ADMINISTRATIVE LAW SECTION
Newsletter
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2018 Legislative Update: Another Quiet Year

by Larry Sellers

During the 2018 regular session, the Florida Legislature considered a number of bills affecting the Administrative Procedure Act (APA) and the practice of administrative law. Like last year, only a few were enacted and became law. Here's a brief summary of what passed and what died, including what you might see again in 2019.

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.

Ratification of AHCA and DOEA Emergency Environmental Control Rules

In the aftermath of Hurricane Irma, a number of assisted living facilities (ALFs) and nursing homes—like many places in Florida—were without power for extended periods of time and had a difficult time maintaining indoor temperatures at the required levels. Some residents suffered from overheating, and residents at one nursing home died. As a result, the agencies responsible for regulating these facilities—the Agency for Health Care Administration (AHCA) and the Department of Elder Affairs (DOEA)—proposed to adopt rules to ensure that indoor ambient temperatures will be maintained at acceptable levels following a loss of electrical power.[1]

The proposed rules[2] require ALFs (rule 58A-5.036) and nursing homes (rule 59A-4.1265) to acquire an alternative power source, such as

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From the Chair

by Robert H. Hosay

As I write, I cannot help but think how quickly this year passed. It seems like I was just writing the first "From the Chair" column yesterday and now I'm writing the last of my tenure. I will reflect on accomplishments of the Administrative Law Section ("ALS") and its many dedicated and hard-working members, but also will identify challenges and provide thoughts on how we can make the ALS a valuable part of every administrative lawyer's practice.

The goal for the year was to increase the Section's relevance to practicing lawyers, including by updating the Section's technology platforms. We took on many activities to accomplish these goals. For example, we established two awards to recognize and memorialize preeminent professionals that practice administrative law. The two awards are the S. Curtis Kiser Administrative Lawyer of the Year and the Administrative Law Section Outstanding Service Award. The establishment of these two awards was long overdue and will serve the ALS well in recogniz-

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ing lawyers in our practice area who have made and likely will continue to make a difference in our profession. Over the coming years, these awards should have a direct impact on the relevance of our Section to lawyers practicing administrative law. I must acknowledge and thank our immediate past chair, Jowanna N. Oates, for owning this project and delivering it with class.

In addition, our law school outreach committee delivered another year of successful outreach to the law schools in Florida. In my opinion, there is not a better method of being relevant to administrative lawyers than getting to incoming practitioners and providing them insight into our area of practice and sharing the value provided by the ALS. We owe our law school outreach committee chair, Judge Lynne Quimby-Pennock, and her co-chair, Sharlee Edwards, a significant "thank you" for running well-organized and thoughtful social gatherings at law schools throughout the state.

The ALS continued to deliver highly relevant and quality content in the ALS Newsletter and The Florida Bar Journal articles. Thank you to the authors, to our Newsletter editors, Judge Elizabeth McArthur and Jowanna N. Oates, and to our Florida Bar Journal editor, Stephen Emmanuel. The work of the publications committee is consistently identified as highly valuable to the ALS membership and I have to agree.

Speaking of being relevant, Bruce Lamb served as our treasurer, chair of the budget committee, and chair of the CLE committee. Thank you, Bruce, for going above and beyond and giving your time to ensure the ALS is relevant and valuable to its membership. With the support of the course co-chairs, Jonathan Harrison Maurer and Ralph DeMeo, the CLE committee recently organized the Advanced Administrative Topics program that was co-sponsored by the Environmental and Land Use Section. Also, the CLE committee organized six webinars tailored to assist those seeking administrative law board certification. Thanks to the commitment of Judge John Van Laningham, Judge Gar Chisenhall, and Kristen Klein, we had quality speakers for the designated topics. Further, the CLE committee is already working to deliver the Section's premier and respected event, The Pat Dore Administrative Law Conference to be held October 12, 2018, in Tallahassee, Florida. Thank you, Jowanna N. Oates and Judge Cathy Sellers, for serving as co-chairs for this most important event for the ALS and administrative law practitioners.

The executive council identified the need to update our technology platforms to provide up-to-date access and interfaces to the ALS. Thanks to our technology committee under the leadership of Paul Drake, we now have a completely revamped website that is much more useful to the membership and user friendly to those who visit the site. Delivery of the website required many hours of work by the technology committee, which consisted of Judge Gar Chisenhall, James Ross, Christina Shideler, Tabitha Harnage, Judge Suzanne Van Wyk, and Gregg Morton. Further, our social media presence has begun to grow with regular postings and notifications that are valuable and useful to our followers. The Section has identified technology as a key tool to ensure we are serving our membership efficiently and effectively.

I would like to recognize Tabitha Harnage for organizing events, collaborating with other organizations to expand the reach of the ALS, and demonstrating the Section's value to current and prospective members. Her service as the young lawyers committee chair is the future of the ALS. The work being done by this committee will result in growth for the ALS.

Our primary challenges are related to member engagement and growth of the ALS. This issue is not isolated to the ALS. Of the 22 sections in The Florida Bar, 21 declined in membership in 2018 despite an increase in the number of lawyers in Florida. This trend should be alarming, but it is also an opportunity for the ALS. Embracing change and aligning ALS activities to the way administrative lawyers practice will result in growth and engaged members. The challenge faced by the ALS can be overcome by the continued work of the engaged members, but we could be more effective with more members willing to serve. Serving is rewarding in many ways. There are numerous opportunities to serve. I answer our challenge with a challenge to you: 1. serve on an ALS committee; 2. position yourself to serve on the ALS executive council; 3. attend and even present at ALS CLE programs; 4. write an article for the ALS Newsletter; and 5. submit and article for publication in *The Florida Bar Journal*.

I appreciate the hard work of the ALS officers. I would have been lost and ineffective without them. It has been a pleasure working with Judge Gar Chisenhall (chair-elect), Bruce Lamb (treasurer), Brian Newman (secretary), and Jowanna N. Oates (immediate past chair). I cannot express enough appreciation for each and every one of these dedicated and service-oriented individuals. The ALS will be in good hands with Judge Chisenhall at the helm. He is intimately aware of the Section's current activities but has also been a force in our long range planning and execution of the Section's strategic plan. He engaged with enthusiasm and never hesitated to make ALS activities a priority.

I will always remember my time serving alongside this team of professionals. I will always appreciate you all for allowing me to serve as chair. I have truly enjoyed the past year and look forward to serving the Bar's hardest working and prestigious section over the years to come!

DOAH CASE NOTES

Substantial Interest Hearings

Shaguandra Ruffin Bullock v. Dep't of Child. & Fams., Case No. 18-228 (Recommended Order April 12, 2018).

FACTS: On approximately July 6, 2017, Shaguandra Ruffin Bullock filed an application with the Department of Children and Families ("DCF") to operate a family day care home. A family day care home is "an occupied residence in which child care is regularly provided for children from at least two unrelated families and which receives a payment, fee, or grant for any of the children receiving care, whether or not operated for a profit." Section 402.305(2), Florida Statutes, requires that child care personnel have good moral character. DCF elected to deny the application based on two confidential investigative summaries ("CIS reports"), one involving Ms. Bullock and the other involving her husband, Marlon Bullock. The CIS report pertaining to Ms. Bullock described an incident that occurred on approximately January 16, 2007. Ms. Bullock was going through a very difficult divorce at the time and went to her then-husband's home to retrieve her minor children. An argument ensued, and Ms. Bullock threw a car jack through the back window of her then-husband's vehicle. Although Ms. Bullock was arrested, the charges against her were dropped. The incident involving Ms. Bullock's current husband occurred on September 7, 2007, but Ms. Bullock had no knowledge of that incident until she saw the pertinent CIS report. Other than the CIS reports, DCF had no other source of information regarding the aforementioned incidents. Ms. Bullock learned of DCF's decision via correspondence dated December 8, 2017, and she requested a formal administrative hearing to contest DCF's proposed denial of her licensure application. During the final hearing, a DCF employee testified that DCF has a "policy" requiring it to deny every application for a family day care home license if a background screening reveals an incident addressed in a CIS report.

OUTCOME: The Administrative Law Judge ("ALJ") determined that DCF's policy regarding CIS reports gave the pertinent statutes a meaning that was not apparent from a literal reading, and constituted an unadopted rule because it had not been promulgated through the rulemaking process in section 120.54, Florida Statutes. As a result, section 120.57(1)(e)1., Florida Statutes, prohibited DCF from basing its denial of Ms. Bullock's application on its unadopted policy. In addition, the ALJ found that the competent, substantial evidence in the record established that Ms. Bullock and her husband are of good moral character, and ultimately recommended that the license application be approved. As for the CIS reports, the ALJ determined that they were hearsay even though DCF's records custodian provided testimony to authenticate them. As found by the ALJ, "[t]he CIS reports and the information contained therein consist of summaries of statements made by third parties to the investigators who prepared the reports. The investigators did not have any personal knowledge about the matters addressed in the reports." The ALJ also determined that the CIS reports did not fall under the business or public records exceptions to the hearsay rule. With regard to the business record exception, the ALJ noted that "[i]t is well-

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established in Florida law that investigative reports generally do not fall within the business records hearsay exception because the persons providing the information to the person preparing the report do not, themselves, have a business duty to provide that information." As for the applicability of the public records exception, the ALJ noted that "the CIS reports consist of a narrative prepared by CIS investigators, who are employees of [DCF], regarding statements made to them by third parties, ostensibly describing their actions or actions of other persons. They do not constitute factual reports 'focused on the essential functions of the office or agency,' which is a necessary element for a document to fall within this category of the exception."

Carlene Reny, Petitioner for the Estate of Anne M. Birch v. Dep't of Mgmt. Servs., Case No. 16-7617 (Recommended Order Jan. 16, 2018).

FACTS: Carlene Reny and Anne Birch began to live together in 1992 and arranged their affairs so that they jointly owned all of their significant property. Pursuant to the Broward County Domestic Partnership Act of 1999, Ms. Reny and Ms. Birch signed an Amended Declaration of Domestic Partnership on October 11, 2002, registering themselves as domestic partners. Under its Defense of Marriage Act ("DOMA"), Florida banned the recognition of same-sex marriages. After working for Broward County for nearly 30 years, Ms. Birch retired on October 23, 2012, and had to select from four options governing how her benefits would be paid. Option 1 provided the maximum retirement benefit of $3,039.25 a month for the remainder of Ms. Birch's life. Option 3 would pay a monthly benefit of approximately $2,000 until the death of Ms. Birch or her surviving spouse, whichever occurred later. Ms. Birch selected Option 1 and indicated that she was not married. Ms. Birch and Ms. Reny were lawfully married in Massachusetts on June 16, 2014. On August 21, 2014, a federal district court entered an order enjoining Florida from enforcing its DOMA. In response to the injunction, the Department of Management Services ("DMS") issued a release on April 14, 2015, to members of Florida's retirement system, stating that retirees who were in a legally-recognized same-sex marriage when they retired and chose Option 1 or Option 2 would have an opportunity to select Option 3 or Option 4 and provide a continuing monthly benefit to their spouses. Ms. Birch selected Option 3 on May 20, 2016, and died on May 24, 2016. DMS acknowledged Ms. Birch's death via a letter dated July 18, 2016, but informed Ms. Reny that all pension benefits ended with Ms. Birch's death. Ms. Reny asked DMS to reconsider its decision, but DMS denied that request on October 20, 2016. Ms. Reny requested a formal administrative hearing, and the matter was referred to the Division of Administrative Hearings ("DOAH").

OUTCOME: The Administrative Law Judge ("ALJ") concluded that neither DOAH nor DMS had subject matter jurisdiction over Ms. Reny's claim. In determining that there was no administrative jurisdiction, the ALJ concluded that "[w]ithin the meaning of section 120.569, substantial interests are determined by an agency only when the agency is substantially exercising its core regulatory duties." While acknowledging that Florida law had made the calculation and payment of pension benefits core regulatory duties of DMS, the ALJ ruled that "[i]t is questionable whether [DMS]'s core regulatory duties extend to administering rights and responsibilities under the Release, which responds to an injunction, not a statute." Accordingly, the ALJ recommended that DMS enter a final order denying Ms. Reny's request for benefits under Option 3. Via a Final Order rendered on April 6, 2018, DMS adopted the ALJ's recommendation.

Ms. Reny has appealed the Final Order to the Fourth District Court of Appeal, where the appeal has been assigned Case No. 4D18-1332.

Disciplinary/Enforcement Actions

Rule Challenges

Pelican Bay Foundation, Inc. v. Fla. Fish & Wildlife Conserv. Comm'n and City of Naples, Case No. 17-2570RP (Final Order of Dismissal Jan. 10, 2018).

FACTS: Section 379.2431(2)(n), Florida Statutes, empowers the Florida Fish and Wildlife Conservation Commission ("the Commission") to adopt rules regulating motorboat speed within waters periodically inhabited by manatees. Pursuant to that authority, the Commission sought to adopt proposed rule 68C-22.023(2)(c), which identifies waterbodies in Collier County in which a slow speed restriction will apply. The Pelican Bay Foundation, Inc. ("Pelican Bay"), filed a challenge to the proposed rule in which it argued that the proposed rule was invalid because it excluded Clam Pass and Outer Clam Bay from the slow speed restriction. However, Pelican Bay did not contend that any of the waterbodies that were listed in the proposed rule should not have been included.

OUTCOME: Section 120.56(2)(b), Florida Statutes, only allows an Administrative Law Judge ("ALJ") to declare a proposed rule wholly or partly invalid. As a result, the ALJ dismissed Pelican Bay's rule challenge because Pelican Bay did not challenge anything in the proposed rule. As stated by the ALJ, Pelican Bay "is challenging the validity of a decision made by the Commission in the rulemaking process, which is not mentioned, described, or materially shown in the proposed rule. This situation differs from one where a party requests that something be added to a proposed rule, the addition is not adopted by the agency, and the party seeks to demonstrate that the adopted provisions are invalid without the requested addition. Here, there is nothing in the proposed rule that is invalid due to the Clam Bay system not being included."

On January 29, 2018, Pelican Bay

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appealed the Final Order of Dismissal to the Second District Court of Appeal, Case No. 2D18-353.

Gerardo Castiello v. Statewide Nominating Comm'n for Judges of Compensation Claims, DOAH Case No. 17-477RU (Summary Final Order Jan. 10, 2018).

FACTS: The Governor appoints Judges of Compensation Claims ("JCCs") to conduct workers' compensation hearings. Pursuant to section 440.45(2)(c), Florida Statutes, JCCs serve four-year terms and can be reappointed, without limit to the number of times a JCC can be reappointed. In addition, section 440.45(2)(c) mandates that the Statewide Nominating Commission for Judges of Compensation Claims ("the Commission") "shall review the [JCC]'s conduct and determine whether the [JCC]'s performance is satisfactory." If the Commission finds that the JCC's performance is unsatisfactory, then the Governor shall appoint a successor judge for a four-year term. All JCCs work within the Office of the Judges of Compensation Claims ("OJCC"), a unit within the Department of Management Services, and section 440.45(4) tasks the OJCC with adopting rules for the Commission to utilize in reviewing the performance of incumbent JCCs. No such rules have been adopted, but the Commission uses a document entitled "Guidelines of Operation of the Statewide Judicial Nominating Commission" ("the Guidelines") in its review of applications of JCCs seeking reappointment. In November 2016, Gerardo Castiello, the JCC for the Miami OJCC, sought reappointment for a second four-year term. On November 14, 2016, the Commission issued a letter to the Governor stating that it was not nominating Judge Castiello for reappointment. Judge Castiello then filed a petition alleging that the Guidelines are unadopted rules utilized by the Commission to reject his reappointment application.

OUTCOME: The hearing officer assigned pursuant to section 120.65(6), Florida Statutes, to decide this matter ruled that the Guidelines are unadopted rules. In doing so, he concluded that "[t]he Guidelines contain statements of general applicability that describe the procedure and practice requirements and prescribe the law and policy of the Commission. Sections I, II, and IV-VII of the Guidelines establish the procedures and practices followed by the Commission in considering applications by incumbent [JCC]s for reappointment, as well as applications from practitioners seeking appointment to vacancies."

The Commission appealed that ruling to the First District Court of Appeal, Case No. 1D18-0458.

BASF Corp. v. Dep't of Evntl. Prot., Leon County, and the City of Tallahassee, Case No. 17-3684RP (Final Order March 2, 2018).

FACTS: In compliance with the federal Clean Water Act, section 403.067, Florida Statutes, requires the Department of Environmental Protection ("DEP") to identify waterbodies that are not meeting water quality standards. Lake Talquin is located on the border between Gadsden and Leon Counties, about 20 miles from the Florida/Georgia border. BASF Corporation ("BASF") operates a cracking clay facility in Georgia, about three miles from the Florida/Georgia border. BASF's facility discharges wastewater effluent into Attapulgus Creek, and that wastewater effluent ultimately flows into Lake Talquin. In 2009 and 2013, DEP determined that Lake Talquin was impaired for nutrients. On November 16, 2016, DEP published a Notice of Proposed Rulemaking that would establish in rule 62-304.305(5) a new Total Maximum Daily Load ("TMDL") for nutrients in Lake Talquin. This TMDL would affect Georgia facilities that discharge nutrients that reach Lake Talquin. On June 26, 2017, BASF filed a petition alleging the proposed rule is an invalid exercise of delegated legislative authority. While DEP contended that BASF's nutrient discharges are the primary reason that Lake Talquin is an impaired waterbody, DEP also contended that BASF lacked standing to challenge the TMDL. In support of this argument, DEP asserted that it has no authority to enforce a TMDL against BASF. However, under the laws and rules governing the protection of Lake Talquin, BASF will be required to comply with the TMDL.

OUTCOME: In ruling that BASF had standing to challenge the proposed rule, the Administrative Law Judge ("ALJ") noted that "Florida's courts have recognized standing when a proposed rule will have a collateral regulatory effect, even when the adopting agency has no direct regulatory authority over the challenger. For example, in Televisual Communications, Inc v. Department of Labor & Employment Security, 667 So. 2d 372 (Fla. 1st DCA 1995), the court held that a publisher of educational video programs had standing to challenge a proposed rule regulating physicians, even though the agency had no regulatory authority over the publisher, because the rule had the collateral effect of regulating the publisher by precluding the sale of its videos." However, the ALJ concluded that BASF failed to demonstrate that the proposed rule was an invalid exercise of delegated legislative authority.

Charles F. McClellan and Natasha Nemeth v. Dep't of Bus. & Prof'l Reg., Div. of Pari-Mutuel Wagering, Case No. 17-5238RU (Final Order March 7, 2018).

FACTS: The Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("the Division"), is the state agency responsible for enforcing Florida's pari-mutuel wagering laws under chapter 550. Section 550.2415(1)(a), Florida Statutes, prohibits racing an animal that has a prohibited substance in its system. In order to enforce this law, Division employees collect urine samples from racing greyhounds prior to a race and

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ship the samples to the University of Florida's Racing Laboratory ("the UF Lab") for testing. The UF Lab currently reports as "positive" any reading for cocaine metabolites at or above 10 nanograms per milliliter ("ng/mL"), and that amount is the UF Lab's current limit of quantification. Section 550.2415(7) requires the Division to "adopt rules establishing the conditions of use and maximum concentrations of medications, drugs, and naturally occurring substances identified in the Controlled Therapeutic Medication Schedule, Version 2.1, revised April 17, 2014, adopted by the Association of Racing Commissioners International, Inc." In addition, section 550.2415(7) mandates that the Division "must designate the appropriate biological specimens by which the administration of medications, drugs, and naturally occurring substances is monitored and must determine the testing methodologies, including measurement uncertainties, for screening such specimens to confirm the presence of medications, drugs, and naturally occurring substances." (emphasis added) The Association of Racing Commissioners International, Inc. ("ARCI"), is the umbrella organization of the official governing bodies for professional horse and greyhound racing in the United States. ARCI's guidelines do not contain laboratory screening limits or thresholds for cocaine and its metabolites, benzoylecgonine ("BZE") and ecgonine methyl ester ("EME").

Charles McClellan and Natasha Nemeth ("the Petitioners") train racing greyhounds, and urine samples from their racing greyhounds tested positive for BZE and/or EME. As a result, the Division filed administrative complaints against the Petitioners. The Petitioners filed a petition on September 21, 2017, challenging alleged unadopted rules and also challenging existing rules 61D-6.007 (permitted medications) and 61D-6.012 (penalty guidelines for drug violations in greyhounds) as invalid exercises of delegated legislative authority. The unadopted rule challenge count was resolved by Partial Summary Final Order (summarized in the March 2018 newsletter's DOAH Case Notes). In the existing rule challenge count, the Petitioners alleged that the Division has effectively delegated the setting of a threshold or screening limit for cocaine and its metabolites to the UF Lab. As a result, the limits of the UF Lab's ability to detect a substance in urine operates as the screening limit for disciplinary action initiated by the Division, and that circumstance is subject to change whenever the UF Lab alters its equipment or methods.

OUTCOME: The Administrative Law Judge ("ALJ") concluded that the Division's rules fail to implement the legislative directives set forth in section 550.2415(7). As stated by the ALJ, "[f]ar from exceeding its grant of rulemaking authority, the Division has declined to adopt rules that section 550.2415 mandates. Yet the Division has moved forward with disciplinary action against Petitioners because of positive urine tests for BZE and EME, based not on laboratory screening limits established by Division rule but on the UF Lab's 'limit of quantification' for cocaine and its derivatives." Accordingly, the ALJ determined that rules 61D-6.007 and 61D-6.012 are invalid to the extent they fail to comply with the mandatory rulemaking requirements of section 550.2415(7). Moreover, because the Division has failed to adopt rules mandated by section 550.2415(7), the ALJ held that the Division "cannot impose sanctions on Petitioners based upon the UF Lab's ad hoc determination of what constitutes a 'reportable' concentration of cocaine and its metabolites in the samples taken from Petitioners' greyhounds."

The Division appealed the Final Order to the First District Court of Appeal, Case No. 18-1212.

The Florida Horsemen's Benevolent and Protective Ass'n, Inc. v. Dep't of Bus. & Prof'l Reg., Div. of Pari-Mutuel Wagering, Case No. 17-5882RX (Partial Final Order March 13, 2018).

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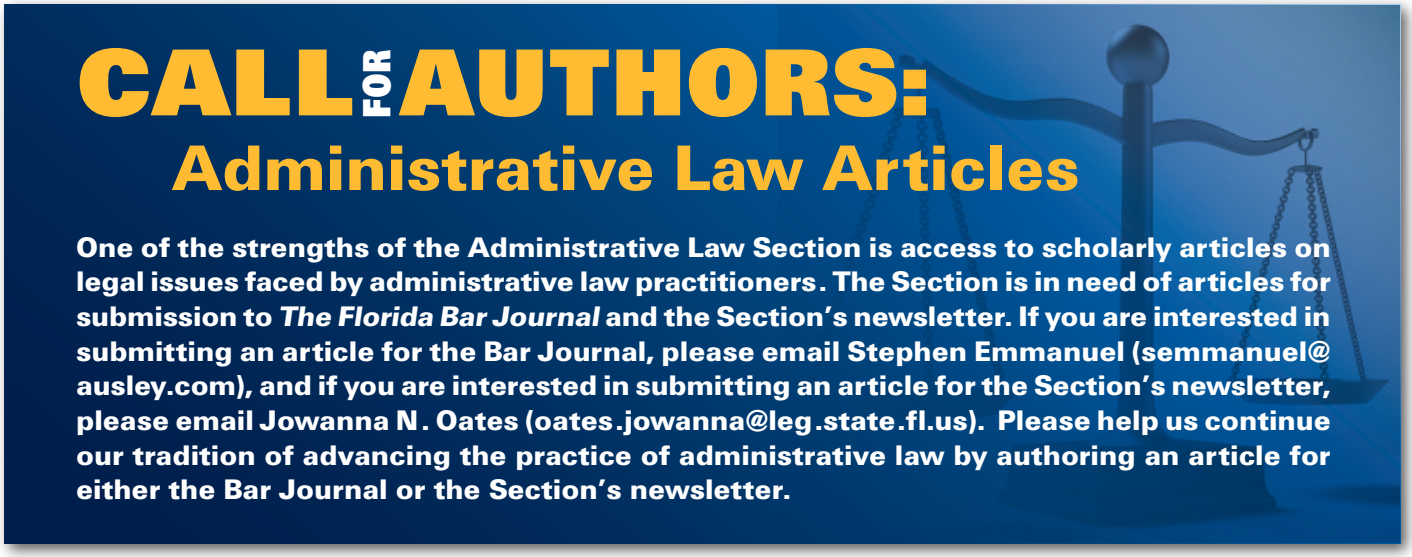

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FACTS: The Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("the Division"), is the state agency responsible for regulating pari-mutuel wagering in Florida. During the 2015 legislative session, the Florida Legislature amended section 550.2415(3)(a), Florida Statutes, so that the Division could not impose a fine "exceeding the purse or sweepstakes earned by the animal in the race at issue or $10,000, whichever is greater[.]" The Florida Legislature also amended section 550.2415(7)(c) to provide that the Division's rules "must include a classification system for drugs and substances and a corresponding penalty schedule for violations which incorporates the Uniform Classification Guidelines for Foreign Substances, Version 8.0, revised December 2014, by the Association of Racing Commissioners International, Inc. ["ARCI"]." Under the guidelines issued by ARCI, owners and trainers of racing animals can receive fines exceeding the maximum permitted under section 550.4215(3). On October 26, 2017, the Florida Horsemen's Benevolent and Protective Association, Inc., filed a petition alleging that rule 61D-6.011, the Division's penalty guidelines rule, is an invalid exercise of delegated legislative authority because it does not adopt the recommended penalties set forth in ARCI's guidelines.

OUTCOME: The ALJ found that the penalty guidelines in rule 61D-6.011 do not incorporate ARCI's recommended penalties and that "the plain language of section 550.2415(7)(c) requires the incorporation of the entire ARCI Document[.]" In response to the Division's argument that ARCI's recommended penalties cannot be incorporated into rule 61D-6.011 because some of ARCI's recommended monetary penalties exceed the statutory limit for fines set forth in section 550.2415(3), the ALJ concluded that the Division "can give credence to both [statutory] provisions by specifying in its rule that, to the extent the recommended penalty identified in the ARCI Recommended Penalties exceeds the penalty allowed in section 550.2415(3), then the limit provided in section 550.2415(3) would prevail. In any event, the perceived conflict does not divest [the Division] of its responsibility pursuant to section 550.2415(7)(c) to incorporate the entire ARCI Document into its rules."

The Division has appealed this ruling to the First District Court of Appeal, Case No. 1D18-1434.

Bid Protests

Fluor-Astaldi-MCM, Joint Venture v. Dep't of Transp. and Archer Western-DeMoya, Joint Venture, Case No. 17-5800BID (Recommended Order April 10, 2018).

FACTS: The Department of Transportation ("DOT") is the state agency responsible for soliciting competitive bids for private-public partnership projects. On February 6, 2017, DOT issued a Request for Proposal ("RFP") involving two contracts, one involving DOT and another involving the Miami-Dade Expressway Authority. The DOT contract pertained to federal interstate highways I-95 and I-395 and a portion of State Road 836 leading to and from the MacArthur Causeway Bridge. The Miami-Dade Expressway Authority contract involved a different portion of State Road 836 from Northwest 17th Avenue to the Midtown Exchange at I-95. A key component of the RFP included the construction of a "Signature Bridge," a "contemporary infrastructure icon" that would carry traffic over a portion of downtown Miami to and from the MacArthur Causeway. The winning bidder or design-build firm would draft preliminary designs, coordinate design services with DOT in order to finalize the engineering and construction plans, and construct the finalized designs. The Fluor-Astaldi-MCM ("FAM") and Archer Western-DeMoya ("AWD") joint ventures were organized specifically to respond to this RFP. After a year-long procurement process, DOT issued a notice of intent announcing that AWD was the winning proposer. FAM protested the decision.

OUTCOME: AWD argued that FAM lacked standing to contest DOT's decision because FAM's proposal was non-responsive. After analyzing several cases, the Administrative Law Judge ("ALJ") concluded that "FAM has standing to bring this protest because it has asserted [that DOT]'s procurement process was so fundamentally flawed that even if its proposal is not found responsive, a rejection of all bids would be required." Despite concluding that FAM had standing, the ALJ recommended that FAM's protest be dismissed because "there was insufficient credible evidence establishing a violation of the governing statutes, rules, policies or RFP by AWD. Nor can it be said [DOT]'s interpretation of the procurement documents or decisions regarding the process were clearly erroneous, arbitrary, capricious or contrary to competition."

Attorney's Fees

Dania Ent. Ctr., LLC, et. al. v. Dep't of Bus. & Prof'l Reg., Div. of Pari-Mutuel Wagering, Case Nos. 16-5682F, 16-5683F, 16-5684F, 16-5685F, 16-5686F, 16-5687F, 16-5688F, and 16-5689F (Partial Final Order Jan. 26, 2018).

FACTS: In DOAH Case Nos. 15-7010 through 15-7016 and 15-7022, eight different pari-mutuel wagering licensees ("Petitioners") challenged the decision of the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("Division"), to repeal rules 61D-11.001(17) and 61D-11.002(5). The aforementioned rules relate to the play of designated player games. On August 26, 2016, an Administrative Law Judge ("ALJ") ruled that the proposed repeal of rules 61D-11.001(17) and 61D-11.002(5) was an invalid exercise of delegated legislative authority. On November 8, 2017, the First District Court of Appeal issued a written opinion in Department of Business & Professional Regulation, Division of Pari-Mutuel Wagering v. Dania Entertainment Center, LLC, 229 So. 3d 1259 (Fla. 1st DCA 2017), affirming the Final Order. The Court

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also ruled that the Petitioners were entitled to attorney's fees and costs and remanded that matter to DOAH to assess the amount. After initiation of the fee proceeding at DOAH, the parties jointly requested that the proceeding be bifurcated into two phases. The first phase would determine whether the $50,000 cap on attorneys' fees established by section 120.595(2), Florida Statutes, precluded DOAH from awarding each Petitioner a separate award of fees up to $50,000. The second phase would be an evidentiary hearing to determine the amount of reasonable fees and costs to be awarded. The request was granted, and the first phase of the bifurcated hearing proceeded.

OUTCOME: The ALJ began his analysis by rejecting the parties' competing assertions that the answer to whether the cap in section 120.595(2) precluded each Petitioner from receiving a separate award of $50,000 could be discerned from the statute's plain meaning. According to the ALJ, "section 120.595(2) is not so clear as to allow for a definitive determination on its face as to whether the statute allows for multiple awards against an agency up to $50,000 when multiple parties have challenged the same proposed rule." However, the ALJ did find the bill analysis pertaining to a 2008 amendment to section 120.595 to be instructive. The ALJ concluded that "[n]ot only does the 2008 Bill Analysis suggest that the Legislature understood that an award against a party was to be limited to the capped amount but, as indicated previously, if the attorney's fee cap could create an open-ended economic impact on state agencies, it is unlikely that the committee staff would have neglected to perform an analysis of that possibility." Finally, the ALJ also considered five other DOAH Final Orders that addressed this question, and concluded that G.B. v. Agency for Persons with Disabilities, Case No. 14-4173FC (DOAH Mar. 24, 2015), aff'd, 180 So. 3d 183 (Fla. 1st DCA 2015), "provides the most direct and recent expression of the construction of section 120.595(2) by an appellate court. Thus, it is concluded that in cases such as this, in which a group of Petitioners is acting in a concerted and collective manner to achieve a common result, the total award of fees to the Petitioners, and against the agency, is limited to $50,000."

Non-Final Orders

Latoya Johnson, on behalf of and as parent and natural guardian of Rhy'lee Wilson, a minor v. Fla. Birth-Related Neurological Injury Compensation Ass'n and Orlando Health, Inc. d/b/a Winnie Palmer Hospital for Women & Babies and Ronald Eason, M.D., Case No. 16-3532N (Non-Final Orders Jan. 10, 2018; Jan. 16, 2018; and Jan. 17, 2018).

FACTS: Latoya Johnson filed a petition on May 27, 2016, seeking benefits pursuant to section 766.301, Florida Statutes, because her daughter allegedly suffered brain damage due to a birth-related neurological injury. After granting two continuances, the Administrative Law Judge ("ALJ") issued a Notice on November 22, 2017, rescheduling the final hearing for January 18, 2018, in Orlando, a date on which all parties reported they were available. On January 9, 2018, Ms. Johnson's attorneys ("Petitioner's counsel") filed a motion for continuance, stating they were in Tallahassee for a three-week trial that began on January 8, 2018, and asking the ALJ to continue the final hearing until the completion of the Tallahassee medical malpractice trial. The ALJ issued an Order on January 10, 2018, denying the motion for continuance because "[t]he schedule conflict of counsel for Petitioner, particularly when this matter has been scheduled for final hearing since November 22, 2017, on a date proposed by all parties, does not constitute good grounds for a continuance." On January 12, 2018, Petitioner's counsel filed an emergency motion for continuance, asking the ALJ to reconsider his previous denial. In support thereof, Petitioner's counsel stated that they had expected the Tallahassee case to settle prior to trial. The ALJ issued an Order on January 16, 2018, denying the emergency motion for continuance. While acknowledging that the majority of medical malpractice cases do settle, the ALJ noted that "counsel for Petitioner waited until the second day of the Tallahassee trial to file his motion for continuance." The ALJ also stated that "[h]ad counsel for Petitioner filed his motion for continuance when it first became apparent that the Tallahassee trial would indeed go forward, rather than on the second day of the trial, the undersigned would be far more sympathetic to Petitioner's plight." According to the affidavit attached to the emergency motion for continuance, Petitioner's counsel "will be presenting in excess of 100 exhibits, and calling 11 expert witnesses and 15 lay witnesses, at the medical malpractice trial. Obviously, significant advance planning for the attendance of witnesses, and presentation of evidence, would have been required. Yet, Petitioner did not deign to notify the undersigned or the opposing parties of the conflict until after the commencement of the trial. Moreover, had Petitioner offered to mitigate the inconvenience and expense being incurred by Respondent and Intervenors, as well as witnesses, in their preparation for hearing, the undersigned might take a different view of the matter." On January 17, 2018, Petitioner's counsel filed a motion for stay pending certiorari review, asking the ALJ to stay further proceedings until potential certiorari review of the ALJ's January 10, 2018, Order by the Fifth District Court of Appeal. Also on January 17, 2018, Petitioner's counsel filed a motion to disqualify the ALJ due to his refusal to continue the final hearing. The ALJ issued Orders that same day denying the motion for stay and the motion for disqualification.

OUTCOME: The Fifth District Court of Appeal issued an Order on January 18, 2018, denying the emergency motion for stay pending certiorari review and the emergency motion for review of order denying stay pending certiorari review. The administrative hearing went forward on January 18, 2018. On February 8, 2018, the Fifth District Court of Appeal issued an Order dismissing the petition for writ of certiorari.

APPELLATE CASE NOTES

By Tara Price, Gigi Rollini, and Larry Sellers

Charter Schools—Requirement to Make Factual Findings
Sch. Bd. of Palm Beach Cnty. v. Dep't of Educ., 237 So. 3d 1039 (Fla. 4th DCA 2018).

Renaissance Charter School, Inc., and Renaissance Charter High School of Palm Beach (Renaissance) applied to the School Board of Palm Beach County (School Board) to open a charter school in Palm Beach County. The School Board rejected Renaissance's application, and Renaissance appealed to the Charter School Appeal Commission (Commission). The Commission recommended that the State Board of Education (State Board) grant Renaissance's appeal, and the State Board adopted the Commission's recommendation. The School Board appealed.

The School Board raised two issues on appeal: the constitutionality of section 1002.33(6)(c), Florida Statutes (2015), as well as various evidentiary issues. The court previously ruled on the constitutionality of section 1002.33(6)(c) as it existed in 2016 in *School Board of Palm Beach County v. Florida Charter Education Foundation, Inc.*, 213 So. 3d 356 (Fla. 4th DCA 2017), and because paragraph (6)(c) was the same in both versions of the statute, the court declined to address the School Board's argument on this issue further. [For a discussion of the Fourth District Court of Appeal's opinion, see page 4 of the June 2017 Administrative Law Section Newsletter.]

Regarding the School Board's evidentiary issues, the court held that the Commission's written recommendation to reverse the School Board's denial "contained only legal conclusions." The court noted that in the School Board's previous appeal, the Commission similarly failed to make adequate factual findings to permit meaningful judicial review. The court noted that section 1002.33(6)(e)5., Florida Statutes, requires the Commission to provide a fact-based justification to the State Board, and the Commission's recommendation was insufficient because it merely stated that the School Board lacked competent substantial evidence to deny Renaissance's charter school application. Thus, the court reversed and remanded the case to allow the Commission to make factual findings consistent with the statute.

Commission on Ethics—Statutory Standards of Conduct for Local Government Attorneys
Robinson v. Comm'n on Ethics, 43 Fla. L. Weekly D687 (Fla. 1st DCA Mar. 29, 2018).

Robert K. Robinson worked as a contracted attorney for the City of North Port (City) for more than 13 years, until September 2014 when the City employed an in-house attorney. Prior to the end of his contract, Mr. Robinson drafted ordinances which he presented to the City Commission for the newly created positions of Zoning Hearing Officer and Code Enforcement Special Magistrate. Mr. Robinson argued that he was uniquely qualified for the positions, which he contended needed to be filled immediately, and he urged the City Commission to appoint him.

A City resident filed a complaint with the Commission on Ethics (COE), which investigated the complaint and found probable cause that Mr. Robinson had violated section 112.313(3), (6), (7), and (16), Florida Statutes. The COE referred the case to DOAH, and an ALJ conducted a two-day hearing. The ALJ then issued a Recommended Order finding that Mr. Robinson had not violated subsections (3) or (7) but had violated subsection (6) and paragraph (16)(c). The ALJ recommended a $5,000 penalty for each violation. After Mr. Robinson filed exceptions to the Recommended Order, the COE adopted the ALJ's findings and recommended that the Governor impose the $10,000 penalty and give Mr. Robinson a public censure and reprimand. Mr. Robinson appealed.

First, Mr. Robinson argued that the COE erred in finding that he violated section 112.313(6) because he did not act "corruptly" pursuant to the statute. The court, however, found that competent substantial evidence supported the ALJ's finding (though implicit) that Mr. Robinson acted corruptly. Mr. Robinson held a position of great influence with the City Commission for a long time and then persuaded the City Commission to create and appoint him to those positions. Moreover, the court concluded that Mr. Robinson knew or should have known that such advice was not consistent with his duties as a local government attorney because on other similar occasions, he had advised the City Commission to hire outside counsel to review the matter.

Second, Mr. Robinson argued that the COE erred in finding that he violated section 112.313(16)(c) because the COE misinterpreted the statute. Section 112.313(16)(c), in relevant part, prohibits local government attorneys from representing an individual or entity before the same local government for whom the attorney works. The key word in the statute is "represent," which the court defined to mean "actual physical attendance on behalf of a client in an agency proceeding," pursuant to section 112.312(22), Florida Statutes. The court then noted that the term "client," according to the dictionary, is defined as one who "engages the professional advice or services of *another*." (emphasis added). The court held that the term "client" should be narrowly construed and did not include Mr. Robinson's representation of himself or his law firm when he recommended that the City Commission appoint him to the new positions.

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Finally, Mr. Robinson argued the COE had abused its discretion by increasing the recommended penalty and including a public censure and reprimand. The court declined to address this issue because it reasoned the COE would need to reconsider the recommended penalty following the court's partial reversal of the COE's Final Order. Thus, the court affirmed the part of the COE's order that found Mr. Robinson violated section 112.313(6), and reversed the part of the order finding he violated section 112.313(16)(c), with instructions that the COE reconsider Mr. Robinson's penalty.

Mr. Robinson filed a motion for rehearing en banc and a motion for certification, which were denied on May 4, 2018.

Florida Real Estate Commission—Entitlement to Recovery Fund Award
Rollas v. Dep't of Bus. & Prof'l Reg., 44 Fla. L. Weekly D271 (Fla. 5th DCA Feb. 2, 2018).

In 2012, John Rollas invested money in Priority One, a residential property management company formed by Peter Voigt, a licensed real estate broker. Mr. Rollas agreed to invest money in exchange for an interest in Priority One, as well as substantially reduced property management services. In 2015, Mr. Rollas gave Priority One a no-interest loan in exchange for the receipt of property management services by Priority One or Mr. Voigt personally, at no cost to Mr. Rollas. Priority One and Mr. Voigt failed to comply with these prior agreements, but Mr. Rollas continued to loan Priority One additional funds. Mr. Rollas terminated his property management agreement in 2016 after learning that Priority One and Mr. Voigt had misappropriated rental proceeds and tenant security deposits.

Mr. Rollas sued Priority One and Mr. Voigt for the failure to repay his loans, conversion, breach of fiduciary duty, and civil theft. The trial court entered a final judgment in Mr. Rollas's favor, stating that Priority One and Mr. Voigt owed him $206,184.38, plus three-fold of his actual damages on his civil theft claims.

Mr. Rollas then filed a claim for the maximum of $50,000 from the Florida Real Estate Recovery Fund (Recovery Fund), for Mr. Voigt's misappropriated security deposits, rental proceeds, and unpaid vendor services. One of the requirements for establishing entitlement to a claim under the Recovery Fund, listed in section 475.482(1), Florida Statutes, is that the licensed real estate broker who injured the claimant must have been acting solely in the capacity of a real estate licensee in the transaction.

The Florida Real Estate Commission (FREC) held an informal hearing and denied Mr. Rollas's claim. FREC concluded that Mr. Voigt was acting in a partnership agreement or joint venture and that the property management agreement was executed to allow Mr. Voigt to repay his debt to Mr. Rollas. Thus, FREC determined that Mr. Rollas did not have an eligible claim because Mr. Voigt was not acting solely in the capacity of a real estate licensee in the transaction. Mr. Rollas appealed.

On appeal, the court noted that the Recovery Fund's provisions should be liberally construed in favor of granting a remedy to those who have suffered monetary losses due to the unscrupulous acts of licensed brokers. The court held that Mr. Rollas had presented a valid claim under section 475.482(1) because he received a final judgment in excess of $50,000 as a result of Mr. Voigt's actions, Mr. Voigt received the misappropriated rental proceeds and security deposits as a result of a real estate transaction, Mr. Voigt was the holder of an active real estate license at the time of the misappropriation, and Mr. Voigt was serving as a property manager in the real estate brokerage transaction, not as a seller, buyer, landlord, or tenant.

The court also concluded that Mr. Voigt was acting solely in the capacity of a real estate licensee when he misappropriated the rental proceeds and security deposits. The court rejected the Department of Business and Professional Regulation's (under which FREC operates) argument that Mr. Rollas should not be permitted to recover from the Recovery Fund because he was an investor in, and an owner of, Priority One. But Mr. Rollas's claim was not based on his financial losses as a result of his ownership interest in Priority One. Instead, the court held that Mr. Rollas's claim was based on his losses that occurred as a result of Mr. Voigt's misappropriation of the rental proceeds and security deposits, which Mr. Voigt received only because he was acting as a real estate licensee when collecting those funds. The fact that Mr. Rollas was receiving property management services at a reduced rate (or no charge) did not alter Mr. Voigt's obligation to ethically perform his duties as a real estate licensee. Thus, the court reversed FREC's order denying Mr. Rollas's claim and ordered FREC to approve his claim from the Recovery Fund.

Florida Retirement System—Reversal of Denial of Senior Management Service Class Benefits
New v. Dep't of Mgmt. Servs., 236 So. 3d 1154 (Fla. 2d DCA 2018).

Betty New appealed a final administrative order of the Department of Management Services (DMS) denying her request for senior management service class (SMSC) benefits in the Florida Retirement System (FRS). In 2002, New began her employment as court counsel for the Sixth Judicial Circuit, which was funded by Pinellas County and designated in the regular class of the FRS. In 2003, the county requested DMS to add New to the SMSC of the FRS, which DMS granted retroactive to her hire date in 2002. In 2004, the funding for the position of court counsel was transferred by operation of law from the county to the state. While New's functions, duties, and responsibilities did not change, DMS informed New that her prior designation and approval in the SMSC was terminated, and she was designated into the regular class until her retirement in 2015. The termination of her SMSC designation reduced her retirement benefits by $4800 annually because she was denied eleven years of SMSC credit.

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Upon retirement, New sought the additional SMSC credit. DMS denied her request on the ground that she had been an employee of the state court system only since 2004, when the funding for the position was transferred by operation of law from the county to the state, and because Florida law did not expressly provide SMSC eligibility for that position.

New requested a formal hearing, after which the ALJ recommended that New's request for SMSC benefits be denied. The ALJ reasoned that New was a county employee from 2002 to 2004 and an employee of the state court system from 2004 to 2015, making her eligible only for regular class member retirement benefits for the entire period, despite the prior grant of SMSC status to New in 2004, retroactive to 2002. DMS then entered a final order denying New's request.

The appellate court focused on whether DMS erred by denying New's request for FRS SMSC service credit from 2004 to 2015 because her employer changed as a result of the transfer of functions between state and local county government. Looking to section 121.055, Florida Statutes (2002), the court noted that while subparagraph (1)(h)(1) did not expressly list court counsel as compulsory participants of the SMSC, paragraph (1)(b) allowed DMS, in its discretion, to designate additional positions for SMSC inclusion when those positions were designated by a local agency. Finding that DMS did just that in 2003 when it granted the county's request to include New in the SMSC, the court concluded that section 121.055(2)(a) then protected New as an employee designated into the SMSC.

In so doing, the court rejected DMS's position that her position had "terminated" when the funding for her position was transferred from the county to the state. The court noted that none of her functions, duties, or responsibilities changed, and section 112.0515, Florida Statutes (2004), provides that the rights of public employees in any retirement or pension fund shall be fully protected in any transfer of functions between units of governments. The court noted that pension statutes must "be liberally construed in favor of the intended recipients," citing *Scott v. Williams*, 107 So. 3d 379, 384-85 (Fla. 2013). As a result, once New was designated into SMSC, it triggered the protections of sections 112.0515 and 121.055(2)(a), and her eligibility could not be impaired or reduced until she retired.

The court therefore reversed the DMS final order and remanded with instructions to award SMSC credits to New for the period of 2004 to 2015.

License Revocation—Agency Cannot Revoke Nursing Home License Based on Non-Statutory Timeframes for Compliance
TR & SNF, Inc. d/b/a The Nursing Ctr. at Univ. Vill. v. Agency for Health Care Admin., 238 So. 3d 934 (Fla. 1st DCA 2018).

The nursing home appealed a final order revoking its license for violating section 408.810(8), Florida Statutes (2014), by not timely providing to the Agency for Health Care Administration (AHCA) requested proof of the home's financial ability to operate. While summarily rejecting the nursing home's argument that AHCA did not have grounds to request the proof, the First District agreed that AHCA did not have authority to revoke the nursing home's license solely because it did not timely provide the requested proof.

The court held that while section 408.810(8) requires the licensee to provide proof of financial ability to operate when asked by AHCA, it does not establish a timeframe within which the proof must be provided. Thus, while the failure to provide the requested proof at all would be a violation of the statute that could justify a license revocation, the mere failure to timely provide it is not,

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particularly where case law explains that disciplinary statutes must be strictly construed with any ambiguity interpreted in favor of the licensee. Here, the nursing home provided the requested proof about a month after the administrative complaint was filed.

In so holding, the court rejected the argument that AHCA could create such a timeline by sending the nursing home a letter with a deadline, where the applicable penalty statute required license revocation to be based on a violation of a statute or a rule, *see* section 400.121(1)(a), Florida Statutes, and established Florida law holds that an agency's authority to suspend or revoke licenses is restricted to grounds enumerated in the statute.

Sunshine Law—Shade Meetings Cannot Be Abused to Reach Decision Just Short of Ceremonial Acceptance
City of St. Petersburg v. Wright, 43 Fla. L. Weekly D347 (Fla. 2d DCA Feb. 14, 2018).

The City of St. Petersburg appealed the trial court's ruling on summary judgment that city council members violated statutory notice requirements when they took up and voted to approve an ordinance amendment that had been discussed during a permissible shade meeting held just prior to that vote. The appellant, Reverend Bruce Wright, cross-appealed the trial court's ruling that the shade meeting and post-meeting vote was permissible, arguing that the council violated the Sunshine Law during the shade meeting, which was a private attorney-client session.

The shade meeting stemmed from pending litigation. The shade meeting was placed on a council public meeting agenda, but that portion was to be attended only by the city council members, the mayor, the city attorney, two assistant city attorneys, and a court reporter. When the shade meeting was held, an assistant city attorney advised the council of a way the city could eliminate exposure to potential prevailing party fees, and seek to obtain dismissal of that litigation. That advice was to approve an amendment to the city's trespass ordinance to correct the deficiencies complained of in the pending litigation.

When the council emerged from the shade session, it resumed its public meeting, at which it approved an amendment to the trespass ordinance on first reading. Several days later, the council voted final approval of the trespass ordinance amendment. The city then moved to dismiss the litigation on the ground that the recent amendment of the trespassing ordinance rendered the case moot. The lawsuit was ultimately dismissed. Wright filed suit contending that the trespass ordinance was invalid because it was conceived at a nonpublic shade session in violation of Florida law.

The Second District agreed, explaining that the purpose of Florida's Government in the Sunshine Law is to protect the public's right to be present and heard during all phases of enactments by government boards, and "to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance," citing *Monroe Cty. v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857, 860 (Fla. 3d DCA 1994). The court also noted that section 286.011(1), Florida Statutes (2011), operates to prohibit any gathering of members where the members deal with some matter on which foreseeable action will be taken.

The court also rejected the argument that the limited exemption from the open meeting requirement for meetings between a public body and its attorney applied. That exemption statute expressly requires that the subject matter of the meeting be confined "to settlement negotiations or strategy sessions related to litigation expenditures." The court noted that the exemption is limited to discussions involving the actual settlement of presently pending litigation.

Based on the transcript of the shade meeting, the court determined that the great majority of the discussion involved the specifics of a proposed amendment to the trespass ordinance. The court held that such discussions did not meet the statutory requirements for the "settlement negotiations or strategy sessions related to litigation expenditures" exemption, but rather, the shade meeting was used to crystallize a secret decision to a point just short of ceremonial acceptance, in violation of Florida's Sunshine Law.

The court therefore reversed the summary judgment and remanded for further proceedings.

Validity of FDLE Rules—Blood Alcohol Collection and Testing
Goodman v. Fla. Dep't of Law Enforcement, 238 So. 3d 102 (Fla. 2018).

The Florida Supreme Court reviewed the Fourth District Court of Appeal's decision in *Goodman v. Florida Department of Law Enforcement*, 203 So. 3d 909 (Fla. 4th DCA 2016), which certified two questions to be of great public importance on rehearing: Whether the Florida Department of Law Enforcement's (FDLE) rules were inadequate to (1) regulate proper blood draw procedures and the homogenization process to cure a clotted blood sample; and (2) specifically regulate the screening of blood samples, document irregularities, and reject unfit samples.

John Goodman's challenges to the sufficiency of FDLE's rules stemmed from a civil suit following a car accident that resulted in death. Mr. Goodman, who was driving at the time, sought to prohibit the admission of blood alcohol tests conducted following the accident, based on the type of needle used and the reliability of the tests' results. For a discussion of the Fourth District Court of Appeal's opinion, see pages 8-9 of the September 2016 Administrative Law Section Newsletter. For a brief discussion of the Fourth District Court of Appeal's certification of the above questions on rehearing, see page 7 of the December 2016 Administrative Law Section Newsletter.

Rule 11D-8.012 concerns the labeling and collection of blood. Mr. Good-

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man argued that rule 11D-8.012 was inadequate because it does not specify the gauge needle required or the tourniquet techniques that should be used. Although the Court noted that the ALJ found that various degrees of blood clotting can occur that could potentially distort the blood alcohol content of a sample, not all clotted blood samples contain reliability issues, and thus do not preclude accurate results. It is standard laboratory practice for analysts to check for clotting irregularities and take steps to account for any effect of a clotted sample. Moreover, defendants may challenge the accuracy of the test results if their samples were affected by clots or the analysts made mistakes in preparing the sample. The ALJ's factual findings surrounding the effects of blood clotting and the analysts' actions in preparing samples were supported by competent substantial evidence, and thus, the Court affirmed those findings.

The Court also analyzed whether rule 11D-8.012 was facially adequate as a matter of law and concluded that although the rule strives for scientific reliability, FDLE "need not regulate every conceivable contingency to comply with the core policy to ensure reliable results." Thus, although FDLE has the "responsibility of establishing uniform and reliable testing methods," which the Court recognized is a "weighty" responsibility, "it does not oppress FDLE with the impossible task of continuously regulating the potential existence of every theoretical problem that could occur during a blood draw." And although the rule did not regulate the needle gauge or tourniquet usage, the Court concluded that it sufficiently ensured reliable results, and that questions as to a particular test's accuracy are best determined on a case-by-case basis.

Rule 11D-8.013 concerns the minimum qualifications to be permitted as a blood analyst. Mr. Goodman argued that the rule was inadequate because it failed to specify that blood analysts must screen, document, and reject bad samples. The Court, however, disagreed, noting that the record had more than enough competent evidence to support the ALJ's finding that analysts regularly examine and document the condition of blood samples as a part of their standard laboratory practice. Mr. Goodman argued that even though these procedures are routinely performed, the rule is inadequate because it does not require the performance of those procedures. The Court rejected Mr. Goodman's argument, noting that it could lead to an "unending litany of reasons" for rejecting the rule, such as its failure to explicitly require the analysts to wear rubber gloves to prevent sample contamination, even if it were proven that every analyst did so as a matter of standard laboratory practice. The Court refused to require "FDLE to promulgate a Rule that specifically lays out every minute detail of a test," which would needlessly expand FDLE's regulations. Thus, the Florida Supreme Court affirmed the Fourth District's opinion and held that rules 11D-8.012 and 11D-8.013 were not invalid.

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Administrative Law Section

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Law School Liaison

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 the Florida State University College of Law faculty and students. It also lists the rich set of programs the College of Law hosted during the spring 2018 semester.

Recent Student Administrative Law-Related Accomplishments

- Samantha Coughlin, Barbara Harris, and Chandler McCoy will be participating in Rocky Mountain Mineral Law Foundation events this year. Barbara Harris is attending the Drafting and Negotiating the Modern Oil and Gas Lease Institute in Denver this May. Samantha Coughlin and Chandler McCoy attended the Federal Offshore Oil & Gas Leasing and Development Short Course in New Orleans this past April.
- Judah Lieblich's article *Minimum Size Restrictions are a Problem for Fisheries, is Litigation the Solution* will be published in ELR – Environmental Law Reporter News & Analysis (forthcoming June 2018). His article outlines how fishery management plans that use minimum size restrictions are in breach of the national standards of the Magnuson Stevens Act, and how litigation has the potential to end the use of minimum size restrictions, for the benefit of fish populations and all fishery users.
- Matthew Pritchett's *Comment, Federal Lands, Federal Authority: The Case for Regulation of Fracking on Federal Lands*, will be published in 36 UCLA J. OF ENVTL. L. & POL'Y (forthcoming June 2018).
- Enio Russe-Garcia's article *Managing Property Buyouts at the Local Level: Seeking Benefits & Limiting Harms*, co-authored with Thomas Ruppert, will be published in an upcoming issue of ELI's Environmental Law Reporter (forthcoming 2018). In response to news articles pointing out the challenges with voluntary buyout programs, the authors developed a model local government ordinance for Florida communities that offers a guide for communities to participate in and support buyout implementation within their boundaries in order to achieve the benefits of reduced flood risk while avoiding the most negative impacts of buyouts on communities.

Spring 2018 Events

The College of Law hosted a full slate of administrative law events and activities for the spring semester.

Environmental Law Externships Luncheon

Every year the Externships office hosts the Environmental Law Externship Luncheon for students interested in externships and volunteer opportunities in Environmental and Law Use law. This year's luncheon was held on February 6, 2018. Individuals who participated, and their organizations, include: Peter Cocotos, NextEra Energy/Florida Power & Light; Patrick Kinni, Blueprint 2000; Bonnie Malloy, Earthjustice; Louis Norvell, Tallahassee City Attorney Office; Jessica Icerman, Leon County Attorney Office; Michael Gray, U.S. Department of Justice, Environment & Natural Resources Division; Chief Judge Robert Cohen, Division of Administrative Hearings; and Judge Francine Ffolkes, Division of Administrative Hearings.

Spring 2018 Environmental Distinguished Lecture

Thomas Merrill, Charles Evans Hughes Professor of Law, Columbia Law School, presented our Spring 2018 Distinguished Lecture, entitled "The Supreme Court's Regulatory Takings Doctrine: Common-Law Constitutionalism Runs Aground" on February 7, 2018. A recording of his lecture is available on our webpage.

Environmental Certificate and Environmental LL.M. Enrichment Lectures

Justin Pidot, Associate Professor, University of Denver Sturm College of Law, gave a lecture entitled, "Suing the President to Protect the Bears Ears National Monument," on January 24, 2018. A recording of his lecture is available on our webpage.

Daniel Raimi, Senior Research Associate, Resources for the Future, and Lecturer, University of Michigan Gerald R. Ford School of Public Policy, presented "The Fracking Debate: The Risks, Benefits, and Uncertainties of the Shale Revolution" on February 21, 2018. A recording of this lecture is available on our webpage.

Mariana Fuentes, Assistant Professor, Florida State University Earth, Ocean and Atmospheric Science Department, presented a lecture titled "Sea Turtle Conservation in a Changing World" on March 28, 2018. A recording of her lecture is available on our webpage.

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.

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a generator, and sufficient fuel to ensure that ambient air temperatures will be maintained at or below 81 degrees Fahrenheit for a minimum of 96 hours in the event of the loss of primary electrical power. These facilities are required to develop a detailed plan as a supplement to their Comprehensive Emergency Management Plan and submit it to their local emergency management agency for approval within 30 days of the effective date of the rules.[3] Plans previously submitted and approved by the local agency require re-submission only if changes are made to the plan.

Facilities are required to have implemented their plan on or before June 1, 2018. AHCA must grant a facility an extension until January 1, 2019, if the facility can satisfy certain requirements under the rules.

The APA provides that a rule may not take effect until ratified by the Legislature if the rule is likely to have an adverse impact on certain criteria or to increase regulatory costs in excess of $1 million in the aggregate within 5 years after the implementation of the rule.[4]

DOEA prepared a revised statement of estimated regulatory costs (SERC) that estimated a total new one-time cost of $243 million for 2,951 ALFs to comply with its proposed rule 58A-5.036. The SERC developed by AHCA for its proposed rule 59A-4.1625 estimates an adverse economic impact of over $120 million. Accordingly, the proposed rules could not take effect until ratified by the Legislature.

SB 7028 ratifies DOEA rule 58A-5.036 and **HB 7099** ratifies AHCA rule 59A-4.1625 solely to meet the conditions for effectiveness imposed by the APA.[5]

Both Acts became effective on March 26, 2018. Chapter 2018-122 and Chapter 2018-123, Laws of Florida.

Ratification of SJRWMD Rule 40C-2.101

HB 7035 ratifies the St. Johns Water Management District (SJRWD) proposed rule 40C-2.101, which establishes a prevention strategy for Silver Springs, an Outstanding Florida Spring. The strategy includes the development of additional water supplies and other regulatory action to prevent the existing flow or water level from falling below the established minimum flow and water level.

The SERC prepared by SJRWMD indicates that the adverse impact or regulatory cost of the proposed rule will exceed $1 million within five years after implementation. Accordingly the proposed rule was required to be submitted to the Legislature and could not take effect until ratified by the Legislature.

The Act became effective on March 19, 2018. Chapter 2018-41, Laws of Florida.

Trauma Centers (HB 1165)

HB 1165 makes major changes to the state's trauma system, in part to reduce the extensive litigation relating to the Department of Health's apportionment of trauma centers needed in a particular trauma service area, as well as litigation relating to the designation of specific hospitals as trauma centers. The bill limits the number of trauma centers in the state to 35. The bill also provides a process for approving trauma centers in excess of the statewide cap based upon current population, trauma case load, and expected population growth. HB 1165 also requires DOH to analyze the trauma system every three years, and to determine if additional trauma centers are required. The bill restricts legal challenges to DOH's decisions relating to the trauma system to applicants and existing trauma centers in the same trauma service area or a contiguous trauma service area.

The bill requires DOH to immediately verify and designate hospitals meeting certain criteria, and it effectively "grandfathers" these facilities. Soon after the passage of the law, DOH verified a hospital as a Level I Trauma Center in accordance with HB 1165, which in turn resulted in the dismissal of a pending administrative proceeding.[6]

HB 1165 provides that if any of the provisions related to the grandfathering are determined to be invalid, then the remaining provisions of the bill are deemed to be void and of no effect.[7]

The Act became effective on March 21, 2018. Chapter 2018-66, Laws of Florida.

Education/Certain Disputes Between School Districts and Charter Schools

HB 7055 is a lengthy measure dealing generally with education. Among other things, the bill revises the hearing procedures once a charter school receives its notice of termination or nonrenewal by removing the option for the school district to conduct the hearing itself. Instead, the hearing must be conducted by an administrative law judge (ALJ) within 90 days after receipt of the request for hearing, and the ALJ (not the school district) issues the final order. The ALJ also must award the prevailing party reasonable attorney's fees and costs incurred during the administrative proceeding and any appeals.

The bill also revises the process for resolving disputes regarding a contract to provide goods and services between the school district and a charter school. If the dispute cannot be resolved through mediation, an appeal may be made to an ALJ appointed by the Division of Administrative Hearings, rather than the Charter School Appeal Commission. The ALJ has final order authority to rule on the dispute and shall award the prevailing party reasonable attorney's fees and costs incurred during the mediation process, administrative proceeding, and any appeals, to be paid by the non-prevailing party.

The Act became effective on July 1, 2018. Chapter 2018-6, 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 bills passed the House and key Senate Committees and might be considered (yet)[8] again in 2019.

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APA/Agency Rulemaking/ SERC

Under current law, an agency is required to prepare a Statement of Estimated Regulatory Costs (SERC) only if there is an adverse impact on small business or if the proposed rule is likely to directly increase regulatory costs in excess of $200,000 in the aggregate within one year after implementation of the rule.[9] **HB 83 and SB 912** would have required an agency to prepare a 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 83 passed the House; SB 912 was reported favorably by the first of three committees. Similar legislation also passed the House, but not the Senate, in 2017.[10]

Certificates of Need (CON)

HB 27 and SB 1492 would have eliminated certificate of need (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 27 passed the House; SB 1492 was not heard in committee. Similar legislation also passed the House, but not the Senate, in 2017.[11]

Attorney's Fees in Certain Administrative Proceedings

Regular readers will note that almost every year some legislation is introduced to require an award of attorney's fees and costs to the prevailing party in an environmental permit proceeding.[12] This session was no exception. This year's version, **HB 7063**, related to natural resources, would have amended section 403.412(5), Florida Statutes, the Environmental Protection Act, to authorize a prevailing party to receive reasonable costs and attorney's fees in an administrative proceeding from an intervenor when the intervenor is a non-prevailing adverse party, as determined by the ALJ.

This provision subsequently was deleted from the bill, and the bill was not enacted.

JAPC Recommendations for Changes to the APA: Periodic Review of Agency Rules and Electronic Filing at DOAH

HB 941 and SB 1410 include recommendations from the Joint Administrative Procedures Committee (JAPC) for changes to the APA. Among other things, this legislation would have required each agency to periodically review its rules for consistency with the powers and duties granted by the applicable enabling statutes.

The bills also would have required the Division of Administrative Hearings (DOAH) to serve all documents on all parties of record. Parties to the proceeding who file electronically are then relieved of the duty to serve other parties who are registered for electronic filing.

HB 941 passed the House; SB 1410 was never heard in committee.

DOAH/Appointment of ALJs

In its last committee of reference, **HB 941** was amended to make significant changes to the process for appointing and reappointing administrative law judges at DOAH. This new process appears to be modeled after that currently used to appoint and re-appoint judges of compensation claims (JCCs).[13]

Currently, ALJs are employed by DOAH. As amended, HB 941 would have required the Governor and Cabinet to appoint ALJs from nominees recommended by a nominating commission. The bill also would have specified the composition of the commission and the process by which the members of the commission would be appointed.

As amended, HB 941 would have specified the length of the ALJs' terms of office (four years) and would have reclassified ALJs from career service to select exempt service employees. The bill also specified that an ALJ may be removed for 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 and Cabinet, who then would determine whether to re-appoint the ALJ for another four-year term. The bill also established a process by which the Governor and Cabinet would appoint the currently sitting ALJs for staggered terms beginning July 1, 2019.

As noted, HB 941 passed the House; it was never considered in the Senate. Similar legislation also passed the House, but not the Senate, in 2017.[14]

Procurement Procedures for Transportation-Related Entities

SB 544 would have required transportation-related entities created under chapters 343, 348, or 349, Florida Statutes, to use the Uniform Rules of Procedure adopted pursuant to section 120.54(5), Florida Statutes, for the resolution of protests arising from certain contract solicitations or award processes. The Uniform Rules would apply to any procurement exceeding the Category Five threshold amount ($325,000), or if the term of the procurement, including the number of days specified in the initial contract and the number of days specified in any authorized contract extension or renewal, exceeds 365 days.

SB 544 was reported favorably by its first committee of reference.

Regulatory Reform/Red Tape Reduction Advisory Committee

HB 791 and **SB 1268** would have created a Red Tape Production Advisory Council within the Executive Office of the Governor. The Council would be required to annually review the *Florida Administrative Code* to determine whether any rules are duplicative, obsolete, or especially burdensome to business, or disproportionately affect businesses with

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fewer than 100 employees or revenue below $5 million. The bills would have provided that if the Council were to find that a rule meets one or more of these criteria and that it can be repealed or amended with minimal impact on public health, safety, and welfare, the Council would have been required to recommend repealing or amending the rule. The Council also would have been required to provide an annual report with its rule recommendations to the Governor, the President of the Senate, Speaker of the House of Representatives, and to the Joint Administrative Procedures Committee for the purposes of publishing the report.

The bills also would have required JAPC to establish a regulatory baseline in the APA, consisting of the total number of agency rules that are in effect on January 1, 2019. Once this baseline had been established, the adoption of a proposed rule would not have been allowed to cause the total number of rules to exceed this regulatory baseline. If an agency proposes a rule that would exceed the regulatory baseline, the agency would have been required to submit a rule replacement request, by proposing to repeal one or more existing rules to maintain the regulatory baseline. An agency would also have been allowed to request that a proposed rule be exempt from the regulatory baseline by submitting an exemption request to JAPC. However, JAPC would not have been authorized to approve an exemption request or a rule replacement request that provides fewer than two rules for repeal or replacement until the total number of rules was 35 percent below the regulatory baseline. JAPC would have been required to submit an annual report providing the percentage reduction and the total number of rules compared to the regulatory baseline. In addition, each agency's annual regulatory plan would have been required to identify existing rules that may be appropriate for future repeal to maintain the regulatory baseline. Finally, the bill would have required JAPC to examine each existing rule for compliance with the APA every four years.

The House bill was reported favorably by its first two committees of reference. The Senate bill was never heard.

Deregulation/Criminal Proceedings/Declaratory Statements

HB 1041 would have made a number of changes to the laws governing certain professions and business organizations regulated by the Department of Business and Professional Regulation (DBPR). Among other things, the bill would have revised the current application procedures for certain professions by: (1) expressly permitting a person to apply for a license while under incarceration or supervision; (2) generally limiting the period during which the agency may consider criminal history as an impairment to licensure; and (3) requiring the licensing agency and the Department of Corrections to make accommodations for applicants incarcerated or under supervision to appear by telecommunication at a licensing hearing.

HB 1041 passed the House, but died in the Senate.

HB 15 also would have amended current law relating to certain professions and business organizations regulated by DBPR, including removing a variety of professions from DBPR regulation, including hair braiders, hair wrappers, body wrappers, nail polishers, make-up applicators, boxing announcers, and boxing timekeepers. The bill also would have eliminated the requirement that certain licensees obtain a certificate of authorization for their business entities, including asbestos abatement consultants and contractors, architects, interior designers, landscape architects, and geologists. And it would have reduced the hours of training required to obtain licenses for barbers, restricted barbers, nail specialists, facial specialists, and full specialists. The bill would have clarified the definition of and scope of practice for the following professions: restricted barbers, nail specialists, full specialists, facial specialists, and hair braiders.

HB 15 passed the House, but died in the Senate.

SB 1114 also included a number of similar proposed changes to the regulatory requirements for various professions and occupations. The bill also would have permitted a person to submit a petition for declaratory statement to any Florida agency to determine the effect of a criminal background on his or her eligibility for occupational or professional licensure.

The bill was reported favorably by the first two committees of reference.

What is in store for the 2019 session? Some of the bills that failed to pass this year also died in 2017. Will the third time be the charm? Or strike three? Stay tuned!

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

Endnotes:

[1] The proposed rules were published following the adoption of emergency rules, which were determined to be invalid. *Florida Association of Homes and Services for the Aging, Inc., d/b/a Leading Age Florida v. Agency for Health Care Administration and Department of Elder Affairs,* Case No. 17-5388RE (Fla. DOAH Oct. 27, 2017). Among other things, the ALJ determined that the agencies failed to demonstrate the existence of an immediate danger and that petitioners proved that the emergency rules are invalid because they are arbitrary and capricious, vest unbridled discretion in the agencies, and contravene the laws they purport to implement.

[2] The proposed rules also were the subject of a legal challenge. *Florida Senior Living Association v. Dep't of Elder Affairs*, DOAH Case No. 17-6835RP (filed Dec. 15, 2017). Thereafter, the proposed rules were changed in several respects, and the challenge was dismissed due to these changes.

[3] The rules became effective on March 26, 2018.

[4] § 120.541(3), Fla. Stat.

[5] Other bills were filed to require emergency power for healthcare facilities (e.g., SB 284 and HB 327) and to require the Public Service Commission to ensure that public utilities effectively prioritize the restoration of services to certain healthcare facilities (e.g., SB 372 and HB 655). None were enacted in 2018.

[6] *See e.g.*, *Public Health Trust of Miami-Dade County, Florida, et al. v. Department of Health*, DOAH Case No. 16-3370 (Order

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Closing Files and Relinquishing Jurisdiction, April 11, 2018).

[7] On May 10, 2018, a complaint for declaratory and injunctive relief was filed seeking a declaration that section 395.4025(16)(c), as established by section 6 of the bill, is an unconstitutional special law and a prohibited grant of a privilege to a private corporation. *Variety Children's Hospital d/b/a/Nicklaus Children's Hospital v. Department of Health*, Case No. 2018 CA 001072 (2d. Jud. Cir. Leon County).

[8] Several of these measures that did not pass in 2018 were also considered in prior years.

[9] *See* §§120.54(3)(b)1 and 120.541(1)(b), Fla. Stat.

[10] *See* HB 1163 (2017) and SB 1640 (2017).

[11] *See* HB 7 (2017) and SB 676 (2017).

[12] *See, e.g.*, SB 996 (2017) and HB 997 (2017).

[13] *See* § 440.45, Fla. Stat. The decision of the Statewide Nominating Commission for Judges of Compensation Claims not to recommend the re-appointment of a judge of compensation claims 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 (Final Order Jan. 10, 2018) (determining that Commission guidelines are unadopted rules), *appeal pending* in *Statewide Nominating Comm'n for Judges of Comp. Claims v. Castiello*, Case No. 1D18-0458 (arguing the SNCJCC is not a state agency); *Castiello v. Statewide Nominating Comm'n for Judges of Comp. Claims*, DOAH Case No. 17-1248 (petition for formal administrative proceeding filed Feb. 8, 2017; stayed pending related appeal in Case No. 1D18-458); *Castiello v. Div. of Admin. Hearings and Off. of Judges of Comp. Claims*, DOAH Case No. 18-2485RP (proposed rule challenge petition filed May 11, 2018). *See also Castiello v. Fla. Div. of Admin. Hearings*, Case No. 1D17-2722 (Fla. 1st DCA Oct. 11, 2017) (dismissing petition for writ of mandamus), *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.).

[14] *See* HB 1225 (2017) and SB 1352 (2017).