephanie Schwarz and Sarah Logan Beasley represented FSU Law at the 2016 Pace Environmental Law Moot Court competition for the second consecutive year, and were one of nine teams (out of almost 100) to reach the semifinal round. Sarah Logan Beasley was named the competition's overall Best Oralist out of more than 200 competitors.
- The 2016-2017 Journal of Land Use & Environmental Law Executive Board consists of: Travis Voyles, Editor-in-Chief; Daniel Wolfe, Executive Editor; Tyler Parks, Executive Editor; Suhail Chhabra, Senior Articles Editor; Brent Marshall, Administrative

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Editor; and Melina Garcia, Associate Editor.

- The 2016-2017 Environmental Law Society Executive Board consists of: Jess Melkun, President; Jessica Farrell, Vice President; Blair Schneider, Treasurer; Janaye Garrett, Secretary; and Travis Voyles, Networking Chair.

Recent Faculty Achievements

Shi-Ling Hsu was a guest speaker at the University of Oregon School of Law in January, where he presented his article, "Capital Transitioning: a Human Capital Strategy for Climate Technologies." In March, Shi-Ling Hsu was a speaker at the J.B. and Maurice Shapiro Environmental Law Symposium at George Washington University Law School, where he presented "The Case for a Carbon Tax 2.0," and also at the University of Illinois School of Law, where he presented his work on climate change technologies.

David Markell's article, "Next Generation Compliance," was published in the ABA Natural Resources & Environment journal. His article, "Dynamic Governance in Theory and Application, Part I," is forthcoming in the Arizona Law Review. Prof. Markell presented his paper "Sea-Level Rise and Changing Times for Florida Local Governments" during a workshop at Columbia Law School's Sabin Center for Climate Change Law.

Erin Ryan presented *Secession and Federalism in the United States* in November at an international federalism conference at the University of the Basque Country, Spain. She presented a new book chapter, *Environmental Federalism's Tug of War Within*, at the University of Kansas in September and at a Federalist Society Conference in January. In March, she presented a version adapted for Chinese academics at the University of Chicago, as the opening presentation for an international environmental governance project, *Chinese and American Environmental Governance Compared: System, Capacity, and Performance.* In April, she presented an article, *Federalism, Regulatory Architecture, and the Clean Water Rule* at a symposium about the Waters of the United States Rule at Lewis & Clark Law School. In February, she published a short essay, *The Clean Power Plan, The Supreme Court, and Irreparable Harm*, on the AMERICAN CONSTITUTION SOCIETY BLOG, THE HUFFINGTON POST, and the ENVTL. LAW PROF BLOG.

Hannah Wiseman was a panelist at the Nicholas Institute for Environmental Policy Solutions, Duke University conference entitled "Navigating the EPA's Clean Power Plan: Charting a Course for Southeast Energy." She also presented her paper "Disaggregating Preemption in Energy Law" in colloquia at the Buchmann Faulty of Law, Tel Aviv University, and at the Northwestern University Pritzger School of Law.

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passed a measure sponsored by Representative Janet Adkins designed to protect regulated persons from an agency's use of an invalid or unadopted rule in enforcement, licensing, or other section 120.57 proceedings. Among other things, the bill creates a new legal defense and allows a collateral rule challenge to such proceedings. The bill also requires agencies to publish a list of rules that, if violated, would constitute minor violations. In addition, the bill expedites administrative hearings related to temporary special events permits.

New Legal Defenses: HB 183 permits a person challenging an agency action involving disputed issues of material fact to contemporaneously allege a defense that the agency's rule was an invalid exercise of delegated legislative authority or that the agency's statement was an unadopted rule.[3] Effectively, the amendment allows a party to bring a rule challenge that can be applied retroactively to the specific case.[4] Having this ability to challenge the validity of an adopted rule in a section 120.57 proceeding has the potential to be a powerful remedy.

Similar legislation passed during the 2015 regular session,[5] but was ultimately vetoed by the Governor. That legislation provided that the administrative law judge's conclusions of law associated with a rule challenge defense under section 120.57 could never be rejected by an agency in the final order.[6] The Governor's veto message stated "the bill has the potential to inflict more harm on an agency's ability to operate in an efficient and accountable manner … [and] alters the long-standing deference granted to agencies by shifting final action authority to an administrative law judge."[7] Under the 2016 legislation, the conclusions of law associated with a challenge to the validity of an existing rule under section 120.57 may be rejected if the agency states with particularity that the conclusions are clearly erroneous.

Authorizes Collateral Rule Challenges: Additionally, HB 183 directly impacts the ruling in *United Wisconsin Life Insurance Co. v. Department Insurance Regulation*.[8] That case started as an enforcement proceeding. While the proceeding was pending, the insurance company brought a separate section 120.56(4), Florida Statutes, action to challenge certain agency statements as nonrule policy. The administrative law judge concluded, and the First District Court of Appeal affirmed, that a petitioner "has no right to pursue a separate, collateral challenge to an alleged nonrule policy where an adequate remedy exists through a section 120.57 proceeding." HB 183 expressly allows a petitioner to bring separate section 120.56 and section 120.57 actions. One potential benefit to bringing a collateral rule challenge pursuant to section 120.56 is that the administrative law judge issues a final order (as opposed to a recommended order) in such cases.

The newly-created defense combined with the express statement that a petitioner may bring a collateral rule challenge will provide petitioners options to ensure that invalid rules or unpromulgated statements are not used against them in enforcement or licensing cases. When evaluating these options, a petitioner should also consider the availability of an award of reasonable costs and attorney's fees. If a petitioner successfully brings a collateral rule challenge or argues a defense to a section 120.57 action based on a determination that the agency's action was an unadopted rule, reasonable costs and attorney's fees may be awarded. However, an award of reasonable costs and attorney's fees is not available for a successful determination regarding an existing rule, under the newly amended section 120.57.[9]

Minor Violations: HB 183 also requires that, by July 1, 2017, all agencies must review and publish a list of all rules that the agency has designated as rules the violation of which would be a minor violation under section 120.695, Florida Statutes. A violation of a rule should be a minor violation if it does not result in economic or physical harm to a person or adversely affect the public health, safety, or welfare or create a significant threat of such harm. The agency's first response to a rule designated as a minor violation is limited to a notification by the agency. The notification must identify the specific rule that is being violated, provide information on how to comply with the rule, and specify a reasonable time for the person to comply with the rule. The notice of noncompliance may not be accompanied by a fine or other disciplinary penalty.

Expedited Hearings for Special Event Permits: Finally, a new provision was added this session. It requires an expedited administrative hearing for challenges to special event permits issued for submerged land leases. These special event permits are issued by the Department of Environmental Protection for the installation of temporary structures, including docks, moorings, pilings, and access walkways, on sovereign submerged lands solely for the purpose of facilitating boat shows and displays in, or adjacent to, established marinas or government-owned upland property. The legislation amends section 403.8141, Florida Statutes, to provide that, upon the filing of a motion after a permit is challenged, a summary proceeding must be conducted within 30 days, regardless of whether the parties agree to the summary proceeding.[10] This expedited procedure reduces the likelihood that a challenger can run out the clock on a temporary event.

The act will become effective on July 1, 2016. Chapter No. 2016-116, Laws of Florida.

House Bill 981 Clarifies SERC Timing Requirements

Relating to Administrative Procedures (HB 981)

In 2010, the Legislature significantly amended the rulemaking process related to statements of estimated regulatory costs (SERC).[11] A SERC must be prepared during

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promulgation of agency rules that are expected to affect small businesses or have an economic impact in excess of $1 million over the first five years after the rule is effective. The bill clarifies that if any provision of a rule is not fully implemented upon the effective date of the rule, the adverse impacts and regulatory costs associated with such provision must be adjusted to include any additional adverse impacts and regulatory costs estimated to occur within five years after full implementation of such provision.

The act will become effective on July 1, 2016. Chapter 2016-232, Laws of Florida.

Several other bills that passed will be of interest to administrative lawyers, even though they do not technically amend the APA.

Combined House Bill 307 & 1313 Affects Pending Litigation and Seeks to Expedite the Approval Process for the Medical Use of Cannabis
Relating to the Medical Use of Cannabis (CS for CS/CS/HB 307 & 1313)

In 2014, the Legislature enacted the Compassionate Medical Cannabis Act (CMCA), which authorizes dispensing organizations approved by the Department of Health (DOH) to manufacture, possess, sell, and dispense low-THC cannabis for medical use by patients suffering from certain conditions.

Under the CMCA, DOH was required to approve five dispensing organizations by January 1, 2015, with one dispensing organization in each of five regions. Implementation of the dispensing organization approval process initially was delayed due to litigation challenging proposed rules that addressed the initial application requirements for dispensing organizations. These rules finally took effect on June 17, 2015. The window to apply to become a dispensing organization closed on July 8, 2015, with 28 applications being submitted. On November 23, 2015, DOH announced the five approved dispensing organizations. Thirteen petitions were filed contesting DOH's approval of these five dispensing organizations. This litigation has delayed the implementation of the CMCA.

Section 3 of the bill seeks to expedite this approval process, and therefore affects the pending litigation, by requiring DOH to grant cultivation authorization to permit operation as a dispensing organization for those dispensing organizations that initially were approved under the DOH rule and meet certain other conditions.

This section of the bill also requires DOH to grant approval to another applicant who initially received the highest aggregate score, through DOH's evaluation process, but was disqualified. An ALJ determined that this applicant should not have been disqualified.[12]

Finally, section 3 of the bill provides that, if an organization that does not meet these new criteria receives a final determination from DOAH, DOH, or a court of competent jurisdiction that was entitled to be a dispensing organization, such organization also shall be a dispensing organization. This means that other applicants who challenged DOH's initial approvals may continue to assert that their applications should be approved.[13]

This act took effect on March 28, 2016. Chapter 2016-123, Laws of Florida.

House Bill 7099 Impacts Decisions Related to Tobacco Taxes
Relating to Taxation (HB 7099)

This bill provides for a wide range of tax reductions and modifications designed to directly impact both individuals and businesses, and to improve tax administration. The analysis below is limited to the legislative efforts to address recent administrative cases related to the regulation of other tobacco products by the Department of Business and Professional Regulation (DBPR). Other tobacco products include items such as pipe tobacco, chewing tobacco, hookah tobacco, and dipping tobacco. The first group of cases relates to the wholesale sales price of the taxable tobacco products. The second set of issues relates to whether cigar wraps constitute taxable tobacco products.

Beginning in 2012, the court in *Micjo, Inc. v. Department of Business and Professional Regulation*[14] interpreted the phrase "wholesale sales price" to exclude non-tobacco charges

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such as federal excise taxes and shipping charges from the taxable base of the wholesale tax imposed on other tobacco products. Initially, DBPR allowed tobacco companies to seek refunds for the overpayment of taxes, but in the fall of 2013, DBPR decided to limit the *Micjo* decision to foreign manufacturers. A number of domestic companies challenged this change of policy, and just before the end of the 2016 session, DBPR's new policy statement was found to be an unadopted rule in violation of section 120.54(1)(a), Florida Statutes.[15] Soon thereafter on March 11, 2016, the Legislature passed an amendment to the definition of wholesale sales price to expressly include federal excise taxes, charges for transportation and delivery, any discounts provided by an affiliate, and any other charges, even if listed as a separate item on the invoice. The legislation codified DBPR's policy and ultimately may remove the necessity for DBPR to promulgate a rule.

In the case of *Brandy's Products, Inc. v. Department of Business and Professional Regulation*,[16] DBPR assessed a company for nearly $72,000 in taxes, surcharges, penalties, and interest related to its distribution of cigar wraps to Florida retailers. The ALJ issued an order recommending that the assessment be set aside because "a blunt wrap is no more loose tobacco than a piece of writing paper is loose wood."[17] DBPR rejected the recommendation and issued a final order directing the company to pay the assessment in full.[18] Brandy's Products appealed, and the First District Court of Appeal reversed DBPR's determination that cigar wraps were taxable "other tobacco products." While an amendment to the statutory definition of "other tobacco products" did not ultimately pass the 2016 Legislature, Judge Wetherell's opinion correctly highlights that the Legislature proposed amendments during the 2015 and 2016 session to make cigar wraps taxable.[19]

The act will become effective on July 1, 2016. Chapter 2016-220, Laws of Florida.

House Bill 1361 Establishes Deadlines for Final Action on an ALJ's Recommended Order Regarding a Challenged Comprehensive Plan Amendment.
Relating to Growth Management (CS/CS/HB 1361)

This bill, generally dealing with growth management, provides that recommended orders submitted to the Department of Economic Opportunity (DEO) by an ALJ regarding a challenged comprehensive plan amendment become final within certain periods absent agency action or an agreement to extend the time.

In cases in which the ALJ recommends that the amendment be found in compliance, the recommended order becomes the final order 90 days after issuance unless within that time: DEO finds the plan amendment to be in compliance and issues its final order; DEO finds the plan amendment not in compliance and it refers the recommended order to the Administration Commission for final action; or all parties consent in writing to an extension of the 90-day period.

In so-called expedited proceedings, if the ALJ recommends that the amendment be found in compliance, DEO must issue a final order within 45 days after issuance of the recommended order. If DEO fails to timely issue a final order, the recommended order finding the amendment to be in compliance immediately becomes the final order.

The act will become effective on July 1, 2016. Chapter 2016-148, Laws of Florida.

House Bill 5101 Exempts Certain Medicaid Hearings Conducted by AHCA from Parts of the APA
Relating to Health Care Services (HB 5101)

A number of exceptions to the APA are listed in the APA, in sections 120.80 and 120.81, Florida Statutes. However, not all exceptions are so conveniently located. HB 5101 creates a new one of these exceptions.

HB 5101 provides that appeals related to Medicaid programs administered by Agency for Health Care Administration (AHCA), including appeals related to Florida's Statewide Medicaid Managed Care program and associated federal waivers, filed on or after March 1, 2017, must be directed to the agency in the manner and form prescribed by the agency. The hearing authority for appeals heard by AHCA may be the Secretary of AHCA, a panel of agency officials, or a hearing officer appointed for that purpose. The hearing authority is responsible for a final administrative decision, and the decision is binding on the agency. Creating a new exception to the APA, the bill provides that, notwithstanding sections 120.569 and 120.57, hearings conducted by AHCA are subject to federal regulations or requirements relating to Medicaid appeals, are exempt from the Uniform Rules of Procedure in section 120.54(5), and are not required to be conducted by an ALJ assigned by DOAH.

The act will become effective on July 1, 2016. Chapter 2016-65, Laws of Florida.

DID NOT PASS

No Sunset Review of Agency Rulemaking Authority
Relating to Legislative Reauthorization of Agency Rulemaking Authority (HB 953 & SB 1150)

This proposed legislation would have created a four-year sunset review process for agencies' rulemaking authority.[20] The bill was designed to give the Legislature the ability to review all grants of rulemaking authority currently in effect and any grants of rulemaking authority in the future. If a grant of rulemaking authority was not reauthorized by the Legislature, such authority would be suspended. During the suspension of rulemaking authority, any rules lawfully adopted remained in effect. Additionally, proposed rules could be

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adopted during the suspension of rulemaking authority, but they would not become effective until ratified by the Legislature. The bill also allowed the Governor to issue a declaration of public necessity to delay any suspension of rulemaking authority for 90 days to allow the Legislature to convene and reauthorize necessary rulemaking.

CON Review Still Required
Relating to Certificates of Need for Hospitals (HB 437)

Once again, legislation was filed to repeal certificate of need (CON) review requirements. HB 437 would have deleted the CON review requirements for hospitals and hospital services. The bill also would have removed the CON review requirement for increasing the number of comprehensive rehabilitation beds in a facility that offers comprehensive rehabilitative services.

Special Transit/Transportation Districts Not Made Subject to APA
Relating to Special Districts (HB 745 & SB 516)

Special districts and local governments are not generally subject to the APA, unless expressly made subject to it by general or special law.[21] SB 516 would have made an independent special district that regulates transit or transportation services (including the Hillsborough County Public Transportation Commission) subject to the APA.[22]

County Decisions to Use Tourist Development Tax Not Made Subject to APA
Relating to Taxation (HB 7099)

HB 7099 (mentioned above) changes the purposes for which certain counties may use revenues from the tourist development tax (TDT) to include the reimbursement of expenses incurred in providing public safety services, including emergency medical services and law enforcement services relating to increased tourism and visitors to an area. These changes were controversial, and the bill for a time included a provision expressly authorizing administrative review of the county's decision pursuant to sections 120.569 and 120.57.[23] Standing to request an administrative hearing would have been provided to any remitter of the TDT or any organization representing multiple remitters of the TDT. During the pendency of the administrative proceeding and any resulting appeal, tax revenues collected under this section could not be used to fund the challenged use or uses. The county's interpretation of this provision would be afforded no deference, and the decision of the ALJ would constitute a final order, subject to judicial review. A prevailing remitter or remitter organization would be awarded reasonable costs of the action plus reasonable attorney's fees, including those on appeal. This provision was not included in the final version of the bill that passed.

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Endnotes:

[1] *See* 2013 HB 1225 & SB 1696; 2014 HB 1355 & SB 1626; and 2015 HB 435 & SB 718.

[2] Over the history of the APA, Governors often have initially vetoed many of the significant changes to the Act. Most of these changes eventually became law--usually shortly thereafter. *See* H. French Brown and Larry Sellers, *2015 Amendments to the APA: Regulatory Plans, Indexing--and Another Veto*, XXXVII Administrative Law Section Newsletter 1 (September 2015).

[3] Current law provides that a party's substantial interests cannot be determined based on an unadopted rule unless the agency can show recent legislation has directed the agency to create a rule and the agency has not had ample time to complete the rulemaking process in good faith. House Bill 183 adds the requirement that the agency prove rulemaking is neither feasible nor practicable.

[4] Note, the determination that a rule was found to be invalid as part of a section 120.57 hearing apparently will be limited to the particular case. It does not appear that the determination would result in the rule being declared void for all purposes, as would be the case following such a determination in a section 120.56 proceeding.

[5] House Bill 435 (2015).

[6] Under section 120.57, the agency would have retained final order authority over the remaining conclusions of law.

[7] *See* veto letter dated June 16, 2015.

[8] 831 So.2d 239, 240 (Fla. 1st DCA 2002).

[9] As amended by HB 183, section 120.57(1)(e)4.'s award of reasonable attorney fees and costs only applies to a court's rejection of the agency's determination regarding an unadopted rule.

[10] Similar opportunities for expedited summary hearings without every party's consent are already available for certain limited projects, including: biomedical research institutions and interstate natural gas pipelines in section 403.973(14)(b); deepwater ports in section 373.4271; and everglades pollution control projects in section 403.088(2)(g).

[11] *See* Larry Sellers, *2010 Amendments to the APA: Legislature Overrides Veto to Require Legislative Ratification of "Million Dollar Rule*s, Fla. Bar Journal Vol. 85. No. 5 (May 2011).

[12] *Banks v Department of Health*, DOAH Case No. 15-7267 (Recommended Order Feb. 26, 2016). In its final order, DOH concluded that its initial determination that Banks failed the background screening should be "invalidated and voided," because he was not subject to the background screening requirement. (Final Order, May 2, 2016).

[13] *See San Felasco Nurseries, Inc. v DOH, et al,* DOAH Case No. 15-7268 (Order Granting Dismissal of Parties and Amendment of Remaining Petition, May 2, 2016).

[14] 78 So. 3d 124 (Fla. 2d DCA 2012).

[15] *See Fla. Bee Distrib., Inc. v. Dep't of Bus. & Prof'l. Regulation*, Final Order, DOAH Case No. 15-6108RU & 15-6148RU (March 3, 2016).

[16] 188 So. 3d 130 (Fla. 1st DCA 2016).

[17] DOAH Case No. 14-3496 (Fla. DOAH Feb. 24, 2015), Rec. Order at 20.

[18] DOAH Case No. 14-3496 (Final Order, June 11, 2015).

[19] *Brandy's Prods., Inc.*, 188 So. 3d 130, fn. 4 (comparing HB 7099, s. 14 (2016) (Second Engrossed), with HB 7099 (2016) (Enrolled)).

[20] The legislation would not have applied to emergency rulemaking under section 120.54(4) or rulemaking "necessary to maintain the financial or legal integrity of any financial obligation of the state or its agencies or political subdivisions."

[21] Section 120.52(1)(c), Florida Statutes.

[22] The Hillsborough County Transportation Commission was created by special act, Chapter 2001-299, Laws of Florida. That special act authorizes the Commission to adopt rules in conformance with the APA.

[23] *See* HB 7099, s. 1 (Second Engrossed).

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