



Newsletter

Evidence at DOAH for Attorneys New to Administrative Practice

by Marc Ito

Earlier this year, an attorney unfamiliar with administrative practice, whose colleague would soon be appearing at the Division of Administrative Hearings (DOAH), asked my advice regarding the recent Florida Supreme Court case, *Florida Industrial Power Users Group v. Graham*, 209 So. 3d 1142 (Fla. 2017). I explained that the case was not a game changer. Rather, it clarified what administrative practitioners have long understood, that the rules of evidence

do not strictly apply in administrative tribunals, and such tribunals have discretion to apply the Florida Evidence Code.

In *Florida Industrial Power Users Group*, Florida Power & Light Company (FPL) filed a petition with the Public Service Commission (PSC) seeking approval to purchase a power plant. The Florida Industrial Power Users Group (FIPUG) and the Office of Public Counsel (OPC)¹ intervened in the proceeding. OPC and

FPL reached a settlement and filed a motion seeking the PSC’s approval of the settlement agreement. FIPUG did not agree to the settlement and proceeded to hearing. At the hearing, FIPUG invoked the rule of sequestration of witnesses pursuant to section 90.616, Florida Statutes. The rule of sequestration – often referred to as “the rule” – requires witnesses to be excluded from a proceeding so that they cannot hear testimony of other

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From the Chair

by Robert Hosay

It is an honor to be elected as chair of the Administrative Law Section. I am excited to have the opportunity to lead the Section as we commence the 2017-2018 Bar year. First, I would like to thank our immediate past chair, Jowanna N. Oates, for her outstanding leadership. Jowanna is a first-class lawyer who worked diligently to move beyond status quo to place the Section in a much better place. Next, I would like to thank my fellow officers, chair-elect Judge Gar Chisenhall, secretary Brian A. Newman, and treasurer Bruce D. Lamb, and executive council members, Christina Shideler, Amy W. Schrader, Michael G. Cooke, Frederick R. Dudley, Stephen C.

Emmanuel, Francine M. Ffolkes, Clark R. Jennings, Patricia A. Nelson, Judge Lynne A. Quimby-Pennock, Judge Suzanne Van Wyk, Gigi Rollini, Colin Roopnarine, Sharlee Hobbs-Edwards, and Tabitha G. Harnage for their dedication to the Section. I am confident this team, along with our committee members and liaisons, will accomplish great things this year.

As I reflect on the past year, we should all be proud of what the Section accomplished under Jowanna’s leadership. This past year, our members benefited from high-quality continuing legal education (CLE) courses, newsletter content, networking opportunities, and more. To highlight

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a few of those accomplishments, the Section, under the direction of Bruce Lamb, sponsored several CLE courses including the sold-out Pat Dore Administrative Law Conference and an advanced-level program co-sponsored by the Environmental & Land Use Law and Government Lawyers Sections. The executive council volunteered at America's Second Harvest of the Big Bend, continuing an annual tradition of community service. The law school outreach committee, headed by Judge Quimby-Pennock, organized "networking noshes" at eight of the state's law schools, providing future members with the opportunity to interact with current Section members. These events are essential to growing and retaining our membership.

My goal for this year is to increase the Section's relevance to our day-to-day activities as lawyers and to make sure the Section is responsive to the needs of our members. We hope to accomplish this by increasing member engagement and improving the Section's web presence. First, we plan to promote member engagement by providing opportunities for current and prospective members to actively participate in the Section. Whether you enjoy speaking to law students, writing articles, or legislative advocacy, there is a way for every member

and prospective member to become actively involved. There will be opportunities to attend seminars, write articles for the newsletter or *The Florida Bar Journal*, and serve on committees, just to name a few. There are numerous occasions to engage with the Section that fit your unique needs and availability.

I would like to extend an invitation to attend the upcoming 2017 edition of "Practice Before DOAH." This program provides an overview of administrative procedures, including pointers on practice before DOAH, ethical issues, evidentiary issues, and e-discovery. Please visit the Section's website for more information regarding this program.

Second, we will focus on updating the Section's technological platforms. Our profession and our area of practice are constantly changing. The legal profession is transforming to meet the needs of a more technological society. Administrative lawyers and all other legal professionals live in fast-paced environments, and content must be accessible quickly and across various platforms. Proficient networking and quick access to information is the expectation. By improving content and access to our website and increasing visibility through social media, the Section can increase dialogue with active and prospective members. Most importantly, we intend to provide informative and helpful content that will be beneficial and add value to our membership.

The technology committee, headed by Paul Drake, with members Judge Chisenhall, James Ross, Christina Shideler, Tabitha Harnage, Judge Van Wyk, and Gregg Morton, is working hard to revamp the Section's technology touch points. This year, the committee will work on creating a friendlier website so that our members can access helpful information more frequently and seamlessly. The intent is to ensure that the website is mobile friendly so content is easily managed when working remotely and on disparate devices. The committee will also post relevant news updates and articles on our Facebook and LinkedIn pages, so that members will be notified of important information quickly and informed about the Section's activities and opportunities to engage. Please be sure to access the Section's social media pages to receive this benefit.

As a long-standing member of the Administrative Law Section, I have been a beneficiary of all the Section has to offer. The Section provides essential products and services to members, including networking, mentorship, and education. This year, I hope every member will actively participate in the Section. The purpose of the Section is to provide a forum for professionals to discuss and exchange ideas and I encourage you to share your thoughts on how the Section can better serve you. We have a busy year ahead and I look forward to serving as your chair.



CALL FOR AUTHORS: **Administrative Law Articles**

One of the strengths of the Administrative Law Section is access to scholarly articles on legal issues faced by administrative law practitioners. The Section is in need of articles for submission to *The Florida Bar Journal* and the Section's newsletter. If you are interested in submitting an article for the Bar Journal, please email Stephen Emmanuel (semmanuel@ausley.com), and if you are interested in submitting an article for the Section's newsletter, please email Jowanna N. Oates (oates.jowanna@leg.state.fl.us). Please help us continue our tradition of advancing the practice of administrative law by authoring an article for either the Bar Journal or the Section's newsletter.

APPELLATE CASE NOTES

by April A. Caminez-Bentley, Tara Price, Gigi Rollini, and Larry Sellers

Agency Authority to Reject ALJ Factual Findings

Yerks v. Sch. Bd. of Broward Cnty., 219 So. 3d 844 (Fla. 4th DCA 2017).

Steven Yerks, a high-school teacher who was terminated primarily for failing to correct performance deficiencies determined through a performance evaluation system, sought judicial review of a final order from the Broward County School Board (School Board). The School Board's final order rejected the ALJ's factual findings and recommendation that Mr. Yerks be reinstated with back pay.

On appeal, the court concluded that the School Board exceeded its authority in rejecting the ALJ's factual findings that were supported by competent, substantial evidence, explaining that “[i]n a fact-driven case where an employee’s conduct is at issue, ‘great weight is given to the findings of the [ALJ], who has the opportunity to hear the witnesses’ testimony and evaluate their credibility.’”

The court also concluded that the School Board should not have rejected the ALJ's determination that the factual record did not support the counts of misconduct against Mr. Yerks. An agency cannot reject a finding of fact by treating it as a legal conclusion—the nature of the determination controls.

Agency Authority to Reject ALJ Factual Findings and Conclusions of Law

Amador v. Sch. Bd. of Monroe Cnty., 42 Fla. Law Weekly D1175 (Fla. 3d DCA May 24, 2017).

The School Board of Monroe County (School Board) sought to terminate Thomas Amador for violating two School Board policies—Policy 4120 (Employment of Support Staff, which included support staff subject to any collective bargaining agree-

ment) and Policy 4210 (Standards of Ethical Conduct)—on allegations related to fraudulent documentation. The ALJ issued an order recommending dismissal of the complaint, determining that, pursuant to Policy 4120, the School Board should have proceeded against Mr. Amador under the collective bargaining agreement, rather than under a School Board policy that applies only to employees that have direct access to students. As a result of that determination, the ALJ declined to reach the merits of the underlying allegations of misconduct under Policy 4210.

The School Board remanded the case to DOAH with instructions to make findings of fact and reach the merits based on the record evidence. On remand, the ALJ again determined the record was devoid of any evidence to support the application of Policy 4120 against Mr. Amador, and also found that the School Board did not prove the allegations under Policy 4210 for fraudulent documentation against Mr. Amador. The ALJ again recommended that the School Board enter a final order dismissing the administrative complaint and reinstating Mr. Amador. The School Board again rejected the ALJ's Recommended Order and terminated Mr. Amador's employment. Mr. Amador sought appellate review.

The court reversed the School Board's decision, concluding that the ALJ's findings of fact were supported by competent, substantial evidence. The court noted that the School Board cannot override the ALJ's findings even if the evidence presented could support two inconsistent findings. The court observed that this is not a case where an agency requires deference based on its own expertise, because such deference does not apply to disciplinary actions.

Collective Bargaining—Gubernatorial Veto of Proviso Language

Int'l Ass'n of Firefighters Local S-20 v. State, 221 So. 3d 736 (Fla. 1st DCA 2017).

The International Association of Firefighters Local S-20 (Firefighters) engaged in collective bargaining with the Governor during the 2015-2016 fiscal year, and the parties reached an impasse on numerous issues, including a pay raise for the Firefighters' members. The Legislature convened a committee to review the impasse issues and included a \$2,000 per member raise for the firefighters in its General Appropriations Act. The Legislature also passed legislation including a catch-all provision that resolved the unaddressed impasse issues by maintaining the status quo. The Governor vetoed the raise and the State presented a bargaining agreement that resolved the impasse issues, including salary, by maintaining the status quo.

In response, the Firefighters filed an unfair labor practice charge with the Public Employees Relations Commission (PERC), arguing that the Governor lacked the authority to veto the Legislature's provision of the \$2,000 per member raise. PERC dismissed the charge and approved the State's bargaining agreement. The Firefighters appealed PERC's dismissal, and argued that because the actions of the Legislature in resolving collective bargaining impasses bind the parties, the Governor was required to approve the raise within the General Appropriations Act. The Firefighters cited *Dade County Police Benevolent Association v. Miami-Dade County Board of County Commissioners*, 160 So. 3d 482 (Fla. 1st DCA 2015), in which the court held that a county mayor could not veto the county commission's resolution of a collective bargaining impasse.

The court rejected the Firefighters' argument, noting that the Florida Constitution explicitly authorizes the Governor to veto any specific appro-

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priation in the General Appropriations Act. The court distinguished *Dade County Police Benevolent Association* by noting the mayor lacked constitutional authority to veto the county commission's impasse resolution, whereas, in the present case, the Governor had constitutional authority to veto specific appropriations. Furthermore, the court explained that the Legislature, knowing that the Governor could veto the raise, also passed a separate bill stating that unaddressed impasse issues could be resolved by maintaining the status quo. Thus, the court affirmed PERC's dismissal of the Firefighters' unfair labor practices charge and held that the Governor was not obligated to have approved the \$2,000 per member raise within the General Appropriations Act.

Food Stamps—Notice and Opportunity for Hearing*Perry v. Dep't of Children & Families*, 220 So. 3d 546 (Fla. 3d DCA 2017).

The Department of Children and Families (DCF) sent Lucy Perry a Notice of Eligibility Review, notifying her of her obligation to reapply for food assistance benefits. The notice informed Ms. Perry that under new guidelines applicable to the food assistance program, certain recipients could be designated as Able Bodied Adults Without Dependents (ABAWD). ABAWDs were required to participate in an employment and training program, which would help the recipients gain work experience and become self-sufficient. The letter also informed Ms. Perry that she had a right to request a hearing before a hearing officer.

At some point, DCF designated Ms. Perry as an ABAWD. The City of Miami Career Center sent Ms. Perry a Notification of Mandatory Participation letter informing her that she was required to participate in the employment and training program. The letter informed Ms. Perry that she had the right to have her case

reviewed by a program supervisor but did not inform her how she could challenge DCF's determination that she was required to participate in the employment and training program. DCF subsequently sent a Notice of Case Action letter dated February 23, 2016, informing Ms. Perry that her food assistance benefits would end on March 31, 2016, because she had not completed the employment and training program. The Notice of Case Action included the same hearing notice that Ms. Perry received in the Notice of Eligibility Review.

Ms. Perry's attorney sent an email to DCF requesting that it provide Ms. Perry with specific notice that she was designated as an ABAWD and allow her time to challenge her designation. DCF did not respond to the email and terminated Ms. Perry's food assistance benefits. Ms. Perry sought a writ of mandamus, arguing that she is unable to work and therefore should be exempt from the employment and training requirements of ABAWDs. After Ms. Perry filed her petition for writ of mandamus, DCF restored her food assistance benefits. Thus, the only issue was whether the agency was obligated to give Ms. Perry notice of her designation as an ABAWD and an opportunity for an administrative proceeding to challenge the designation.

The court noted that the parties disputed when DCF acted to trigger Ms. Perry's right to an administrative hearing. The court found that DCF's rules provided the right to an administrative hearing when DCF made a determination that would affect a person's receipt of actual benefits, not when DCF designated Ms. Perry as an ABAWD, which might one day affect her receipt of benefits. Thus, the court denied Ms. Perry's petition for writ of mandamus, because DCF had already fulfilled its duty to provide her with notice and an opportunity for a hearing.

Licensure—Preservation and Deviation from Recommended Penalty*Garrison v. Dep't of Health, Bd. of Nursing*, 220 So. 3d 1278 (Fla. 5th DCA 2017).

Thadaeus Garrison, a registered nurse who pled nolo contendere to charges stemming from a road-rage incident involving a minor, sought review of the Department of Health, Board of Nursing's (Board) Final Order imposing a two-year suspension of his nursing license (which reflected an increase over the recommended penalty), a fine, and a reprimand following an informal hearing.

Mr. Garrison argued that the Board erred in considering the arrest affidavit, which was not contained in the complaint but was admitted into evidence without his objection, and in failing to refer the matter for a formal hearing once it became apparent that there were disputed issues of material fact, even though no formal hearing was requested. The court affirmed the Board's decision, determining that Mr. Garrison did not preserve either issue for appeal. The court further noted that in informal hearings, boards may deviate from the recommended penalty "without stating with particularity its reasons therefor in the order," as would be required in formal hearings under section 120.57(1), Florida Statutes.

Licensure—Statutory Year Applicable to Exemption from Disqualification for Employment*E.J. v. Dep't of Children & Families*, 219 So. 3d 946 (Fla. 3d DCA 2017).

E.J. was convicted of an aggravated assault. Nearly ten years after her conviction, E.J. sought to apply for child care positions, but was disqualified because of her criminal record. E.J. applied to the Department of Children and Families (DCF) for an exemption from disqualification. After DCF denied her application, E.J. timely sought a formal administrative hearing. The ALJ issued a Recommended Order finding that E.J. had met her burden of proving rehabilitation by clear and convincing evidence pursuant to section 435.07(4), Florida Statutes.

DCF filed exceptions to the Recommended Order and, while the proceeding remained pending and prior to the entry of a final order,

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section 435.07(4) was amended to prohibit DCF from granting exemptions for current or prospective child care workers who were charged with or convicted of enumerated offenses, including aggravated battery. Following the effective date of the amended statute, DCF issued a Final Order granting DCF’s exceptions and denying E.J.’s application for exemption from disqualification.

On appeal, the court determined that “a change in a licensure statute that occurs during the pendency of an application for licensure is operative as to the application, so that the law as changed, rather than as it existed at the time the application was filed, determines whether the license should be granted,” citing *Lavernia v. Department of Professional Regulation, Board of Medicine*, 616 So. 2d 53, 53-54 (Fla. 1st DCA 1993). Because E.J.’s application and administrative proceeding were pending when the statutory changes went into effect, and the Final Order was rendered after the amended statute’s effective date, DCF was statutorily barred from granting E.J. an exemption. Accordingly, the court affirmed DCF’s Final Order denying the exemption.

Public Records—Reasonable Time for Production and

Advance Payment Required

Agency for Health Care Admin. v. Zuckerman Spaeder, LLP, 221 So. 3d 1257 (Fla. 1st DCA 2017).

The Agency for Health Care Administration (AHCA) declined to provide public records sought by Zuckerman Spaeder, LLP (Zuckerman), until the firm paid AHCA’s invoices that included a special service charge pursuant to section 119.07(4)(d), Florida Statutes. This charge was billed to reimburse AHCA for extensive use of its information technology and substantial clerical and supervisory hours expended by agency personnel, including to review and redact confidential information from the documents. Zuckerman refused to pay, but did not withdraw its requests. Instead, Zuckerman filed a petition for writ of mandamus. After an evidentiary hearing, the trial court ordered AHCA to produce a modified list of documents within 48 hours, without requiring any payment prior to production. The court also retained jurisdiction for future computation of reasonable costs incurred by AHCA in preparation of those records.

AHCA appealed, arguing among other things that it was error for the trial court to order production within 48 hours without prepayment of AHCA’s charges, and that Zuckerman failed to establish a clear legal right to mandamus relief. The court determined that Zuckerman was not entitled mandamus relief because AHCA was entitled to payment pur-

suant to section 119.07(4) prior to furnishing the records. Additionally, the court found that the trial court erred in requiring AHCA produce the records within 48 hours, where the documents contained confidential information requiring redaction, without specific findings of fact or legal authority to require such a short turnaround.

Public Records—Trade Secrets Exemption

Surterra Fla., LLC v. Dep’t of Health, 42 Fla. Law Weekly D1332 (Fla. 1st DCA June 9, 2017).

This appeal was taken to challenge an order ruling that the identities and information related to the consultants, investors, and partners of applicants for licenses to operate dispensing organizations for low-THC cannabis or medical cannabis did not meet the definition of a “trade secret” under section 812.081(1)(c), Florida Statutes (“trade secret statute”).

The appellate court reversed the trial court’s findings regarding appellants’ consultants, and remanded for more specific findings as to whether the particular identities and related information of appellants’ consultants met the requirements of the trade secret statute. The court stated that evidence was presented regarding why particular consultants’ identities and related information met the definition of a trade secret based

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on the information they supplied to the applicants, such as information regarding the production process. The court noted that a “list of suppliers” can qualify under the trade secret statute, and industry consultants can supply organizations with valuable information about how to cultivate, process, transport, and dispense cannabis. However, because the order contained no findings as to whether the trial court found that was the case here, the court remanded for such findings.

Regarding the investors and partners, however, the court affirmed because no evidence was presented to show that the investors and partners actually qualified under the trade secret statute. Rather, the only testimony offered included broad assertions that the identities and related information of appellants’ investors and partners met the definition of a trade secret, without any evidence being presented to show how the identities and related information of the specific investors and partners at issue met the section 812.081(1)(c) requirements.

Renewal of Medical Licenses—Felony Convictions Where Drug Court Programs Were Not Offered

Paylan v. Dep’t of Health, 42 Fla. Law Weekly D1343 (Fla. 2d DCA June 9, 2017).

Christina Paylan was convicted of a third-degree felony under chapter 893, Florida Statutes, for obtaining a controlled substance by fraud, and a third-degree felony under chapter 817, Florida Statutes, for fraudulent use of personal information. After sentencing, the Department of Health (DOH) filed an administrative complaint against Ms. Paylan for being convicted of crimes related to the practice of medicine. The Board of Medicine (Board) suspended Ms. Paylan’s license for two years, followed by one year of probation, and ordered her to pay a \$5,000 fine and

costs and to complete continuing medical education.

During Ms. Paylan’s suspension, she timely filed her application for licensure renewal. Section 456.0635(3)(a)(2), Florida Statutes, requires DOH to deny an application for renewal of a medical license if the applicant has been convicted of a third-degree felony under chapters 817 or 893, unless the applicant is currently in a drug court program allowing the withdrawal of a plea upon successful completion of the program, or where more than 10 years have passed since the sentence and any subsequent probation period has ended. DOH notified Ms. Paylan that it would deny her renewal application pursuant to section 456.0635, due to her conviction under chapter 893. DOH’s notification did not discuss Ms. Paylan’s conviction under chapter 817.

Ms. Paylan requested an evidentiary hearing and argued that the denial of her license renewal violated double jeopardy, *res judicata*, and collateral estoppel principles because she was already suspended by the Board for her crimes. The hearing officer recommended denying her application based on section 456.0635, because Ms. Paylan was not enrolled in a drug court program and it had not yet been 10 years since her sentence had ended. DOH issued a Final Order adopting the recommended report, and Ms. Paylan sought judicial review.

The court noted that the Board’s disciplinary proceedings were conducted following Ms. Paylan’s violations of the disciplinary statutes, whereas DOH’s denial of Ms. Paylan’s license renewal application was based on whether she met the requirements for continued licensure. Her conviction under chapter 893 subjected her to both disciplinary proceedings and the denial of her license renewal application, but those two actions did not implicate either double jeopardy or the administrative finality doctrine. The Board’s disciplinary proceedings did not determine any issues involving her fitness for renewal of her license, and DOH did not deny Ms. Paylan’s renewal application based on the dis-

cipline she received from the Board. The court also disagreed that DOH’s denial of Ms. Paylan’s renewal application was punitive.

The court found that the application of section 456.0635(3)(a)(2) to her renewal application was not unjust, because the statute did not require the trial court to offer or order a defendant to attend a drug court program. Instead, the court noted that Ms. Paylan could have chosen to voluntarily enter a drug court program instead of proceeding to trial and hoping to be found not guilty. The court determined that DOH lacked the authority to grant her an exception to the statute’s express prohibitions. Unless Ms. Paylan were to successfully challenge the statute on constitutional grounds, the court held that neither it nor DOH could modify the statute to permit DOH to approve her license renewal application.

Rule Challenges—Revised SERC Triggers Additional Point of Entry

Fla. Pulp & Paper Ass’n Env’tl. Affairs Inc. v. Dep’t of Env’tl. Prot., 42 Fla. Law Weekly D1528 (Fla. 1st DCA July 11, 2017).

The Department of Environmental Protection (DEP) published a notice of proposed rulemaking to amend rules 62-302.400 and 62-302.530 in the Florida Administrative Register (FAR). DEP’s Environmental Regulation Commission (Commission) held a public hearing on the proposed rule amendments. The Commission approved the proposed amendments to rule 62-302.530. The Commission also approved the proposed amendments to rule 62-302.400 with some changes. After the hearing, DEP published a Notice of Change for rule 62-302.400 and a Notice of Correction for rule 62-302.530 in the FAR. The Notice of Correction stated, in part, that DEP had revised its statement of estimated regulatory costs (SERC) because a lower cost regulatory alternative (LCRA) had been received and was immediately withdrawn. The Florida Pulp and

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Paper Association Environmental Affairs, Inc. (Association) filed a rule challenge petition alleging that the proposed amendments to rule 62-302.530 were an invalid exercise of delegated legislative authority. The Association's petition stated it was timely because it was filed within 20 days of the Notice of Change and within 20 days of a revised SERC.

DEP moved to dismiss the petition, arguing that (1) the Association could not use a Notice of Change to rule 62-302.400 to challenge proposed amendments to rule 62-302.530; and (2) the revised SERC did not provide a point of entry because it merely acknowledged a LCRA that was immediately withdrawn, and thus was "the functional equivalent of not receiving any good faith written proposals" for a LCRA. The ALJ entered a Final Order dismissing the Association's petition, concluding that the notices did not provide a point of entry for the Association because the notices did not change the proposed amendments to rule 62-302.530; and the Association could not use the document DEP had "misidentified" as a revised SERC as a point of entry because it was not substantially affected by the document.

On appeal, the court rejected DEP's argument that the revised SERC did not provide a point of entry because it was not required to revise the SERC after the LCRA was immediately withdrawn. The court held that by preparing and making publicly available a revised SERC, DEP provided the Association with a point of entry to challenge the proposed amendments to the rule. The court found it immaterial that the revised SERC did not change the estimated costs and merely changed the narrative accompanying the estimated costs. In addition, the court rejected DEP's argument that because the Association was not substantially affected by the revised SERC, it could not challenge the proposed rule following the issuance of the revised SERC. The court concluded that DEP was conflating the issues of standing and

timeliness and that standing was based on whether a person was substantially affected by the proposed rule, not whether a party was substantially affected by a revised SERC.

The court also rejected the ALJ's conclusion that it would be inequitable for the Association to benefit from another point of entry that was "serendipitously" created by the revised SERC when the Association had the opportunity to challenge the proposed rule within 21 days after the date of publication or within 10 days after the final public hearing. The court noted the points of entry listed in section 120.56(2)(a) operated independently, and thus, a person who failed to challenge a proposed rule during an earlier entry point could still challenge the proposed rule following a later entry point. Thus, the court reversed the ALJ's Final Order dismissing the Association's rule challenge petition as untimely and remanded the petition for consideration on the merits.

Note: Two other appeals from this same Final Order are pending in the Third District Court of Appeal: (1) *City of Miami v. State Dep't of Env'tl Prot.*, Case No. 3D16-2129; and (2) *Seminole Tribe of Fla. v. Dep't of Env'tl Prot.*, Case No. 3D16-2440.

Summer Jai Alai Permits—Statutory Interpretation

West Flagler Assocs., Ltd. v. Dep't of Bus. & Prof'l Reg., 219 So. 3d 149 (Fla. 3d DCA 2017).

Section 550.0745(1), Florida Statutes, authorizes the owner or operator of a pari-mutuel permit who has the smallest play or total pool within the county for the two consecutive years next prior to filing an application, to apply to the Department of Business and Professional Regulation's Division of Pari-Mutuel Wagering (Division) to convert its permit to a summer jai alai permit. If an eligible owner or operator declines to convert its permit, the statute authorizes the Division to issue a new summer jai alai permit in the eligible owner's or operator's county. West Flagler Associates, Ltd. (West Flagler) filed

two applications for a new summer jai alai permit pursuant to section 550.0745(1). The first application was based on fiscal years 2012-13 and 2013-14 in which it was alleged that the South Florida Racing Association (SFRA) had the smallest play or total pool, was eligible to convert its pari-mutuel permit to a summer jai alai permit, and declined to do so. The Division denied the application because it concluded that no pari-mutuel permit holders were eligible to convert a permit, as West Flagler had the smallest play or total pool for fiscal year 2012-13, and Summer Jai Alai Partnership (Partnership) had the smallest play or total pool for fiscal year 2013-14.

The second application was based on fiscal years 2013-14 and 2014-15 in which it was alleged that SFRA had the smallest play or total pool, was eligible to convert its pari-mutuel permit to a summer jai alai permit, and declined to do so. The Division denied the application because it concluded that the Partnership, not SFRA, was the permit holder with the smallest play or total pool for both fiscal years. Because the Partnership already held a summer jai alai permit, the Division concluded that it was not eligible to convert its existing summer jai alai permit to a new permit.

West Flagler filed petitions for administrative hearings to contest the denial of its applications. The Division consolidated the petitions and referred them to DOAH. For the denial of the first application, the issue was whether the phrase "smallest play or total pool" in section 550.0745(1) includes not only "live" wagers made at Florida facilities, but also, out-of-state wagers, known as "simulcast export" wagers. West Flagler argued that the phrase "smallest play or total pool" did not include simulcast export wagers. If this statutory interpretation was correct, then SFRA would have had the smallest play or total pool for both fiscal years, and the Division should have granted West Flagler's application. The ALJ concluded, however, that simulcast export wagers should be included in the calculation of each pari-mutuel's

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play or total pool, and thus, the Division properly denied West Flagler's application.

For the denial of the second application, the issue was whether it was possible under section 550.0745(1) to convert an existing summer jai alai permit to a new permit. The ALJ concluded that it was not possible to convert an existing summer jai alai permit to a new permit, and thus, the Division properly denied West Flagler's application. The Division issued a Final Order that adopted the ALJ's Recommended Order, and West Flagler appealed.

On appeal, West Flagler argued that the language of section 550.0745(1) excluded simulcast export wagers from the calculation of "smallest play or total pool." The court disagreed, reasoning that chapter 550, Florida Statutes, did not limit the calculation of "smallest play or total pool." The court concluded that the phrase "within the county" limited the owners and operators who were qualified to convert a permit, not the physical location of the wagers calculated.

West Flagler also argued that the Partnership could have converted its existing summer jai alai permit because a new summer jai alai permit would have allowed it to change locations. The court rejected this argument, noting that the statute did not support West Flagler's argument. Instead, the court held that "a plain reading" of the statute showed that if the permit holder has an existing summer jai alai permit, "then clearly it cannot 'convert' its summer jai alai permit to a summer jai alai permit, as there is nothing to 'convert.'" Because the eligible permit holder was unable to convert a summer jai alai permit, the statute did not authorize the Division to grant a new summer jai alai permit to West Flagler. The court affirmed the Division's Final

Order, which denied West Flagler's two applications for summer jai alai permits.

Summer Jai Alai Permits—Declaratory Statements

West Flagler Assocs., Ltd. v. Dep't of Bus. & Prof'l Reg., 220 So. 3d 1239 (Fla. 3d DCA 2017).

West Flagler Associates, Ltd. (West Flagler) holds a pari-mutuel permit to conduct greyhound racing at the Magic City Casino in Miami-Dade County and operates slot machine gaming at the facility under a separate license. West Flagler also holds a pari-mutuel permit to operate jai alai in the county. West Flagler sought a declaratory statement from Department of Business and Professional Regulation's Division of Pari-Mutuel Wagering (Division) that it could still operate slot machines at the Magic City Casino if West Flagler operated jai alai, instead of greyhound racing, at the facility. Hartman and Tyner, Inc., and H&T Gaming, Inc. (Proposed Intervenors), who own competing gaming facilities, sought leave from the Division to intervene in opposing West Flagler's amended petition. West Flagler opposed intervention.

The Division issued an "Order Declining Petition for Declaratory Statement" and concluded that it could not answer the questions West Flagler raised because it would require the Division to interpret constitutional language found in Article X, section 23(a) of the Florida Constitution. The Order also denied the Proposed Intervenors' motion to intervene as moot. West Flagler appealed the Order, and the Proposed Intervenors cross-appealed the denial of their motion to intervene.

The court held that West Flagler's amended petition for declaratory statement did not require the interpretation or application of any constitutional provisions. Instead,

the court reasoned that Article X, section 23(a) granted the Legislature the authority to implement the constitutional amendment, as well as to further authorize agency rules. The Legislature then enacted statutes to implement the constitutional amendment in chapter 551, Florida Statutes, and directed the Division to adopt "all rules necessary to implement, administer, and regulate slot machine gaming as authorized in this chapter." § 551.103(1), Fla. Stat. The court noted that section 120.565(1), Florida Statutes, expressly authorized agencies to render their opinions on the application of statutory provisions and agency rules as to a person's particular circumstances. The court concluded that the Division had "no legal basis . . . to shirk its statutory duty" simply because the term "eligible facility" appeared in both Article X, section 23(a), and section 551.102(4), Florida Statutes.

But the court declined to rule on the legal issues in West Flagler's amended petition because the Division denied the petition on procedural grounds without reaching the substance of West Flagler's legal issues. Instead, the court reversed and remanded the Division's Order and directed the Division to rule on West Flagler's amended petition for a declaratory statement and the Proposed Intervenors' motion to intervene.

Note: The Division issued a Final Order Granting Declaratory Statement on July 19, 2017. See *In re: Petition for Declaratory Statement, West Flagler Associates, Ltd.*, Case No. 2016-014603, DS 2016-020 (July 19, 2017).

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DOAH CASE NOTES

Substantial Interest Hearings

Shands Jacksonville Medical Center, Inc., d/b/a UF Health Jacksonville v. Dep't of Health and Orange Park Medical Center, Inc., Case No. 16-3369 (Recommended Order Jan. 27, 2017), DOH Final Order No. 17-0752-FOF-HSEM (Final Order Apr. 27, 2017).

FACTS: Chapter 395, Part II, Florida Statutes, provides for the establishment of a statewide trauma system “designed to meet the needs of all injured trauma center victims who require care in an acute-care setting . . .” §395.40(2), Fla. Stat. The Department of Health (“DOH”) is the state agency primarily responsible for administering Florida’s trauma system and is required by statute to adopt a rule allocating the number of trauma centers throughout the state. Rule 64J-2.010, entitled “Allocation of Trauma Centers Among Trauma Service Areas,” allocates trauma centers among the state’s 19 trauma service areas (TSAs) based on a calculation of each TSA’s need for trauma centers. Shands Jacksonville Medical Center, Inc., d/b/a UF Health Jacksonville (“Shands”), operates a Level I trauma center in TSA 5, which consists of Baker, Clay, Duval, Nassau, and St. Johns Counties. On April 1, 2016, Orange Park Medical Center (“Orange Park”) filed an application to operate as a Level II trauma center in TSA 5. Even though data from 2014 indicated that TSA 5 needs just one trauma center, DOH provisionally approved Orange Park’s application on April 28, 2016, and Orange Park has operated as a provisional Level II trauma center since May 2016. Prior to 2015, DOH rejected trauma center applications if rule 64J-2.010 indicated there was no need in the relevant TSA. Shands challenged the approval of Orange Park’s application by asserting that it violated DOH’s own rules and governing statutes. In addition, Shands argued that the approval was based on an unadopted rule that would allow the approval of

provisional trauma centers regardless of any need indicated by rule 64J-2.010.

OUTCOME: The ALJ recommended that DOH issue a final order denying Orange Park’s application to operate a provisional trauma center in TSA 5. In doing so, he concluded that “[n]ot only is the Department’s new policy of accepting letters of intent and ensuring applications in the absence of an available slot contrary to statute and its existing rule, it is also unreasonable and nonsensical. All parties, including the Department, acknowledged that the establishment of a provisional trauma center involves millions of dollars of investment in equipment, staff, and expertise. It is highly unlikely that a hospital would make the investment necessary to establish a provisional trauma center, and undergo the lengthy and time-consuming review process, knowing in advance that final denial of the program is a foregone conclusion, due to lack of allocated need.” The ALJ also concluded that DOH relied on an unadopted rule in order to approve Orange Park’s application because that practice “represents a significant shift from the Department’s existing rule requirements.” Finally, the ALJ concluded that DOH acted “illegally” by allowing Orange Park to operate a provisional trauma center. DOH’s decision to issue a provisional license to Orange Park was merely proposed agency action that Shands had a right to challenge, but DOH erroneously treated it as final agency action.

In a Final Order rendered on April 27, 2017, DOH rejected the ALJ’s recommendation and approved Orange Park’s application to operate as a level II provisional trauma center. With regard to the ALJ’s conclusion that DOH’s position is “unreasonable and nonsensical,” DOH stated in its Final Order that “the plain language of the statute places the consideration of allocated need, or slots in a TSA, at final selection of a trauma

center and not at the provisional review stage. This interpretation is reasonable from the perspective of the Department’s duties to ensure an inclusive system that incorporates all facilities that have resources to care for trauma patients. *See* § 395.40, Fla. Stat. It is not the Department’s role to ensure that a hospital makes a profitable investment.” As for the ALJ’s conclusion that DOH relied upon an unadopted rule to approve Orange Park’s application, DOH stated that its “decision to accept letters of intent is based on the language of [section 395.4025] and does not represent a significant shift from the existing rules.” As for the ALJ’s conclusion that DOH acted “illegally” by allowing Orange Park to operate a provisional trauma center, DOH stated that interpreting section 395.4025 as requiring DOH to withhold provisional approval until a hearing is waived or concluded would render “meaningless the directive in the statute that ‘after April 30’ the provisional trauma center is eligible to begin operations.”

Shands has appealed the DOH Final Order to the First District Court of Appeal, where the appeal is pending as case no. 1D17-2215.

Plants of Ruskin, Inc. and Tornello Landscape Corp., d/b/a 3 Boys Farm v. Dep't of Health, Case Nos 17-0116 and 17-0117 (Recommended Order May 23, 2017).

FACTS: The Compassionate Medical Cannabis Act of 2014 (“the Act”) authorizes licensed physicians to prescribe non-euphoric “medical marijuana” for qualified patients having certain illnesses. Pursuant to section 381.986(5), Florida Statutes (2015), the Department of Health (“DOH”) is responsible for licensing a limited number of cannabis dispensing organizations, and each dispensing organization will have the primary

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(but nonexclusive) responsibility for one of five regions in Florida. Each licensed dispensing organization will cultivate, process, and sell medical marijuana to qualified patients for medicinal purposes. Florida Administrative Code Rule 64-4.002(5)(a), promulgated to implement the Act, requires DOH to “substantively review, evaluate, and score” all timely submitted and complete applications, and the applicant with the “highest aggregate score” in each region will be DOH’s intended licensee for that region. Pursuant to rule 64-4.002(2), DOH’s evaluation of each applicant is based on specific items to be considered, which are organized by the following subject areas: cultivation, processing, dispensing, medical director, and financial. Plants of Ruskin, Inc. (“Plants of Ruskin”), and Tornello Landscape Corp., d/b/a 3 Boys Farm (“Tornello”), were two applicants for dispensing organization approval for the southwest region. On November 23, 2015, DOH notified Plants of Ruskin and Tornello that DOH had preliminarily determined that another applicant, Alpha Foliage, Inc. (AFI), was the most qualified applicant to be the dispensing organization for the southwest region. Plants of Ruskin and Tornello requested administrative hearings, and DOH forwarded the cases to the Division of Administrative Hearings.

Before the administrative hearings were conducted, chapter 2016-123, Laws of Florida, was passed and became law. The 2016 law essentially declared AFI an authorized dispensing organization, while allowing denied applicants awaiting administrative hearings to proceed with their hearings to prove they were entitled to approval. If a denied applicant was successful in that effort, an additional dispensing organization could be approved for the region.

OUTCOME: Because the Florida Legislature essentially declared AFI an authorized dispensing organization via chapter 2016-123, Laws of Florida, DOH argued that the Legislature had legislatively ratified its

preliminary determination. The ALJ rejected this argument but held in an Order issued on September 12, 2016, that AFI “is not a bona fide applicant whose merits can be considered in the comparative review of competing qualified applicants. . . .” As a result, the ALJ concluded that he should comparatively review the applications of Plants of Ruskin and Tornello by explaining that AFI “is now licensed pursuant to direct, independent, and supervening legislative action. In effect, the Department has already gotten what it originally wanted (AFI as a [dispensing organization]), and the instant evidentiary ruling will not change that outcome. At ‘worst’ for the Department, it will eventually be required as a result of this Order to issue another license to a qualified applicant, which it is authorized by law to do—an undesirable outcome, perhaps, for AFI and other licensed [dispensing organizations] who might prefer a less competitive market, but hardly a loss for the Department, since, as a governmental agency, it presumably has no interest in maximizing AFI’s profits.”

As for the comparative review of the two denied applicants, the ALJ first considered DOH’s initial review and found that DOH did not “score” the applications as required by rule 64-4.002(5)(a). Instead, DOH merely “ranked” the applicants, and those rankings did not account for the qualitative differences between the applicants. The ALJ undertook to devise a scoring approach that accounted for qualitative differences between the applicants, and after scoring the applications of Plants of Ruskin and Tornello, the ALJ found that there was no meaningful qualitative difference between the two applicants and both were qualified for licensure.

In his Conclusions of Law, the ALJ addressed DOH’s arguments that its initial determination should stand. For instance, DOH announced on the last day of the final hearing that neither Plants of Ruskin nor Tornello had met all of the minimum conditions for licensure. The ALJ rejected that argument by noting that section 120.60(3), Florida Statutes, requires an agency to state with particularity the basis for denial of a licensure

application. Therefore, the “issues for hearing in a license application denial case, as between the agency and the applicant, are framed by the section 120.60(3) denial letter and the applicant’s petition for hearing.” Because DOH never disputed Plant of Ruskin’s or Tornello’s bare qualifications until the final hearing was nearly over, neither applicant “was required to prove, at hearing, the undisputed fact that it met all the conditions for licensure. To prevail, rather, the applicants needed to prove something different: that one of them, comparatively speaking, is the most qualified applicant. “[A]bsent extraordinary circumstances not present here, an agency cannot be allowed to ambush an applicant on the final day of a three-week hearing with the allegation that the applicant has failed to prove requirements for licensure that were never in dispute.”

DOH also advocated in support of its initial determination by arguing that the ALJ should not be conducting a de novo review for the sake of formulating agency action. Instead, a more deferential review was appropriate. However, the ALJ rejected this argument by concluding that “[j]ust as changing circumstances adversely affecting an applicant’s qualification for licensure can be considered by the agency if evidence of the facts is received prior to the final decision, so too is the applicant entitled to present, and have the agency consider, proof of recent developments which positively affect the applicant’s qualifications.” DOH also argued that its initial determination was a policy-infused finding of fact entitled to deference under the standard announced in *McDonald v. Department of Banking and Finance*, 346 So. 2d 569 (Fla. 1st DCA 1977). In rejecting this argument, the ALJ concluded that the 1996 amendments to the Administrative Procedure Act undermined *McDonald*’s concept of policy-infused findings of fact. According to the ALJ, “regardless of whether [policy-infused findings of fact were] ever consistent with the Florida APA, it cannot be squared with today’s APA. Forty years after *McDonald* was decided, the time has come to let

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go of [the concept of policy-infused findings of fact], which is bad law and should be discarded, once and for all.” Finally, the ALJ noted that Article X, Section 29 of the Florida Constitution empowers DOH to issue “reasonable regulations necessary to implement Florida’s constitutionally mandated medical marijuana program. . . .” Accordingly, because he found the Plants of Ruskin and Tornello applications to be virtually indistinguishable from a qualitative standpoint, the ALJ recommended that “the Department consider whether it has the constitutional authority to license them both as this juncture and, if it believes it has such authority, to consider exercising it.” If DOH determines that it lacks such authority, then the ALJ recommended that DOH approve Tornello’s application.

Rule Challenges

Orlando Health Care, Inc. v. AHCA; Adventist Health System/Sunbelt, Inc., d/b/a Fla. Hosp.; and Central Fla. Health Servs., LLC, Case No. 17-1976RX (Summary Final Order June 9, 2017).

FACTS: The Agency for Health Care Administration (“AHCA”) is the state agency responsible for administering the certificate of need (“CON”) program. Certain types of health care facilities (such as hospitals and nursing homes) must obtain a CON prior to establishing new facilities, adding certain beds, or offering certain services. Pursuant to section 408.039, Florida Statutes, applicants for a CON file their applications in batching cycles, and AHCA performs a comparative review of all applications in a particular batching cycle. Ultimately, AHCA issues notice of its intent to approve or deny each CON application. Section 408.039(5)(a), Florida Statutes, establishes a 21-day window in which applicants may contest the issuance or denial of a CON. Since 1992, Florida Administrative Code Rule 59C-1.012(2)(a) has provided that “[i]f a valid request for

administrative hearing is timely filed challenging the noticed intended award of any certificate of need application in the batch, that challenged granted applicant shall have ten days from the date the notice of litigation is published in the Florida Administrative Weekly [now Register] to file a petition challenging any or all other cobatched applications.” On or about September 7, 2016, Orlando Health Care, Inc. (“Orlando Health”), Adventist Health System/Sunbelt, Inc. (“Florida Hospital”), and Central Florida Health Services, LLC (“CFHS”), filed applications to establish new hospitals in Orange County. On December 2, 2016, AHCA issued a notice that all three applications had been approved. Within the 21-day time period established by section 408.039(5)(a), Florida Hospital challenged AHCA’s intended approval of CFHS’s application. Orlando Health utilized the same 21-day period to challenge AHCA’s intended approval of Florida Hospital’s CON application. On January 5, 2017, CFHS, as a challenged and granted applicant, utilized the 10-day time period in rule 59C-1.012(2)(a) to challenge AHCA’s intended approval of Florida Hospital’s CON application. On January 11, 2017, Florida Hospital also utilized that 10-day window to challenge AHCA’s intent to grant Orlando Health’s CON application. On March 30, 2017, Orlando Health filed a rule challenge petition alleging that rule 59C-1.012(2)(a) is an invalid exercise of delegated legislative authority because it exceeds AHCA’s grant of rulemaking authority, and enlarges, modifies, or contravenes the law purported to be implemented. Florida Hospital and CFHS intervened in support of AHCA’s position that the challenged rule is valid.

OUTCOME: The ALJ entered a Summary Final Order concluding that rule 59C-1.012(2)(a) “appears to have exceeded AHCA’s legislative authority” in violation of section 120.52(8)(b). However, the ALJ dismissed Orlando Health’s petition, concluding that section 408.0455, Florida Statutes (“the savings statute”), prevents a determination that the challenged rule is invalid. The

savings statute mandates that “[t]he rules of [AHCA] in effect on June 30, 2004, shall remain in effect and shall be enforceable by the agency with respect to ss. 408-031 - 408.045 until such rules are repealed or amended by [AHCA].” The ALJ agreed with AHCA’s and CFHS’s argument that “when a statute mandates that existing rules remain in effect and are enforceable, the effect of the statutory mandate is irrefutable.”

Orlando Health has appealed the Summary Final Order to the First District Court of Appeal, and Florida Hospital and CFHS have cross-appealed. The appeal is pending as case no. 1D17-2463.

Renaissance Charter School, Inc. v. School Board of Palm Beach County, Case Nos. 16-5126 & 16-5157RX (Final Order July 11, 2017).

FACTS: Renaissance Charter School, Inc. (“Renaissance”), is a not-for-profit corporation that operates six charter schools in the Palm Beach County school district. On August 3, 2015, Renaissance submitted an application to create a charter high school in Palm Beach County. By letter issued on November 13, 2015, the School Board of Palm Beach County (“School Board”) denied Renaissance’s application. In doing so, the School Board partially relied on its Policy 2.57, as revised on May 27, 2015, to impose the following requirements: (a) charter schools must meet a standard beyond the status quo for “innovative learning methods;” (b) every charter contract must contain a provision requiring 51 percent of the charter school’s governing board members to reside within Palm Beach County; and (c) every charter contract must contain a provision precluding new charter schools from being located in the vicinity of a district-operated school having the same grade levels and programs. Renaissance filed a rule challenge petition alleging multiple grounds on which Policy 2.57 was allegedly invalid.

OUTCOME: The ALJ rejected Renaissance’s argument that Policy

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2.57 exceeded the School Board's rulemaking authority. The ALJ concluded that "the undersigned is not persuaded that Renaissance met its burden to demonstrate that the School Board exceeded its legislative authority and violated section 120.52(8)(b). The legislature provided school boards authority over public schools, which includes charter schools. In this proceeding, the record fails to show that the State Board of Education has exclusive authority over rulemaking for charter schools. Instead, the evidence demonstrates the School Board has broad powers, which include rulemaking for charter schools, not just a consultation role to the State Board of Education. Moreover, no evidence was presented to show any express prohibition in either the Florida Constitution or general law for school boards to adopt charter school rules as mandated by section 1001.32(2). Accordingly, the School Board has statutory authority to promulgate rules pertaining to charter schools and it was not shown that Policy 2.57 is an invalid exercise of delegated legislative authority." Nevertheless, the ALJ concluded that the revisions to Policy 2.57 regarding innovative learning methods, the residency of board members, and the location of charter schools were inconsistent with state law, and therefore, invalid under section 120.52(8)(c).

The School Board has appealed the Final Order to the Fourth District Court of Appeal and Renaissance has cross-appealed. The appeal is pending as case no. 4D17-2539.

Fla. Ass'n of Independent Charter Schools, Aspira Raul Arnaldo Martinez Charter School, and Miami Community Charter Middle School v. Fla. Dep't of Educ. and State of Fla. Bd. of Educ., Case No. 17-1986RP (Final Order July 21, 2017).

FACTS: The State of Florida contributes to capital funding for charter schools, and the Commissioner of Education is required to allocate

charter school capital outlay funds if appropriated by the Legislature. Section 1002.33, Florida Statutes, specifically authorizes the State Board of Education to adopt rules addressing charter school eligibility for capital outlay funds. In addition, section 1013.62(1)(a)3., Florida Statutes, mandates that a charter school is eligible for capital outlay funding if it has "satisfactory student achievement based on state accountability standards applicable to the charter school." On March 22, 2017, the State Board of Education approved proposed amendments to Florida Administrative Code Rule 6A-2.0020. Pertinent to the instant case is the requirement that "[b]eginning in the 2017-2018 school year, a charter school that receives a grade designation of "F" or two (2) consecutive grades lower than a "C" shall not be eligible for capital outlay funding." The Aspira Raul Arnaldo Martinez Charter School ("the Martinez Charter School") serves 573 students in Miami-Dade County. Its school grades for 2014-2015 and 2015-2016 were "D." Miami Community Charter Middle School ("Miami Community Charter") serves 283 students. Its school grades for 2014-2015 and 2015-2016 were also "D." If the proposed amendments to rule 6A-2.0020 become effective and Martinez Charter School and Miami Community Charter receive school grades lower than "C" for 2016-2017, then they will be ineligible for the 2017-2018 capital outlay appropriation. Along with the Florida Association of Independent Charter Schools, Martinez Charter School and Miami Community Charter filed a petition alleging that the proposed amendment at issue amounts to an invalid exercise of delegated legislative authority.

OUTCOME: The ALJ rejected the Petitioners' argument regarding a lack of rulemaking authority by concluding that "the State Board of Education has both the authority and duty pursuant to section 1001.02(1) to adopt rules to implement the provisions of law conferring duties upon it for the improvement of the state system of K-20 education. The charter school statute, section 1003.22, spe-

cifically authorizes the State Board of Education to adopt rules which address charter school eligibility for capital outlay funds." The Petitioners also argued that the amendment at issue is invalid because the eligibility determination can only be based on how students perform on a state-wide, standardized test. However, the ALJ rejected this argument by noting that the "state accountability standards applicable to charter schools" described in section 1013.62(1)(a)3. are primarily driven by the school grading system described in section 1008.34. As concluded by the ALJ, "[t]he individual student achievement levels described in section 1008.34(1)(a) are only a step in the process that results in the state accountability standards applicable to the charter schools. The remainder of section 1008.34(2) and (3) creates a school grading system applicable to most public and charter schools."

The Martinez Charter School and Miami Community Charter have appealed the Final Order to the First District Court of Appeal. The appeal is pending as case no. 1D17-3401.

Bid Protests

Joe Moretti Phase Three, LLC v. Fla. Housing Fin. Corp., Case No. 17-1543BID (Recommended Order June 9, 2017).

FACTS: Florida Housing Finance Corporation ("Florida Housing") is the public corporation responsible for allocating and distributing low-income housing tax credits, and Florida Housing competitively awards tax credits to developers of eligible housing projects. On October 28, 2016, Florida Housing issued "Request for Applications 2016-114, Housing Credit Financing for Affordable Housing Developments Located in Miami-Dade County" ("RFA 2016-114"). Under Florida Administrative Code Rule 67-48.023(1), an applicant is ineligible to apply for competitive housing credits if the proposed development is subject to an extended use agreement ("EUA"). An EUA is an agreement between an appli-

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cant seeking tax credits and Florida Housing. That agreement runs with a particular piece of property and assures that the property is devoted to affordable housing. However, an applicant can seek to have an EUA amended by filing a request with Florida Housing. Joe Moretti Phase Three, LLC (“Moretti”) and Stirrup Plaza Phase Three, LLC (“Stirrup Plaza”) submitted applications in response to RFA 2016-114. Because the land associated with both developments had been subject to EUAs since 2015, Moretti and Stirrup Plaza needed to have those EUAs amended prior to the December 15, 2016, deadline for submitting applications for RFA 2016-114. Accordingly, Anthony Del Pozzo, the vice president of both Moretti and Stirrup Plaza, initially contacted Florida Housing via e-mail on November 1, 2016, about amending the EUAs. Formal requests to amend those EUAs followed soon thereafter. Despite a great deal of communication between representatives of Moretti, Stirrup Plaza, and Florida Housing between November 1, 2016, and December 15, 2016, the EUAs were not amended by the December 15, 2016, deadline. As a result, Florida Housing deemed the Moretti and Stirrup Plaza applications ineligible. On February 20, 2017, Moretti and Stirrup Plaza filed petitions challenging Florida Housing’s determination.

OUTCOME: The ALJ did not recommend that Florida Housing award tax credits to Moretti or Stirrup Plaza. In doing so, the ALJ determined that there was no persuasive evidence that the relevant personnel at Florida Housing were aware prior to December 12, 2016, that: (a) Moretti and Stirrup Plaza were seeking to amend the EUAs so they could apply for RFA 2016-114; or (b) there was any sort of time constraint associated with the requests to amend the EUAs. Accordingly, the ALJ ruled that “[w]ithout any persuasive evidence that Florida Housing was aware or timely notified

that Moretti Phase Three and Stirrup Plaza Phase Three were working under a deadline, then undersigned cannot conclude that Florida Housing’s failure to act more expeditiously on the requests to amend the EUAs was arbitrary, capricious, or unreasonably interfered with the objectives of competitive bidding.”

JPM Outlook One Limited P’ship and Grande Park Limited P’ship v. Fla. Housing Fin. Corp., Case Nos. 17-2499BID and 17-2500BID (Recommended Order June 29, 2017).

FACTS: The Florida Housing Finance Corporation (“Florida Housing”) is a public corporation that facilitates affordable housing in Florida through administration of the low income housing tax credit program. Florida Housing allocates housing tax credits through the issuance of request for applications (“RFAs”). On October 7, 2016, Florida Housing issued “RFA 2016-110, Housing Credit Financing for Affordable Housing Developments Located in Medium and Small Counties” (“RFA 2016-110”). Section Four of RFA 2016-110 required applicants to include a signed “Applicant Certification and Acknowledgement” form indicating the applicant’s acknowledgement of RFA 2016-110’s requirements. Section Four also contained a sentence referred to by Florida Housing as the “effects clause,” warning that “[i]f the Applicant provides any version of the Applicant Certification and Acknowledgement form other than the version included in this RFA, the form will not be considered.” On November 10, 2016, Florida Housing modified the Applicant Certification and Acknowledgement Form associated with RFA 2016-110 and imposed an additional requirement for proposed developments deemed by Florida Housing after the application deadline to be “scattered sites.” The modified Applicant Certification and Acknowledgement Form cautioned that “[f]or the Application to be eligible for funding, the version of the Applicant Certification and Acknowledgement Form reflecting the Modification posted

11-10-16 must be submitted to the Corporation by the Application Deadline, as outlined in the RFA.” JPM Outlook One Limited Partnership (“JPM Outlook”) and Grande Park Limited Partnership (“Grande Park”) are limited partnerships in the business of providing affordable housing. JPM Outlook and Grande Park responded to RFA 2016-110 by filing applications containing the original version of the Applicant Certification and Acknowledgement Form rather than the modified version. Florida Housing deemed JPM Outlook and Grande Park’s applications ineligible solely because their applications did not contain the modified version of the Applicant Certification and Acknowledgement Form. JPM Outlook and Grande Park challenged Florida Housing’s determination and argued that the deviation should be waived as a minor irregularity.

OUTCOME: The ALJ recommended that Florida Housing issue a final order confirming its initial decision that JPM Outlook and Grande Park are ineligible for funding. In doing so, the ALJ concluded that “[t]he effects clause is not ambiguous: ‘If the Applicant provides any version of the Applicant Certification and Acknowledgement form other than the version included in this RFA, the form will not be considered.’ Florida Housing reasonably points out that waiving such a specific mandatory requirement in the RFA would put it on a ‘slippery slope’ in which any mandatory requirement might be considered waivable. See *St. Elizabeth Gardens v. Fla. Hous. Fin. Corp.*, Case No. 16-4132BID, RO at 47-48 (Fla. DOAH Oct. 18, 2016; FHFC Nov. 28, 2016). Applicants would be in doubt as to how strictly Florida Housing intends to interpret mandatory provisions in future RFAs. One bidder would naturally suspect favoritism when the agency waived mandatory specifications for another bidder, thus undermining public confidence in the integrity of the process. It would not be in the interest of Florida Housing or the public to intentionally introduce ambiguity into this clear RFA provision.”



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2017 APA Legislation: Not Much This Year, But a Sign of Things to Come?

by Larry Sellers

During the 2017 legislative session, the Florida Legislature considered a number of bills affecting the Administrative Procedure Act (APA) and the practice of administrative law. A few passed, including: (1) a measure authorizing the Department of Health and applicable boards to use the emergency rulemaking process to adopt rules implementing the constitutional amendment allowing the use of medical marijuana, (2) legislation establishing an administrative process by which any county resident may challenge the adoption of instructional materials, and (3) a bill ratifying two agency rules.

Many other proposals died, including bills that would make significant changes to the process for appointing and re-appointing administrative law judges (ALJs) and revising the rulemaking process. But some of these proposals passed the House and received substantial attention in the Senate, so look for these to be considered again next session.

Here's a brief summary of what passed and what died, including what to expect in 2018.

PASSED

No significant changes to the APA were enacted this year. However, the Legislature approved several measures likely to be of interest to administrative lawyers.

Medical Marijuana: Implementing the Constitutional Amendment

Legislation enacted in 2014 and 2016 to authorize the medical use of medical marijuana proved to be a boon for administrative lawyers. There were multiple administrative challenges to the efforts to adopt implementing rules and a variety of litigation contesting the Department of Health's (DOH) selection of the five

dispensing organizations authorized by the law.¹

This June, the Legislature enacted **Senate Bill 8-A** in an effort to implement the constitutional amendment regarding medical use of marijuana approved by voters last November. This legislation, too, already has resulted in a flurry of activity, including filings in circuit court seeking to direct DOH to issue a license pursuant to the new law, followed by the filing of a petition for writ of prohibition in the appellate court seeking to direct the circuit judge to dismiss the case for failure to exhaust administrative remedies.² And a prominent backer of the constitutional amendment called a press conference to announce the filing of a lawsuit because the implementing legislation does not authorize the smoking of marijuana.³

As it relates to administrative procedure, SB 8-A grants DOH and the applicable boards limited emergency rulemaking authority to meet the July 3, 2017, rulemaking deadlines imposed by the constitutional amendment. The bill allows DOH and the applicable boards to use the emergency rulemaking authority irrespective of whether there is an immediate danger to the public health, safety, or welfare which requires emergency action.⁴ Likewise, the bill exempts emergency rules from the 90-day limit on the duration of the rules, and it allows the emergency rules to remain in effect until replaced through non-emergency rulemaking procedures. The bill also exempts DOH and the applicable boards from the requirement to prepare a statement of estimated regulatory costs (SERC). The bill allows DOH and the applicable boards to adopt emergency rules to replace any emergency rules that are held to be an invalid delegation of legislative authority or unconstitutional. However, the bill prohibits DOH and the applicable boards from adopting emergency

rules to replace the second set of emergency rules if they are also held to be an invalid delegation of legislative authority or unconstitutional.

The bill requires DOH and the applicable boards to begin replacing the emergency rules by January 1, 2018.

The act became effective on July 1, 2017; Chapter 2017-232, Laws of Florida

Challenges to Instructional Materials

House Bill 989 generally revises district school board responsibilities relating to the review and adoption of public K-12 instructional materials. One section of the bill that received some attention in the news media adds county residents to those who may challenge the use or adoption of instructional materials and revises the requirements relating to the public hearing for adoption of such materials.⁵ The bill requires each district school board to adopt a policy regarding an objection by a parent or resident of the county to the use of a specific instructional material, which clearly describes a process to handle all objections and provides for a resolution. The process must provide the parent or resident the opportunity to proffer evidence to the district school board with respect to certain matters. The district school board also must establish a process by which the parent of a public school student or a resident of the county may contest the district school board's adoption of specific instructional material. The parent or resident must file a petition, on a form provided by the school board, within 30 calendar days after the adoption of the material by the school board. Within 30 days after the 30-day period has expired, the school board must, for all petitions timely received, conduct at least one open public hearing before an

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unbiased and qualified hearing officer. The hearing officer may not be an employee or agent of the school district. The hearing is not subject to the provisions of the APA; however, the hearing must provide sufficient procedural protections to allow each petitioner an adequate and fair opportunity to be heard and to present evidence to the hearing officer. The school board's decision after convening a final hearing is final and not subject to further petition or review.

The act became effective on July 1, 2017; Chapter 2017-177, Laws of Florida

Ratification of DOEA Rule Relating to Practice for Professional Guardians and BOM Rule for Office Surgery

Legislation enacted in 2010 provides that rules with a million dollar impact may not take effect until ratified by the Legislature.⁶ **House Bill 7073** ratifies a Department of Elder Affairs (DOEA) rule relating to the practice for professional guardians, rule 58M-2.009, and a Board of Medicine (BOM) rule relating to the standard of care for office surgery, rule 64B8-9.009.

The act became effective on June 23, 2017; Chapter 2017-165, Laws of Florida.

DID NOT PASS

Most bills relating to administrative law were not enacted this year, including those that would make significant changes to the APA. However, some of these failed bills passed the House and key Senate committees and are expected to be considered again in 2018.

DOAH/Appointment of ALJs

House Bill 1225 and Senate Bill 1352 would have made significant changes to the process for appointing and re-appointing Administrative Law Judges (ALJs) at the Division

of Administrative Hearings (DOAH). This new process appears to be modeled after that currently used to appoint and re-appoint judges of compensation claims (JCCs).⁷

Currently, ALJs are employed by DOAH. The bills would have required the Governor (or the Governor and Cabinet) to appoint ALJs from nominees recommended by a nominating commission. The bills also specified the composition of the commission and the process by which the members of the commission would be appointed.

The bills would have specified the length of the ALJs' terms of office (four years),⁸ and would have reclassified ALJs from career service to select exempt service (or senior management) employees, thus allowing them to be fired without cause. Prior to the expiration of an ALJ's term, the commission would review the ALJ's conduct, determine whether performance is satisfactory and report its findings to the Governor (or Governor and Cabinet), who then determines whether to re-appoint the ALJ for another term.

HB 1225 passed the House; SB 1352 passed two of the three committees of reference. The bills differed in several respects, including the appointing authority.

APA/Agency Rulemaking/SERC

House Bill 1163 and Senate Bill 1640 would have required an agency to prepare a Statement of Estimated Regulatory Costs (SERC) before the adoption or amendment of any rule other than an emergency rule. The bills also would have required the agency to prepare a SERC for a rule repeal only if such repeal would impose a regulatory cost.

The measures also would have provided that in any challenge to a rule repeal, the repeal must be considered presumptively correct by the adjudicating body.

HB 1163 passed the House; SB 1640 was reported favorably by the first of three committees in the Senate.

Certificates of Need (CON)

House Bill 7 and Senate Bill 676 would have eliminated CON

review for hospitals and hospital services. The bills also would have removed the requirement for CON review for increasing the number of comprehensive rehabilitation beds in a facility offering comprehensive rehabilitation services.

HB 7 passed the House; SB 676 was not heard in committee.

Attorney's Fees/Administrative Proceedings

Senate Bill 996 and House Bill 997 would have required the ALJ to award attorney's fees and costs to the prevailing party in a proceeding seeking to cancel or modify a permit having the effect of authorizing the development of land. The ALJ would not be required to make this award against the challenger if the challenge was substantially justified or if special circumstances exist that would make the award unjust.

These measures were very controversial with environmental interest groups, and were temporarily postponed in their respective first committees of reference.

Ratification of DFS Rules Adopting Reimbursement Manuals

Senate Bill 404 would have ratified Department of Financial Services (DFS) rules 69L-7.501 and 69L-7.100, adopting the workers compensation reimbursement manuals for hospitals and ambulatory surgical centers. The bill passed the Senate, but died in the House.

Ratification of BOM Rule Relating to Costs for Reproducing Medical Records

The Board of Medicine amended rule 64B8-10.003, establishing costs of reproducing medical records. The rule sets the maximum reasonable cost per page that a physician may ask of the party requesting the medical records. The Board determined that the rule would impose costs that exceed one million dollars over five years and therefore requires ratification by the Legislature before it may take effect. A measure was filed in 2016 to ratify the rule, but was not enacted. The rule was the subject of an administrative challenge, and the

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ALJ determined the rule to be valid. On appeal, the challengers asked the court to determine the appeal was moot because the rule was not ratified during the legislative session following adoption (the 2016 regular session). The court rejected the argument and affirmed the ALJ's final order.⁹

No bill was filed during the 2017 legislative session to ratify the rule. However, two measures (**House Bill 569/Senate Bill 826**) would have repealed the authority of the Board to establish these costs, but neither was enacted.

PSC Policies and Practices for Cost Recovery

Among other things, **House Bill 7071** would have eliminated the exemption from rulemaking in section 120.80, Florida Statutes, for Public Service Commission (PSC) policies and practices relating to cost recovery clauses, factors, and mechanisms, and would have made such statements subject to the rulemaking requirements in the APA. The bill would have exempted such rules adopted prior to July 1, 2020, from the requirement for legislative ratification in section 120.541(3).

HB 7071 was reported favorably by its first committee of reference. No companion bill was filed in the Senate.

Suspension of Agency Rulemaking Authority

House Bill 365 would have created a four-year sunset review process for agency rulemaking authority. Similar legislation was filed in 2016.¹⁰ HB 365 was not heard in committee and no Senate companion was filed this year.

Codification of Uniform Rules of Administrative Procedure

House Bill 1389 would have made numerous changes to the APA. Many of the proposed changes would codify

provisions of the Uniform Rules of Administrative Procedure into chapter 120, Florida Statutes. The bill was not heard in committee, and no similar legislation was filed or considered in the Senate.

A final note: Representative Eric Eisnaugle, the sponsor of HB 1389 and HB 365, resigned from the House when he was appointed to the Fifth District Court of Appeal late in the legislative session. He frequently sponsored legislation affecting the APA, including HB 985 (2015), a bill relating to indexing of final orders that he filed at the request of the Administrative Law Section of the Florida Bar.¹¹ Congratulations to Judge Eisnaugle.

Larry Sellers practices in the Tallahassee office of Holland & Knight LLP.

Endnotes:

¹ For a summary of some of these proceedings, see Fla. S. Comm. on Appropriations, SB 8-A, Staff Analysis (June 8, 2017). At the time this article was submitted for publication, DOH had not yet issued its final order in the most recently concluded administrative proceeding contesting the issuance of the license to operate a dispensing organization for the Southwest Region. See *Plants of Ruskin, Inc. v. Dep't of Health*, Nos. 17-116 & 17-117 (Fla. DOAH May 23, 2017) (Recommended Order). And DOH's Final Order following the administrative proceedings challenging the decision to issue the license to operate a dispensing organization for the Northeast Region was the subject of a pending appeal. See *Loop's Nursery & Greenhouses, Inc. v. Dep't of Health*, Case No. 15-7274 (Fla. Dep't of Health Jan. 5, 2017) (Final Order), *appeal pending in* No. 1D17-237 (Fla. 1st DCA, notice of appeal filed Jan. 19, 2017). SB 8-A authorizes the issuance of additional licenses, which is expected to moot or otherwise resolve these pending proceedings.

² *Dep't of Health v. TropiFlora, LLC*, No. 1D17-2796 (Fla. 1st DCA, petition filed July 12, 2017; order to show cause issued July 14, 2017).

³ *People United for Medical Marijuana, Inc. v. Dep't of Health*, No. 2017 CA 1394 (Fla. Cir. Ct., complaint filed July 6, 2017).

⁴ For example, the Board of Medicine approved emergency rules establishing disciplinary guidelines on August 4, 2017. The

Board of Medicine and the Board of Osteopathic Medicine are expected to consider the required consent form on August 25, 2017.

⁵ Sarah Kaplan, *New Florida Law Lets Any Resident Challenge What's Taught in Science Classes*, Washington Post (July 1, 2017).

⁶ This requirement is now codified in section 120.541(3), Florida Statutes. For a discussion of this legislation, see Larry Sellers, *The 2010 Amendments to the APA: Legislature Overrides Veto of Law to Require Legislative Ratification of "Million Dollar Rules,"* 85 Fla. B.J. 37 (May 2011); and Eric H. Miller and Donald J. Rubottom, *Legislative Rule Ratification: Lessons from the First Four Years*, 89 Fla. B.J. 36 (Feb. 2015).

⁷ Fla. Stat. § 440.45. The decision of the Statewide Nominating Commission for Judges of Compensation Claims not to recommend the re-appointment of a JCC is currently the subject of pending litigation at DOAH and in the appellate courts. See *Castiello v. Statewide Nominating Comm'n for Judges of Comp. Claims*, Case No. 17-477RU (Fla. DOAH, petition challenging statements defined as unadopted rules filed Jan. 20, 2017); *Castiello v. Statewide Nominating Comm'n for Judges of Comp. Claims*, Case No. 17-1248 (Fla. DOAH, petition for formal administrative proceeding filed Feb. 8, 2017); and *Castiello v. Fla. Div. of Admin. Hearings*, No. 1D17-2722 (petition for writ of mandamus); see also *Castiello v. Statewide Nominating Comm'n for Judges of Comp. Claims*, No. 3D17-341 (Fla. 3d DCA Mar. 29, 2017) (denying petitions for writs of prohibition, mandamus, etc.).

⁸ One version of SB 1352 would have provided for an eight-year term, but that was changed after a Senate staff analysis noted that if ALJs are "officers" as that term is used in Article III, Section 13 of the Florida Constitution, then that provision limits their terms to four years. See Fla. S. Comm. on Judiciary, SB 1352, Staff Analysis (Apr. 18, 2017 (pre-meeting analysis)).

⁹ *Fernandez v. Dep't of Health, Board of Medicine*, 42 Fla. L. Weekly D806 (Fla., 1st DCA Apr. 11, 2017), *petition for review*, No. SC17-1165 (Fla., petition filed June 23, 2017).

¹⁰ For a brief summary of these measures, see H. French Brown, IV & Larry Sellers, *The 2016 Amendments to the APA: Say Goodbye to United Wisconsin—And More*, 90 Fla. B.J. 46 (Sept./Oct. 2016).

¹¹ See Daniel E. Nordby, *From the Chair*, Vol. XXXVI Admin. L. Section Newsletter No. 4 (June 2015). For a summary of HB 985, see H. French Brown, IV & Larry Sellers, *2015 Amendments to the APA: Agency Regulatory Plans, Indexing—and Another Veto!*, Vol. XXXVII Admin. L. Section Newsletter No. 1 (Sept. 2015).



Law School Liaison

2017 Update from the Florida State University College of Law

by David Markell, Steven M. Goldstein Professor

This column highlights recent administrative law-related accomplishments of our Florida State University College of Law students and faculty. It also features a partial list of the rich menu of programs the College of Law will host during the fall 2017 semester.

Fall 2017 Events

The College of Law has a full slate of administrative law events and activities on tap for the fall semester:

The Psychology of Climate Change: Why Do People Believe What They Believe?

This panel discussion, organized by Professor Hsu, will explore cutting-edge research on the psychology of climate change. The research suggests that, for people of all range of beliefs, views about climate change stem from a variety of factors that are not highly dependent upon the state of climate science. This panel will also explore possible paths forward in light of the psychological dimensions of climate change. This panel will be held on Friday, September 29, 2017, at 2:00 p.m. in Roberts Hall, room 310.

Fall 2017 Distinguished Lecture

Professor Vicki Been, Boxer Family Professor of Law, New York University School of Law, will serve as the Fall 2017 Distinguished Lecturer. Professor Been's lecture will begin at 3:30 p.m. on Wednesday, October 25, 2017, in Roberts Hall, room 310 and will be followed by a reception in the College of Law Rotunda.

Energy Policy and Markets in a Shifting Federal-State Landscape

This symposium, convened by Professor Wiseman, will discuss the changing energy regulatory and economic landscape from the local to the

federal levels. Markets drive many aspects of energy policy, and local and state policies do not consistently align with federal ones. Thus, even with new federal incentives for certain fuels, such as coal, other fuels such as renewable energy and natural gas might continue to outcompete sources that have historically dominated the United States energy mix. Symposium participants will discuss this complex landscape, with one panel focusing on electricity issues (with a focus on renewables), and a second panel focusing on fossil fuels. Symposium speakers include Lincoln Davies, Hugh B. Brown Presidential Endowed Chair in Law, University of Utah College of Law; Dr. Shanti Gamper-Rabindran, Assistant Professor, Graduate School of Public and International Affairs, University of Pittsburgh; Emily Hammond, Professor of Law, George Washington University Law School; Kate Konschnik, Director of Harvard Law School's Environmental Policy Initiative of the Environmental Law Program and Lecturer on Law; Felix Mormann, Associate Professor, Texas A&M University School of Law and Faculty Fellow, Steyer-Taylor Center for Energy Policy and Finance, Stanford University; Jim Rossi, Professor and Director, Program in Law and Government, Vanderbilt Law School; and Kristen van de Biezenbos, Assistant Professor, University of Calgary Faculty of Law. This symposium will be held on Wednesday, November 8, 2017, at 3:30 p.m. in Roberts Hall, room 208.

Recent Student Achievements

- Valerie Chartier was awarded a significant, extremely competitive Rocky Mountain Mineral Law Foundation Scholarship for the upcoming year.
- Congratulations to the new 2017-2018 Executive Board of the Environmental Law Society!

- President: Jessica Farrell
- Vice President: Jill Bowen
- Treasurer: Matt Pritchett
- Secretary: Laurel Tallent
- Mentor Chair: Savannah Brown
- Congratulations are also due to the new 2017-2018 Journal of Environmental and Land Use Law Executive Board.
- Editor-in-Chief: Graham O'Donnell
- Executive Editors: Jill Bowen and Johnny Vernaglia
- Associate Editor: Jessica Farrell
- Administrative Editor: Kristen Schalter
- Senior Articles Editor: Brent Marshall

Recent Faculty Achievements

- In May, Shi-Ling Hsu presented "Alternative Facts in Economics and the Environment" at the Third Sustainability Conference for American Legal Educators, at Arizona State University; "Carbon Taxes: A Complete Revenue Analysis" at the 9th Annual Society for Environmental Law and Economics meeting, in Oxford, UK; and "Capital, Economic and Ecological," at the Rocky Mountain Mineral Law Foundation Natural Resource Law Teachers Meeting in Calgary, Canada.
- On May 11, 2017, Steve Johnson spoke on "EPA and Other Federal Rulemaking Under the Trump Administration," at the 2017 Environmental Conference co-sponsored by the Air & Waste Management Association (Northeast Florida Chapter) and Florida State University. His copresenter was Matt Leopold of Carlton Fields, previously general counsel of the Department of Environmental Protection.
- David Markell's sixth book,

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LAW SCHOOL LIAISON

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COMPLIANCE AND ENFORCEMENT OF ENVIRONMENTAL LAW (Edward Elgar Publishing Limited, 2017) (Paddock, Markell, and Bryner, eds.), was published this summer. This volume is part of a major, multi-volume project that is being developed in association with the IUCN Academy of Environmental Law. In June, Professor Markell discussed issues relating to regulatory design and enforcement with officials from the United States Government Accountability Office (GAO) as part of an ongoing GAO project. Also this summer, Professor Markell served as a Senior Fellow and taught a course on Environmental Compliance and Enforcement at Melbourne University Law School in Melbourne, Australia.

- Erin Ryan spent the summer teaching negotiation at FSU College of Law's Oxford summer program in England. Professor Ryan presented on the structure of Chinese environmental governance at the Rocky Mountain Mineral Law Foundation biannual Law Teacher's Institute at Banff National Park, in Alberta, Canada. She was interviewed by Portland Monthly about the constitutional possibilities for subnational climate governance initiatives in western coastal states, and by science writer Charles Schmidt about the scientific ramifications for water resource management if EPA adopts the narrow definition of 'navigability' that the late Justice Antonin Scalia advocated in *Rapanos vs. United States*.
- Mark Seidenfeld was the featured speaker in a teleforum sponsored by the Administrative Law & Regulation Practice Group of the Federalist Society on June 21, 2017. He spoke on "Chevron's Foundation: Congressional Delegation of Interpretive Primacy."
- Hannah Wiseman has two forthcoming articles, *Delegation and Dysfunction*, __ Yale J. on Reg. __ (forthcoming 2017) and *Regula-*

tory Triage in a Volatile Political Era, __ Colum. L. Rev. Online (forthcoming 2017). In July 2017, Professor Wiseman served as the Trustee for FSU Law at the 63rd Annual Rocky Mountain Mineral Law Institute in Santa Fe.

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.

Agency Snapshot: Florida Department of Lottery

by Giselle M. Girones

The Florida Department of Lottery (Florida Lottery) is a unique agency that functions as an entrepreneurial business enterprise responsible for generating funds to improve public education in the state. The Florida Lottery formed in 1986, when Florida voters first authorized a lottery through a constitutional amendment, to use proceeds to enhance public education. The mission of the Florida Lottery is to maximize revenues for education and allow the people of Florida to benefit from additional monies while providing the best lottery games available. To date, more than \$6.3 billion lottery dollars have been responsible for funding school recognition and merit programs for improved schools, as well as renovations in schools and classrooms. The Florida Lottery is headquartered in Tallahassee and has eight district offices throughout the state.

Secretary:

Jim Poppell
The Florida Lottery
250 Marriott Drive
Tallahassee, FL 32301
Phone: (850) 487-7711

Mr. Poppell was recently appointed as the Secretary for the agency by Governor Rick Scott and began his role on July 10, 2017. Secretary Poppell received his Bachelor of Arts from Eckerd College, his Masters degree from Spring Arbor University, and law degree from University of Missouri-Kansas City School of Law. Secretary Poppell has served as the Chief of Staff and General Counsel for the Department of Economic Opportunity (DEO). Prior to his time at DEO, Secretary Poppell served as a minister

for 21 years. Additionally, Secretary Poppell is also known for holding various leadership positions with Florida Power and Light Company as well as NextEra Energy, Incorporated.

Agency Clerk:

Diane Schmidt
Phone: (850) 487-7724

Mailing Address:

The Florida Lottery
250 Marriott Drive
Tallahassee, FL 32301

Location:

Department of Lottery
250 Marriott Drive
Tallahassee, Florida 32301

General Counsel:

David Guerrier

Number of lawyers on staff: 2

Kinds of Cases:

The Florida Lottery's Office of General Counsel provides legal services to all facets of the Florida Lottery, and advises staff on agency business, pursuant to the Florida Statutes and administrative rules. The Office is responsible for assisting in planning and directing phases of the legal program for the Florida Lottery as well as drafting legislative bills, developing regulations for the programs, and interpreting state and federal acts. Additionally, the Office serves as the Florida Lottery's Chief Ethics Office. The Office consists of two attorneys, one legal analyst, and two administrative support staff.

For information related to requesting public records, visit <http://www.flalottery.com/openGovernment>.

ALJ Q&A

by Richard J. Shoop

For this edition of ALJ Q&A, I had the opportunity to interview the Honorable Jessica Enciso Varn. Judge Varn has a very unique background. Prior to being appointed as an ALJ in 2011, Judge Varn served as a commissioner for the Public Employees Relations Commission for nine years. Additionally, during her legal career, she has taught legal research and writing and Spanish for lawyers at the Florida State University College of Law; served as a law clerk for the Honorable Ann Cawthon Booth at the First District Court of Appeal; and worked in private practice for McConaughay, Roland, Maida and Cherr, P.A., as well as DuBois & Cruickshank, P.A. Judge Varn is currently the sunshine chair for Tallahassee Women Lawyers, and has been recognized by the Florida Association for Women Lawyers as a Leader in the Law. She is co-chair of the ABA National Conference of the Administrative Law Judiciary special education committee, and has also served as vice-chair and chair of the Second Judicial Circuit Judicial Nominating Commission. She has had the privilege of serving as a Spanish-language interpreter in federal court proceedings and has been honored to be the guest speaker for naturalization ceremonies in the U.S. District Court, Northern District of Florida. Judge Varn is married to Craig Varn, has one son who attends Leon High School, and one small dog with a big attitude. I was especially interested in interviewing Judge Varn not only because of her diverse background, but also because of the unique role she has at DOAH, which is discussed in our interview below.

RS: How did you become involved in the practice of administrative law?

JV: I was appointed in 2001 to the Public Employees Relation Commission. Before that, I hadn't touched administrative law. At the time, I was teaching at the [Florida State University] law school. I was teaching legal research and writing and Spanish for

lawyers, and was also of-counsel to a small worker's compensation firm, handling their appeals. I was asked by Governor Jeb Bush to serve as the neutral commissioner at the Public Employees Relation Commission. If you are familiar with that statute [section 447.205, Florida Statutes], no more than one commissioner can represent the interests of unions, and no more than one commissioner can represent the interests of management. They already had a commissioner for each, and needed an attorney that had never represented either group to serve on the Commission. I served on the Commission for nine years. Other than taking Florida administrative law in law school, I had never actually done anything with chapter 120 until then. During those nine years, I learned everything about chapter 120, but I was mainly on the end of issuing final orders.

RS: What led you to the step of wanting to become an ALJ?

JV: Honestly, it was the Commission having to downsize due to the recession. The Commission decided to make two of the commissioners part-time, and only have the chair be a full-time commissioner. We thought a lot about it, since we were forced to make a reduction in our manpower, and we decided to do it on the commission-level. We determined that, by doing so, we could still issue good quality final orders without having to reduce the number of hearing officers or staff in our clerk's office any more than we had done already. We offered the plan up to the Legislature in early 2011, and that's when I decided that I had to be looking for what I could do next. I saw that there were going to be six vacancies at DOAH, and I knew that I had a good résumé for it since I had spent nine years doing final orders under chapter 120. I didn't come with any practice experience under chapter 120, and I can't say that I ever represented anyone in chapter 120 proceedings, but I knew enough of the structure of it certainly,

since the Commission wrote final orders. I was comfortable with my research and writing skills, which is a basic skill for an ALJ. So that's what led me to becoming an ALJ. I needed to take the next step, and was having to make a career decision at the time.

RS: If I recall correctly, you handle very specialized cases at DOAH. Tell me a little about that and how it differs from a typical case brought under chapter 120?

JV: Well, the biggest difference is that it is not a chapter 120 proceeding at all. There are three of us that are currently in a two-year rotation, which expires in April 2017. This is the first time DOAH has carved out a unit to do these cases. We hear Individuals with Disabilities Education Act ("IDEA") cases. It's a federal act that involves all students who have individual education plans. The other issue that we deal with exclusively is the Rehabilitation Act of 1973, also a federal act. Section 504 of the Rehabilitation Act also involves school boards and students that don't have a cognitive dysfunction that prevents them from accessing their education like a kid with disabilities, but they have other types of issues, for example asthma or diabetes. So, you are dealing with issues that might affect how they access their education, but mostly it's a matter of accommodations, not that they have a learning disability. The easier way to describe it is that everyone who is an IDEA student is also a 504 kid, but not all 504 kids are IDEA kids. So these are contract cases with DOAH. The school boards contract with DOAH to hear these cases. In other states, they go straight to federal court. Every state is different on how they conduct their IDEA due process hearings and 504 hearings. And even in 504 world, to make it crazier, every county in the state of Florida decides how to do their 504 cases. They can do them in-house. They have a lot of discretion

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ALJ Q&A*from page 20*

in that area. So we do not hear 504 cases for all counties, just those that request that we do the hearings for them.

RS: How many counties would you say do the hearings through DOAH?

JV: Probably 80 percent. The other interesting thing is that all of our orders are final orders and they can be appealed straight to the district courts of appeal or to federal district court. The other thing I like about what I do is that I can award relief in the cases. I can award fees, I can award damages.

RS: Wow, that's a big difference from chapter 120 cases.

JV: Right. The other thing that I love about what I do is that I am dealing only with federal law. So it's a fun change for me because never in my career have I focused on circuit court of appeal decisions. I'm reading Eleventh Circuit Court of Appeal decisions, I'm reading federal district court decisions. That's just different and exciting because my career up until now has had a focus on Florida state law, rather than federal law. So I am really decidedly not right now in the world of chapter 120.

RS: Well, I think you've answered my question about what you love the most about being an ALJ as well...

JV: (Laughs).

RS: Unless there's something else you want to add to that.

JV: There is. My colleagues. We have a phenomenal sense of collegiality at DOAH, and I don't think you appreciate it, know it and get it until you get inside the building. We have a lot of fun together. We go to lunch together all the time, we have breakfasts together to celebrate birthdays, we do things like the chili cook-off every year for the Tallahassee Bar Association, or cooking for the homeless together. We just have a great deal of comradery there, unlike any job I've ever had. It's truly a level of

collegiality that I've never experienced before. It's pretty phenomenal.

RS: Describe what a typical day for you as an ALJ looks like.

JV: If I'm not hearing a case, I start my morning by looking at every single one of my cases. I check the dockets to make sure I haven't missed a deadline because, in my specialized area, we have a lot of statutory deadlines to meet, and we get audited by the Department of Education on whether we are meeting those deadlines. Also, in our unit of three, I am the one who reviews every case that comes in, and assigns the cases to one of the other ALJs, or to myself. The unit consists of Todd Resavage, Diane Cleavinger, and myself. I don't just look at my docket. I look at Judge Cleavinger's docket and Judge Resavage's docket as well, not to be nosy, but to manage and make sure that nobody is overloaded. I'll use a sports analogy. It's a little bit like being a point guard on a basketball court. I look to see who is open, and I don't want to pass to the same person too many times. For example, we had five cases filed this week, but Judge Resavage is in a week-long hearing in Fort Lauderdale right now. So, I distributed all the new cases between Judge Cleavinger and myself because when you're hearing a case you are obviously completely out of pocket, so when an emergency comes in, or even just a new case comes in you don't want to feel like you are behind the curve. It's just unnerving to finish a day of hearing when you know you have three more, and you look at your email and see you have a new case. The other thing that is in the nature of what we do is that all of the cases we hear are expedited, which is one of the reasons why Bob [Chief Judge Robert Cohen] carved these cases out. From the moment a case is filed, not with us, but with the school board, we have only a 45-day window to hear the case, and a shortened time period to issue our decision by federal law. Because we have shrunken time periods, there is less discovery and less preparation because everyone already has all the paperwork, so there is not a whole lot of need for discovery. So we go to hearing

very quickly, and we issue orders very quickly. We have a very quick turnaround on these cases, which is why they were somewhat jarring when all of us [ALJs] did them. It's like a bid protest. All of the sudden you have to clear your desk because you have to set this for hearing in the next 30 days. You're going. It's like a telephone conference that day to set up the dates. They have that nature to them. They are fast-paced. So, because of that, I take great care in assigning cases. I have a master list of all of our unit's cases, and when they are set for hearing. I'm super OCD about being organized, so I have them color-coded. I have which ones are awaiting an order, which ALJ has to be writing an order, and deadlines on when cases should be set for hearing. I highlight the cases that are set for hearing next week, and then I also redistribute cases at times. For example, Judge Resavage's case was set for a five-day hearing, but he just told me this morning that the petitioner is resting today, and today is day five. I am going to re-assign one of his cases to Diane or to myself that's scheduled for hearing in the next week or so because he is going to have to re-schedule the end of this hearing. It might be a 10-day hearing instead of a five-day hearing. So we move them around a lot, and I'm the one that does that. So my morning is spent reviewing all of my cases and all of Todd's and Diane's cases, so that I can go to Diane and say, "Look, I see that you are writing [a final order] right now, and you are on a deadline. I can take your case for next week so that you can get a good order out, and I'll just hear the case because I don't have an order to write right now." I monitor all that, so a lot of my morning is spent looking to see whether Todd or Diane has closed a case, whether they have put one in abeyance, whether they have set one for hearing so that I can put it on my list. I look at my list a lot. My list is always on one of my [computer] screens. For the rest of my time, I am writing an order, I am reading a transcript, or I'm researching. If I am hearing a case, I am completely dependent on my assistant, Brooke

continued...

ALJ Q&A*from page 21*

Robertson. For example, she knows that Judge Resavage is out of town at a hearing, so she is in charge of looking at his docket and will let me know if anything is filed that needs to be addressed. If so, I'll ask him for permission to enter an order addressing the issue, or ask him to tell me what he wants me to do with it. We watch each other's backs a lot because we are a little unit, and because our cases are so fast-tracked. We have to work really well together, and we do. We have a passion for getting the best product out of the building, and, in order to do so, we have to redistribute the work at times. So that's a typical day.

RS: How do you use technology in your work?

JV: I use Excel every day because I can't live without my Excel spreadsheet. I am constantly updating it, constantly moving things around. Obviously, all of our legal research is computerized. In what I am doing now, I don't do a whole lot of Lexis-Nexis work. There is a whole other research engine for education cases. We have access to a whole database of education cases that get issued on a daily basis across the nation. So that's the other thing I do every day. If I don't have an order to work on, a motion to rule on, or a telephone conference, something pressing to do, I'll jump on the website and look at what decisions have come out of California or New York. There are some states that are real litigious in my substantive area, so I find it fascinating to read about how other states address certain issues. You would not believe how much stuff comes out of the IDEA and 504. It's really mind-boggling how much variation there is in the cases. The Supreme Court heard an IDEA at the beginning of this year, so this afternoon I am going to look at the transcript of the oral argument because I have a lot of interest in how they are going to decide the case, and what impact it will have on my cases. So I use technology that way. And then when I am remote we all have

laptops, and I do exactly what I told you that I do when I am in the office on my laptop. So if I'm home with a sick kid, I can work on my laptop and do everything remotely that I would do if I were in the office. Check my docket, check my email, and update my Excel spreadsheet.

RS: What is the most common mistake you see attorneys make who practice in front of you?

JV: A lack of organization. I think attorneys need to remember that they are, or they should be, the expert of their case, and I'm not. So, tell me your story in an orderly fashion, and present your witnesses in an orderly fashion. Educate me about your case. Tell me what I need to know. Don't make me go hunting for it. I mean I will review every document that you put in front of me, but I've heard cases before where the witnesses talked about issue A for days, and I ended up deciding it on issue B, which hardly any witnesses talked about, but was in my exhibits that were properly admitted into the record, and that you wanted me to look at. So I decided the case on issue B, and you never even talked about it. Why didn't they present one witness to point that out to me? I found it on my own. I guess that is two things. That's a lack of knowing your facts very well, and a lack of knowing how to present them in an orderly fashion.

RS: What's the best piece of advice you could give a young lawyer that you wished someone had given you when you first started out?

JV: I guess it goes back to what I just said. If I had to look back, I would have done a better job of knowing every detail of the exhibits that I'm going to put in front of a judge, and organizing my cases better. Really think about how to present things in an orderly fashion. I guess I would have put more thought into that.

RS: What do you like to do for fun?

JV: I read a lot. I love to exercise. I love to travel. And I have a family, so my family takes up quite a bit of time, between being a mom, being a wife, and being a daughter.

RS: How do you manage to balance your work and your personal life?

JV: I make sure that I carve out time every day to exercise, and that is my tool for mental stability. It's the only time of the day where all that I am thinking about, if I'm jogging, is putting one foot in front of the other and getting from point A to point B. I have learned that it is what I need to stay balanced, and the endorphins I get from it help me to deal with life in a better way. I'm calmer, and I'm more measured. When I don't go and exercise, I tend to get crankier, more short-tempered, and more easily frustrated. There's something about the physical process and releasing those endorphins that makes me deal with life in a much more healthy way. I have to do it, and it's modeling good behavior for my kid. And my husband is the same way. We encourage our son to do the same thing in order to deal with all the things that teenagers get frustrated with. Just going outside and moving will help you address the issues you are dealing with right now. Even when I'm hearing cases, I make time to get on the elliptical at the hotel, or go outside and run if it's safe to do that. I think that's key for me, which I know sounds weird because you are carving out time for yourself, and not dealing with your family or dealing with work, but I find that if I don't do that, I'm not going to do either of those roles very well. I'm a better judge, I'm a better wife, I'm a better mom, I'm a better daughter, I'm better at all of that when I make sure that I am good and have taken care of myself. I think that's how I balance everything.

RS: Many years into the future, when it's all said and done, how would you like to be remembered as an ALJ?

JV: Wow, that's quite a lead-in (laughing). I think in terms of temperament, I want to be seen as somebody who was measured, who was calm, and that everyone who was in the room with me when I was presiding over a case felt that, at the end of the day, they walked out with as much dignity as they walked in with. I want them to come out with having felt like she listened, she was fair, she was

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thoughtful, I had my day, and, even if I lose, it was a good experience. In terms of my decisions, the writing that I do, the academic part of what I do, I think my biggest thing I would want people to think about is that I was very disciplined, and respected the role that I have in the separation of powers. I think it requires a lot of discipline to remember that I don't get to re-write the laws the way I think they should have been written, and not become results-oriented. I think that it requires discipline not to become involved in the drama of the case, particularly when, with what I am doing now, there is a lot of emotion. My heart might break for a family that is living day-to-day with

a severely disabled child, but I have to apply the law as it is written, and that might mean that they will lose. That's particularly important to me right now given the kind of the cases that I hear. That's how I want to be remembered. That I was very steady, understanding that, as a judge, you do not get to write the law. You have to follow it as written, whether you like it or not. And also that my decisions were clear, and the parties understood how I got to where I got.

Postscript: I interviewed Judge Varn at the end of January. Since that time, Chief Judge Cohen has made the decision to have Judge Varn, Judge Resavage and Judge Cleavinger continue doing special education cases, with one minor change in that Judge Resavage is also hearing NICA cases now as well.

Richard J. Shoop is the Agency Clerk for the Agency for Health Care Administration. He attended the University of Miami for both undergraduate studies and law school, obtaining a Bachelor of Arts in History with General Honors in 1996 and a Juris Doctor in 1999. He began his legal career at the Quincy office of Legal Services of North Florida, Inc. In 2001, Mr. Shoop went to work for the State of Florida, first with the Agency for Health Care Administration and then with the Department of Health as a prosecuting attorney for the Boards of Medicine, Osteopathic Medicine and Psychology. He accepted the position of Agency Clerk for the Agency for Health Care Administration in 2004. Mr. Shoop served as a member of the Administrative Law Section's executive council from 2009 to 2017, and is a past chair of the section.



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witnesses. The PSC denied FIPUG's request to invoke the rule. FIPUG appealed the denial, arguing that the PSC erred in failing to sequester the witness according to section 90.616.²

The Supreme Court held that according to the principles of statutory construction, the scope of the Florida Evidence Code, as set forth in chapter 90, Florida Statutes, did not encompass administrative proceedings:

To ascertain legislative intent [of chapter 90], we first look to the other provisions within chapter 90 itself. Section 90.103, Florida Statutes (2015), entitled "Scope; applicability," states:

(1) Unless otherwise provided by statute, this code applies to the same proceedings that the general law of evidence applied to before the effective date of this code.

(2) This act shall apply to criminal proceedings related to crimes committed after the effective date of this code and to civil actions and all other proceedings pending on or brought after October 1, 1981.

(3) Nothing in this act shall operate to repeal or modify the parole evidence rule.

§ 90.103, Fla. Stat. (2015). Under subsection (1), the Florida Evidence Code applies to the same proceedings to which the general law of evidence applied before July 1, 1979.³ However, as asserted by FPL and the PSC, the general law of evidence did not apply to administrative proceedings before that date. Therefore, under [section] 90.103(1), Fla. Stat. (2015), the Florida Evidence Code does not strictly apply to administrative proceedings.

Id. at 1144.⁴ (internal citations omitted).

After holding that chapter 90 did not strictly apply in administrative proceedings, the Court considered whether an administrative tribunal *may* apply the evidence code in administrative proceedings. Conveniently for administrative lawyers,

the Court held that whether the PSC had discretion to apply the evidence code in administrative proceedings turns on a pure analysis of chapter 120, Florida Statutes, itself:

Administrative proceedings are instead governed by chapter 120, Florida Statutes, known as the Administrative Procedure Act (APA). *See* §§ 120.51, 120.569(1), Fla. Stat. (2015). Although chapter 90 sets forth the Florida Evidence Code, the APA contains its own guidance regarding the admissibility of evidence—including testimony—which is found in section 120.569(2)(g), Fla. Stat (2015). That section reads:

Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida. Any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath.

§ 120.569(2)(g), Fla. Stat. (2015). This section exemplifies the longstanding general rule, described above, that the rules of evidence do not strictly apply in administrative proceedings. We find that the Commission has discretion on whether to apply the Florida Evidence Code and, in particular, the rule of sequestration to its proceedings.

Id. at 1145-1146. (internal citations omitted).

The natural follow-up question is, if administrative tribunals under chapter 120 have discretion to apply, or not to apply, the Florida Evidence Code, what, exactly, are the rules of evidence applicable in a chapter 120 administrative hearing?

This two-part article is an attempt to provide a broad answer to that question. Part I of the article will examine the submission of evidence and burdens of proofs. This article will be limited to practice before DOAH and is intended for attorneys new to administrative practice. It will not cover practice in non-DOAH forums, such

as the PSC and other administrative tribunals. It also will not cover evidentiary issues that can arise during discovery. It is intended as a roadmap to common evidentiary issues likely to arise in administrative proceedings without delving too deeply into any one issue.

First, some background regarding post-hearing administrative procedure is needed in order to understand why it is important to understand the rules of evidence during an administrative hearing.

Introduction: Why Is It Important to Understand the Rules of Evidence in Administrative Hearings?

The short answer is that, unlike at a civil trial, not all "evidence" admitted into the record at an administrative hearing is sufficient to support an administrative law judge's (ALJ's) findings of fact. "Evidence" in administrative hearings, then, involves the process of identifying what evidence can support an ALJ's findings of fact, and what evidence cannot.

The longer answer is that when an administrative hearing is complete and fully briefed, the ALJ will issue a recommended (or final) order that contains findings of fact and conclusions of law. In most cases, a state agency will then issue a final order that either adopts the ALJ's findings of fact and conclusions of law or modifies them. An agency's final order is then appealable to a district court of appeal. The catch is that state agencies and appellate courts have very limited authority to modify an ALJ's findings of fact. Persuading the ALJ that the evidence supports your version of the facts is crucial to the ultimate success of the case, as it will be very difficult for an agency or an appellate court to reverse the judge's findings of fact.

An agency or an appellate court cannot reverse an ALJ's finding of fact unless, after reviewing the entire record, the agency or court determines that there is no competent, substantial evidence⁵ supporting such finding of fact.⁶ This is a very

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high standard. If only a scintilla of evidence supports an ALJ's finding of fact—and even if a great amount of evidence weighs against it—a state agency or court has no authority to reverse that finding.

Substantial case law supports this high standard. An agency is not free to re-weigh the evidence or to reject findings of fact unless there is no competent, substantial evidence to support them. *See Health Care and Ret. Corp. v. Dep't of Health & Rehab. Servs.*, 516 So. 2d 292, 296 (Fla. 1st DCA 1987); *Heifetz v. Dep't of Bus. Reg.*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985); *Schumacker v. Dep't of Prof'l Reg.*, 611 So. 2d 75 (Fla. 4th DCA 1982).

An agency may not attempt to resolve evidentiary conflicts, nor judge the credibility of witnesses. *See Belleau v. Dep't of Envtl. Prot.*, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Cnty. Sch. Bd.*, 652 So. 2d 894 (Fla. 2d DCA 1995). Those evidentiary-related matters are the prerogative of the ALJ as “fact-finder” in administrative proceedings. *See Heifetz v. Dep't of Bus. Reg.*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985).

An ALJ's decision to accept the testimony of one expert witness over another expert's testimony is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of competent substantial evidence of record supporting this decision. *See Collier Med. Ctr. v. Dep't of Health & Rehab. Servs.*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985); *Florida Chapter of Sierra Club v. Orlando Utilities Comm'n*, 436 So. 2d 383, 389 (Fla. 5th DCA 1983).

An agency has no authority to evaluate the quantity and quality of the evidence presented at a DOAH formal hearing, beyond making a determination that the evidence is competent and substantial. *See Brogan v. Carter*, 671 So. 2d 822, 823 (Fla. 1st DCA 1996). If the DOAH record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual finding. *See*

Dep't of Corrections v. Bradley, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987).

Finally, if there is any doubt about this high standard, chapter 120 provides for a severe penalty against an agency that improperly reverses a finding of fact:

APPEALS.—When there is an appeal, the court in its discretion **may** award reasonable attorney's fees and reasonable costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process, or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion. Upon review of agency action that precipitates an appeal, if the court finds that the agency improperly rejected or modified findings of fact in a recommended order, the court **shall** award reasonable attorney's fees and reasonable costs to a prevailing appellant for the administrative proceeding and the appellate proceeding.

§120.595(5) Fla. Stat. (2017) (emphasis supplied). So while it is *discretionary* for an appellate court to award attorney's fees in cases of a frivolous appeal or gross abuse of discretion, it is *mandatory* for an appellate court to award attorney's fees in cases when an agency reverses an ALJ's finding of fact that is supported by competent substantial evidence; and the fees awarded in such instances are for the appellate proceeding *and* the administrative proceeding below.⁷

As mentioned above, a unique feature of administrative hearings—as opposed to civil trials—is that not all evidence admitted into the record is capable of supporting a finding of fact. In an administrative hearing, it is possible for an ALJ to accept testimony or other evidence into the record, but later determine after briefing is complete that such evidence is not competent and substantial, and therefore cannot support a finding of fact. Knowing the rules of evidence in administrative proceedings is important because such knowledge enables the administrative practitioner to identify competent, substantial evidence that can support an ALJ's finding of fact, and distinguish other testimony, documents, and media that cannot support an ALJ's finding

of fact—thereby reducing the likelihood that a favorable outcome could later be reversed by an agency or an appellate court.

With this background in mind, the remainder of part I of this article reviews common issues with the introduction of evidence at DOAH.

I. Parties at DOAH Have the Right to Present Evidence

Parties have a right to present evidence at DOAH. The source of this right is chapter 120 itself. Section 120.57(1)(b) provides:

All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, to file exceptions to the presiding officer's recommended order, and to be represented by counsel or other qualified representative. When appropriate, the general public may be given an opportunity to present oral or written communications. If the agency proposes to consider such material, then all parties shall be given an opportunity to cross-examine or challenge or rebut the material.

§ 120.57(1)(b) Fla. Stat. (2017).⁸

II. How to Submit Evidence

The methods by which evidence may be presented are provided by section 120.569, Florida Statutes, and rule 28-106.213, Florida Administrative Code. Evidence may be presented by testimony under oath.⁹ Documentary evidence may be received in the form of a copy or excerpt. If a copy is submitted, the court will allow parties the opportunity to compare the copy with the original, if available.¹⁰

Video and telephone testimony are permissible “if requested and the necessary equipment is reasonably available.” Fla. Admin. Code R. 28-106.213(5). The real-world consequence of this rule is that practitioners should request by motion in advance of the final hearing for a

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witness to appear remotely and must communicate with court staff to make sure the proper equipment will be available. DOAH staff will make their best efforts to accommodate technological needs, but they must know in advance what those needs are.

III. Burden of Proof and Evidentiary Standards

A. Preponderance of the Evidence

The general rule is that the party asserting the affirmative of an issue¹¹ has the burden of proof by a preponderance of the evidence:

Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized.

§ 120.57(1)(j) Fla. Stat. Exceptions to the general rule are in license application proceedings, penal proceedings, rule challenges, and bid protests.

B. Licensure Proceedings

In a challenge to an agency's denial in an application for licensure, and in a third-party challenge to an agency's approval of an application for licensure, the applicant has the burden to prove by preponderance of the evidence that the applicant is entitled to the license. The applicant bears the "ultimate burden of persuasion of entitlement." *Dep't of Transp. v. J.W.C. Co., Inc.*, 396 So. 2d 778, 779 (Fla. 1st DCA 1981).¹²

C. Penal or Disciplinary Proceedings

In penal proceedings—for example, when an agency seeks to impose a fine, suspension, or other penalty on a person or a license—the agency bears the burden of proof by clear and convincing evidence. *See Dep't of Banking & Fin. v. Osborne Stern and Co.*, 670 So. 2d 932 (Fla. 1996).¹³

The Florida Supreme Court has

held that clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'"¹⁴ The clear and convincing evidence level of proof:

entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting with approval *Slo-mowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

D. Rule Challenges

The burden of proof in rule challenges falls on either the agency or the petitioner depending on the type of rule challenge. Section 120.56, Florida Statutes, provides for three types of rule challenges: challenges to proposed rules (rules that an agency has proposed but has not yet adopted), challenges to existing rules (rules that have been adopted by the agency and are in effect), and challenges to unadopted rules (agency statements that meet the definition of "rule" but that have not been adopted pursuant to formal rulemaking procedure).

In a proposed rule challenge, the challenger has the burden of going forward with evidence. The agency then has the ultimate burden to prove by a preponderance of the evidence that the proposed rule is valid. *See* § 120.56(2), Fla. Stat.

In an existing rule challenge, the challenger has the burden of going forward with evidence and proving by preponderance of the evidence that

the rule is invalid. *See* § 120.56(3), Fla. Stat.

In an unadopted rule challenge, the challenger's petition is required to include the text or description of the unadopted statement and provide facts sufficient to show that the statement meets the definition of an unadopted rule. If the challenger proves the allegations in its petition, the agency then has the burden to prove that rulemaking is not feasible or practicable. *See* §§ 120.56(4) and 120.57(1)(e), Fla. Stat.

E. Bid Protests

The burden of proof in bid protests likewise depends on the type of state action protested and is provided section 120.57(3)(f):¹⁵

In a protest to an invitation to bid or request for proposals procurement, no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered. In a protest to an invitation to negotiate procurement, no submissions made after the agency announces its intent to award a contract, reject all replies, or withdraw the solicitation which amend or supplement the reply shall be considered. Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, proposals, or replies, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. In any bid-protest proceeding contesting an intended agency action to reject all bids, proposals, or replies, the standard of review by an administrative law judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent.

§ 120.57(3)(f), Fla. Stat.

Conclusion

Part II of this article will examine

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issues related to the admissibility of evidence and will appear in the next issue of the newsletter.

Marc Ito is an attorney with Parker, Hudson, Rainer and Dobbs. He is in the firm's health industry practice group in the Tallahassee office. Before going in to private practice, Marc spent seven years representing various agencies of the State of Florida. During this time he represented the State in rulemaking and rule challenges under Florida's Administrative Procedure Act, federal class actions related to Medicaid, and Medicaid qui tam actions under Florida's False Claims Act.

Endnotes:

¹ The Public Counsel is an attorney appointed to represent the "general public" in proceedings at the Public Service Commission. See § 350.061, Fla. Stat. (2017).

² *Id.* at 1143.

³ "The original effective date of the Florida Evidence Code was June 1, 1977. Ch. 76-237, § 8, Laws of Fla. However, in a series of bills, the Legislature amended the original date to instead read 'July 1, 1979.' See ch. 77-77, § 1, Laws of Fla.; ch. 78-361, § 22, Laws of Fla.; ch. 78-379, § 1, Laws of Fla." *Florida Indus. Power Users Group v. Graham*, 209 So. 3d 1142, 1144 n.2 (Fla. 2017).

⁴ The Court rejected an argument by appellants that the Court should have narrowly

construed a previous PSC order as applying the rules of evidence to administrative proceedings before the PSC, and also rejected an alternative statutory construction that the "all other proceedings" language within section 90.103(2) included administrative proceedings because the case at bar was an "other proceeding" that occurred after October 1, 1981.

⁵ The competent, substantial evidence standard is addressed in part II of this article.

⁶ See § 120.57(1)(l) Fla. Stat. (2017).

⁷ This account of post-hearing administrative procedure is very much a thirty-thousand-foot view that excludes important procedural details. In 2011 and 2012, Administrative Law Judge Gar Chisenhall, published two articles aimed at attorneys new to administrative practice, one article geared more for lawyers representing the State, and another article geared more for lawyers in private practice. See *What One Can (and Can't) Do with an Unfavorable Recommended Order and Practice Tips for Private Attorneys New to Administrative Law*. Both are extremely helpful to new practitioners and are highly recommended. Both articles are available on the Administrative Law Section website: <http://www.flaadminlaw.org>.

⁸ References to Florida Statutes are to the 2017 Florida Statutes unless otherwise provided.

⁹ § 120.569(2)(g), Fla. Stat.; Fla. Admin. Code R. Rule 28-106.213(1).

¹⁰ § 120.569(1)(h), Fla. Stat.

¹¹ See *Balino v. Dep't of Health & Rehab. Servs.*, 348 So. 2d 349, 350 (Fla. 1st DCA 1977).

¹² *JWC* contains language that frequently comes up in litigation when there is a dispute over the order of presentation at trial or confusion between the terms "burden of proof" and "burden of going forward with evidence." The burden of going forward with evidence is different than the burden of ultimate

persuasion. Though this issue is beyond the scope of this article, practitioners should be aware of the following language from *JWC*:

This burden [of persuasion] is not subject to any "shifting" by the hearing officer, although it is entirely possible that a shifting of the burden of going forward with the evidence may occur during the course of the permitting proceeding. We think that part of the problem presented in this appeal stems from use of the term "burden of proof" to refer at times to the "burden of ultimate persuasion," and at other times to the "burden of going forward with the evidence."

* * *

Generally speaking, the burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case he fails.

JWC, 396 So. 2d at 787.

¹³ See also *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987); *Fox v. Dep't of Health*, 994 So. 2d 416 (Fla. 1st DCA 2008); *Kany v. Fla. Eng'rs Mgmt. Corp.*, 948 So. 2d 948 (Fla. 5th DCA 2007); *Dieguez v. Dep't of Law Enf., Crim. Just. Stds. & Training Comm'n*, 947 So. 2d 591 (Fla. 3d DCA 2007); *Pou v. Dep't of Ins. & Treas.*, 707 So. 2d 941 (Fla. 3d DCA 1998).

¹⁴ *In re Graziano*, 696 So. 2d 744, 753 (Fla. 1997).

¹⁵ The procedural intricacies of bid protests are complicated and beyond the scope of this article. For more guidance on bid protests See Edwardo S. Lombard, *Fla. Admin. Practice*, 10th Edition, §§ 11.1-11.26.