ADMINISTRATIVE LAW SECTION
Newsletter
Vol. XLII, No. 1 Jowanna N. Oates and Tiffany Roddenberry, Co-Editors September 2020

2020 Legislative Update: Another Quiet Year?

By Larry Sellers

The 2020 legislative session was another quiet one for administrative lawyers. The legislature enacted some modest changes to the Administrative Procedure Act (APA), and it approved a few other measures of interest to administrative practitioners. The legislature also considered, but did not pass, several other bills—including some filed in prior years. Comprehensive legislation that would transfer many of the functions of the Governor and Cabinet to the Governor or other agencies controlled by the Governor was filed but never heard. Here's a brief summary of what passed and what died, including what you might see again in 2021.

Bills That Passed

Two bills passed that amend the APA.

Quorum Requirements for RPCs

In something that may become much more common, **CS/SB 1398** amends the APA to address quorum requirements for meetings of the regional planning councils by authorizing members to participate via communications media technology under certain circumstances. The bill provides requirements for establishing a quorum for meetings of the councils when the voting member appears via telephone, real-time video conferencing, or similar real-

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From the Chair

By Bruce D. Lamb

As we begin what must be the most unusual of Bar years I am excited to serve as your Chair. First, I would like to thank the Immediate Past Chair Judge Brian A. Newman for his leadership and service. In addition to his responsibilities as the Chair, Brian continued the development of the DOAH trial academy, which I believe will become a signature program for the Section. I would also like to thank the members of the Executive Council with terms expiring in 2020, Paul Drake, Francine M. Ffolkes, Tara Price, Gigi Rollini, and Collin Roopnarine for their service to the Section. Many thanks must be extended to the Ad Hoc Uniform Rules of Procedure Committee for its tireless devotion and multiple meetings. The Committee, chaired by Larry Sellers with Paul Drake serving as reporter, also included Seann Frazier, Shaw Stiller, and Administrative Law Judges Yolonda Green, Elizabeth McArthur, Lisa Nelson, and David Watkins.

Having served as the Chair of the CLE Committee since 2013, I have stepped aside and appointed Brittany Adams Long as the new Chair. She has also agreed to serve as the Section's representative to The Florida Bar CLE Committee. The COVID-19

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crisis has significantly impacted our 2020 CLE presentations. The Advanced Topics Seminar has been delayed until November. Hopefully, we can move forward with a live presentation at that time. After careful consideration and previous postponements, the steering committee of the Pat Dore program has decided to convert that program into a webinar series that will be presented as soon as possible.

The Long Range Planning Committee created several programs in an attempt to grow the Section membership and open it up to wider active participation. The Administrative Law Section Outreach Program in Tallahassee and Young Lawyers Committee have been very successful. There are many to thank for the success, but I believe Tabitha Jackson should be recognized. The South Florida chapter of the Administrative Law Section has developed quickly under the leadership of Sharlee Edwards and others. During this year, I hope to begin the development of a Central Florida chapter. Katherine McGinnis has agreed to assist me in organizing the Central Florida chapter. Regrettably, our plans have been delayed as we would like to include some type of live mixer to begin this program.

As many of you are aware, I am also a member of the State and Federal Government and Administrative Practice (SFGAP) Certification Committee. The SFGAP Certification Committee has been very responsive to the Administrative Law Section's desire to revise the certification and examination requirements in an attempt to grow the number of certified attorneys. Judge Gar Chisenhall has been a tireless advocate for this plan. Significant progress has been made. The Certification Committee has already revised the content of the examination to place increased emphasis on Florida practice over federal practice. The examination is now 80% Florida practice based, and there are no federal essay questions currently. The Certification Committee is also moving forward with a plan to revise the standards for qualifying to sit for the examination and to rename the certification itself, possibly to Florida Government and Administrative Law Certification. These changes require amendments to the standards for board certification which must be approved by the Board of Legal Specialization and Education (BLSE) and ultimately the Board of Governors. The rule changes have been drafted and submitted at a meeting of the BLSE. This resulted in some additional revisions and inquiries to other sections. The SFGAP Certification Committee is hopeful that this process will move forward during 2020 to completion. The Section has also focused continuing education programs on exam preparation and is working on a project to provide study materials via links on the Section's website. Many thanks to Angela Morrison, Gregg Morton, Megan Silver, and Judge Chisenhall for rounding up study materials and shepherding this project.

In conclusion, your Section needs your active participation, perhaps now more than ever. Many significant projects have been initiated to expand the activities of the Section in an attempt to grow our membership. I would also like to thank those of you who volunteered to serve on the committees of the Section. A posting of committee membership rosters is available on our website. Please reach out to the other members of your committee and develop plans to further our primary goal of increased membership and service. Thank you for the opportunity to serve as your Chair.

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

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APPELLATE CASE NOTES

By Tara Price, Melanie Leitman, Gigi Rollini, and Larry Sellers

Attorney's Fees—Prevailing Party Provision in Charter School Termination Statute Does Not Apply to Administrative Proceedings Commenced Before Effective Date

Sch. Bd. of Palm Beach Cty. v. Bakst, 294 So. 3d 923 (Fla. 4th DCA 2020).

Eagle Arts Academy, Inc. (Eagle) formerly operated a charter school in Wellington, Florida, sponsored by the Palm Beach County School Board (School Board). The term of the charter school contract was for five years, ending June 30, 2019.

The statute governing the termination of a charter provides for two types of terminations: (1) the nonrenewal or termination of a charter within 90 days, and (2) the immediate termination of a charter where the health, safety, or welfare of the students is threatened. On March 16, 2018, the School Board initiated the 90-day termination proceeding based on Eagle's alleged failure to meet generally accepted standards of fiscal management. In its 90-day termination notice, the School Board indicated that it was terminating the contract due to Eagle's past due invoices, failure to pay rent for its school facility, declining enrollment, and failure to timely present a balanced budget. The School Board also informed Eagle of its right to request a hearing on the proposed termination. Eagle filed a petition for a hearing and the School Board referred Eagle's request for hearing to DOAH. The hearing was ultimately set for August 9 and 10, 2018.

Meanwhile, on July 1, 2018, the applicable termination provision of the charter school statute was amended in part. One key amendment was the addition of a fee-shifting provision requiring the ALJ to award the prevailing party reasonable attorney's fees and costs incurred during the administrative proceeding and any appeals.

On August 1, 2018, while the 90-day termination proceeding was still pending, the School Board voted to immediately terminate Eagle's charter contract pursuant to the alternate, immediate termination process authorized by statute. Under this statutory provision, section 1002.33(8)(c), Florida Statutes, immediate termination of a charter is authorized if a sponsor sets forth in writing the particular facts and circumstances indicating that an immediate and serious danger to the health, safety, or welfare of the charter school's students exists. The primary grounds for immediate termination set forth in the notice were Eagle's eviction from a school facility for nonpayment of rent and failure to provide sufficient notice or proof that it had secured a new facility for the imminent start of school.

The School Board then filed a notice of dismissal of the 90-day termination proceeding as moot. Eagle filed a response in opposition to the notice of dismissal, and the ALJ held a hearing. Eagle advised that it reserved all its rights with the School Board's voluntary dismissal, but had no objection to the file being closed. Eagle also then announced that it planned to move for attorney's fees as the prevailing party. The School Board objected. The ALJ subsequently entered an order granting the School Board's motion to dismiss the proceedings related to the no-longer pending 90-day termination.

In a separate order, the ALJ ruled on Eagle's entitlement to attorney's fees and costs pursuant to the 2018 version of section 1002.33(8)(b), concluding that, while the fee-shifting provision of the 2018 statute was not intended to be retroactive, the triggering event for Eagle's entitlement to fees was the entry of the ALJ's dismissal order, which occurred after the effective date of the 2018 statute. The ALJ further concluded that Eagle was the prevailing party in the proceeding by virtue of the School Board's voluntary dismissal of its administrative complaint.

On appeal, the court reversed. The court agreed that the statute was not intended to, and should not be, applied retroactively. However, it noted that the 2018 statute provided that the ALJ shall award the prevailing party reasonable attorney's fees and costs incurred "during the administrative proceeding," and the court found that, as a substantive change in the law, the 2018 statute did not apply to administrative proceedings commenced before its effective date. In this case, the parties had been litigating the termination proceeding for several months when the statute took effect. Accordingly, the court held that the application in this case was an improper retroactive application of the 2018 statute and it reversed the order of attorney's fees and costs to Eagle.

Fact Finding—Essential to Set Forth Factual Findings Prior to Making Good Cause Determination

A.C. v. Agency for Health Care Admin., 45 Fla. L. Weekly D1621a (Fla. 3d DCA July 8, 2020).

A.C. is a disabled 13-year-old minor who had received medically necessary benefits for years through the Florida Medicaid Prescribed Pediatric Extended Care Program. A.C.'s provider though that program requested that A.C. receive occupational therapy services from eQHealth Solutions (eQHealth), the Agency for Healthcare Administration's (AHCA) contractor for medical necessity determinations for benefits. eQHealth denied A.C.'s request because some of the requests were untimely and other requests were missing a physician's signature or clarification of the requested hours.

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eQHealth told A.C. she had the right to have the decision reconsidered and to request a Medicaid fair hearing.

Subsequently, A.C.'s physician provided an additional 17 pages of information to AHCA, specifying a total number of requested hours and including a dated physician's signature. eQHealth again denied the requested services, stating that it could not provide a proper review because A.C. was receiving occupational therapy services from another provider who did not provide clarification to the agency. The second denial again informed A.C. of her right to a Medicaid fair hearing.

A.C. requested a Medicaid fair hearing, and the hearing officer issued a show cause order threatening dismissal because her mother had not filed a written authorization to be A.C.'s designated representative. A.C.'s mother sent in the written authorization and additional information from A.C.'s occupational therapist. The hearing officer issued another order to show cause after A.C.'s mother did not show for the scheduled hearing, and A.C.'s mother timely explained that she had become disabled and had a Social Security income appointment at the same time for which she had no notice. The hearing officer determined that A.C.'s mother's explanation was not good cause and issued a final order stating that A.C.'s fair hearing request was abandoned. A.C.'s mother sought judicial review.

The court held that the hearing officer's final order was deficient because it did not set forth specific findings of fact that would allow the court to review the hearing officer's legal conclusion. The hearing officer departed from the essential requirements of the law by failing to determine the facts and circumstances surrounding A.C.'s mother's explanation. Specifically, the hearing officer was obligated to determine why or how A.C.'s mother became disabled prior to ruling that she lacked good cause to miss the fair hearing. Thus, the court reversed and remanded the case for the hearing officer to engage in additional fact finding surrounding A.C.'s mother's absence at the fair hearing and whether A.C.'s mother had demonstrated good cause.

Liquor Licensure—Statutory Authority to Limit Scope of Regulated Activity & Propriety of Declaratory Statement
MB Doral, LLC v. Dep't of Bus. & Prof'l Regulation, 298 So. 3d 132 (Fla. 1st DCA 2020).

The Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (DABT) issued a final order determining that licensed vendors like M.B. Doral d/b/a Martinibar could not receive deliveries of alcohol at catered events.

Martinibar holds a "quota" liquor license which authorizes it to sell alcohol at certain catered events "without any additional licensure." § 561.20(2)(a)5, Fla. Stat. (2018). Martinibar intended to receive deliveries from alcohol distributors directly onsite at large catered events, such as music festivals and sporting events, and sought a declaratory statement from DABT approving this practice. Martinibar's position was that onsite deliveries from distributors are critical because they eliminate extra costs and logistics associated with receiving deliveries off-site and then transporting to the event site.

DABT's order concluded that licensed vendors cannot receive alcohol deliveries directly to catered events. DABT acknowledged that nothing in the Beverage Law, chapter 561, Florida Statutes, addressed the circumstance that Martinibar presented, but nonetheless concluded the deliveries are unlawful—it opined that the legislature's silence indicated a prohibition of deliveries to anywhere other than a licensed premises.

The First District found no merit to DABT's position, holding that the Beverage Law contains no restrictions on the time, location, and manner of deliveries from distributors, so long as they are made in a licensed vehicle. In fact, the law does not even require delivery to a licensed premises. The court refused to accept the legislature's silence on time, location, and manner of delivery as imposing any restrictions thereon. As such, the court reversed DABT's declaratory statement to the extent that it prohibited on-site delivery at catered events where it is lawfully serving alcohol.

Intervenors to the case argued that DABT's issuance of a declaratory statement was improper, as it amounted to a rule of general applicability, and thus instead of issuing a declaratory statement DABT should have addressed Martinibar's inquiry through rulemaking. The court rejected this argument, finding that even when faced with a petition for declaratory statement that would have a broad and general application so as to meet the definition of a rule, an agency must still issue a declaratory statement in addition to initiating rulemaking. An agency cannot avoid issuing a declaratory statement merely because it affects other regulated parties.

Medicaid Reimbursement—Agency's Challenge to ALJ's Use of Pro Rata Formula Was Not Preserved for Appellate Review—Trial Court Improperly Reduced Agency's Recovery Based on Attorney's Fees and Costs
Agency for Health Care Admin. v. Rodriguez, 294 So. 3d 441 (Fla. 1st DCA 2020).

Abraham Rodriguez was permanently injured and partially paralyzed in a motor vehicle crash. The Agency for Health Care Administration (AHCA) paid $154,219 in Medicaid benefits for Rodriguez's medical expenses, constituting his total past medical expenses. Rodriguez filed a products liability lawsuit against Ford Motor Company and others. His lawsuit was settled for $500,000. The settlement did not differentiate between types of damages, attorney's fees, or costs but was a "global resolution" of the lawsuit.

AHCA sought reimbursement for its Medicaid expenditures from Rodriguez's settlement. The formula set out in section 409.910(11)(f), Florida Statutes, would result in

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AHCA's recovery of $126,021.55 from the $500,000 settlement. However, Rodriguez contested the amount designated as recovered medical expense damages payable to AHCA, pursuant to section 409.910(17)(b). He filed a petition with DOAH, seeking a reduction of AHCA's reimbursement to $12,800—the portion of his settlement he alleged was properly allocated to past medical expenses. Rodriguez arrived at his proposed recovery amount of $12,800 using a pro rata analysis of the value of his lawsuit compared to the settlement amount, and then applying the same proportion (8.3%) to his total past medical expenses paid with Medicaid funds ($154,219).

In the final order, the ALJ found that Rodriguez had proved the value of his civil case was $6 million, consisting of $154,219 of past medical expenses, $2.1 million of future medical expenses, $800,000 of lost wages and loss of future earning capacity, and about $2.95 million of noneconomic damages, including pain and suffering and loss of consortium. The ALJ further found that the settlement of $500,000 constituted a "settlement discount" of 91.7% of the $6 million value of Rodriguez's civil case. The ALJ then calculated that reducing the past medical expenses of $154,219 by 91.7% yields about $12,800, which the ALJ accepted as AHCA's recovery. In the final order, the ALJ also accepted the parties' stipulation that Rodriguez had incurred $147,000 in attorney's fees and $122,956 in costs in the course of the civil litigation. The ALJ found that since Rodriguez's fees and costs represented approximately 54% of his $500,000 settlement, AHCA's $12,800 recovery should be further reduced by 54% resulting in $5,800 recovery for AHCA.

The court affirmed the ALJ's finding that the Rodriguez proved the damages, attorney's fees, and costs recovered from the settlement of his civil lawsuit, including the portion of the settlement proceeds representing past medical expenses. The court also affirmed the ALJ's finding that AHCA's recovery for past medical expenses, reduced by the same proportion as the ratio of the value of the settlement to the value of the civil lawsuit, was $12,800. The court found that AHCA did not object during the administrative hearing to the pro rata formula used to calculate AHCA's reduced recovery, and therefore had failed to preserve this issue for appeal. However, the court found error in the ALJ's additional reduction of AHCA's recovery to $5,800 because of attorney's fees and costs incurred in the civil lawsuit, as this was not requested by Rodriguez. Accordingly, the court set aside this portion of the final order and remanded for an order providing that AHCA shall recover $12,800.

Medical Marijuana Licensure—No Entitlement to Default Licenses
MedPure, LLC v. Dep't of Health, 295 So. 3d 318 (Fla. 1st DCA 2020).

MedPure, LLC and Green Point Research (Appellants) appealed the Department of Health's (DOH) dismissal of their petitions for formal administrative hearings following DOH's denial of their requests for licensure to operate a Medical Marijuana Treatment Center (Center).

Following the circuit court's ruling in *Fla. Dep't of Health v. Florigrown, LLC*, No. 2017 CA 002549 (Fla. 2d Cir. Ct.), Appellants in 2018 wrote DOH letters requesting licensure as Centers pursuant to article X, section 29 of the Florida Constitution. At the time, DOH had a rule stating that it was not accepting applications. DOH responded to Appellants in March 2019 that DOH was not currently accepting applications and would publish in the Florida Administrative Register the dates when applications would be accepted. In April and May 2019, Appellants filed petitions for formal administrative proceedings to challenge DOH's "rejection" of their applications. Appellants argued, *inter alia*, that they were entitled to default licenses under section 120.60, Florida Statutes, because DOH did not take action within 90 days.

DOH dismissed the petitions in June 2019, concluding that (1) Appel-

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lants' 2018 letters did not qualify as applications under section 120.60; (2) default licensure is not applicable when there are a finite number of licenses; and (3) Appellants should seek judicial review, instead of administrative action, to compel compliance with the Florida Constitution. Appellants sought judicial review of DOH's dismissal of their petitions.

First, the court ruled that Appellants' 2018 letters were "bare bones" and thus, did not qualify as completed applications sufficient to trigger the deadlines in section 120.60. The letters did not provide the necessary information, were not on DOH's application form, and DOH had notified Appellants and the public via rule that it was not accepting applications. The court also agreed that a license for a Center could not be obtained by default, given the limited number of available licenses and the potential threat to public health and safety.

Finally, the court held that article X, section 29 of the Florida Constitution contemplates judicial review if DOH were to violate any constitutional obligations. The court concluded the Florida Constitution did not support Appellants' claimed entitlement to immediate licensure as a result of any constitutional violation. Thus, the court affirmed DOH's dismissal of Appellants' petitions for formal administrative hearings.

Mootness—Speculative Claims Cannot Serve to Survive Dismissal
Kendall Healthcare Grp. Ltd. v. Pub. Health Trust of Miami-Dade Cty., 296 So. 3d 553 (Fla. 1st DCA 2020).

In the wake of the legislative elimination of the certificate of need (CON) process for general hospitals, Kendall Regional Medical Center and East Florida DMC (Appellants) were unsuccessful in their efforts to keep a portion of their administrative case alive for the purpose of recovering attorneys' fees. Although Appellants agreed that their appeal of the Agency for Health Care Administration's (AHCA) denial of their CON application was rendered substantively moot by the legislative enactment of section 408.036(1), Florida Statutes (removing creation of a new general hospital from CON review process), they argued that AHCA's improper rejection of findings of fact in the recommended order could and should survive the mootness of the substantive claims because it gave rise to collateral legal consequences in the form of a claim to attorneys' fees.

Appellate jurisdiction can survive mootness when collateral legal consequences which affect the rights of the parties remain; one example of this is entitlement to attorney's fees. Attorney fee entitlement in such a scenario must be non-speculative and automatic for the claim to survive mootness and to allow for the appellate court to be able to rule on the merits of the mooted underlying claim for purposes of disposing of the attorney's fee claim.

Appellants argued that their attorney's fee claim under 120.595(5), Florida Statutes, was non-speculative—it was based on a claim that AHCA, in its final order, improperly rejected factual findings of the ALJ. The court found that Appellants' argument presented the issue out of context, and when properly examined it became clear that AHCA's final order was not reweighing the evidence or judging witness credibility en route to rejecting specific factual findings, it was instead rejecting the legal conclusion offered in the recommended order to conclude that Appellants had not demonstrated need as a statutory matter.

The consequence of the court's finding that the final order rejected legal conclusions and not specific factual findings was that Appellants' underlying arguments, even if correct on the merits, would not trigger an automatic award of attorney's fees. As such, the court concluded that Appellants' fee claim was too speculative to survive the mootness of the underlying claim.

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DOAH CASE NOTES

By Gar Chisenhall, Matthew Knoll, Dustin Metz, Virginia Ponder, Christina Shideler, Paul Rendleman, and Tiffany Roddenberry

All Fla. Safety Inst., LLC v. Fla. Virtual Sch., Case No. 20-0179BID (Recommended Order May 4, 2020; Final Order May 26, 2020).

https://www.doah.state.fl.us/ROS/2020/20000179.pdf

FACTS: Florida Virtual School ("Florida Virtual") is a statutorily-created virtual school intended to develop and deliver online distance learning in the state. Florida Virtual issued a request for proposal seeking hands-on, "Behind the Wheel" driver education courses for Florida Virtual's driver education students. A proposal evaluation committee ("the committee"), consisting of four Florida Virtual employees, evaluated proposals from All Florida Safety Institute, LLC ("All Florida") and United Safety Council, Inc. ("United Safety Council") during a public meeting which was recorded. When the committee discussed All Florida's proposal to include new Tesla cars in its fleet for the student drivers' use, one of the evaluators can be heard on the audio recording saying something like "[w]hat a bunch of idiots." At the conclusion of the meeting, the committee voted unanimously to award the contract to United Safety Council. All Florida protested the decision, and the matter was referred to DOAH.

OUTCOME: All Florida argued that the committee member's comment demonstrated that he was biased against All Florida and that the comment led the other committee members to view All Florida's proposal in a negative light. While the committee member did not recall making the comment at issue, the evaluator in question testified that it sounded like something he might have said. Nevertheless, he also testified that his opinion regarding All Florida's Tesla commitment did not impact his scoring. The ALJ found the committee member's testimony to be credible and found that while he "could have chosen better words to express himself, the use of the term 'idiots' in this context does not suggest that he was biased." Ultimately, the ALJ rejected All Florida's arguments and recommended that Florida Virtual dismiss the protest. Florida Virtual issued a final order, adopting the ALJ's recommendation and dismissing All Florida's petition with prejudice.

Agency for Pers. with Disabilities v. Meadowview Progressive Care Corp. Grp. Home, Case No. 20-2087F (Amended Final Order July 6, 2020).

https://www.doah.state.fl.us/ROS/2020/20002087%20Amended.pdf

FACTS: The Meadowview Progressive Care Corporation Group Home ("Meadowview") holds a license to operate a group home serving intellectually disabled persons. At all relevant times, Etha Griffith was a Meadowview director and the onsite manager of the group home. In August 2018, the Department of Children and Families ("the Department") issued a verified report, finding that Ms. Griffith had financially exploited several group home residents by charging for nonemergency transportation that was included in the group home's base fee. Nevertheless, the Department did not recommend further action. A few months later, in November 2018, Ms. Griffith submitted a licensure renewal application on Meadowview's behalf and responded "no" to a question asking if "you or [an] ownership controlling entity affiliated with this application [have] ever been identified as responsible for [financial exploitation]?"

In March 2019, the Agency for Persons with Disabilities ("APD") issued an administrative complaint alleging in Count I that Meadowview violated section 393.0673(1)(b), Florida Statutes, by being responsible for the exploitation of a vulnerable adult. In Count II APD alleged that Meadowview falsely represented or omitted a material fact in its licensure application when Ms. Griffith responded "no" to the question regarding financial exploitation. After a formal administrative hearing, an ALJ issued a recommended order, effectively recommending dismissal of all counts, and APD substantially adopted that recommendation in its final order. Meadowview then petitioned for an award of attorney's fees pursuant to section 57.105, Florida Statutes. Section 57.105 authorizes an award of fees if the losing party made a claim that it knew or should have known: (a) was unsupported by the material facts; or (b) would not be supported by the application of then-existing law to those material facts.

OUTCOME: The ALJ concluded that APD was liable for Meadowview's attorney's fees. The ALJ noted that the Department's verified report named Ms. Griffith, and not Meadowview, as the party at fault. "If the Verified Report had named [Meadowview], rather than Ms. Griffith, as the responsible person, [then APD] would have prevailed by introducing into evidence the Verified Report." Therefore, the ALJ concluded that Count I was unsupported by the law because it erroneously treated Meadowview and Ms. Griffith as being "interchangeable." As for Count II, the issue turned on the materiality of Ms. Griffith not mentioning the verified report in Meadowview's application. The ALJ concluded that "[t]he omission of the Verified Report was

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not material because [APD] knew all about the report and its contents when the Application was filed, and knowledge precludes materiality"; "if the other party already knows the facts, they are not material when the first party fails to disclose them." Accordingly, the ALJ found that APD was liable for Meadowview's attorney's fees under Counts I and II.

Dep't of Fin. Serv., Div. of Workers' Compensation v. E. Coast Shutters, Inc., Case No. 19-6006 (Recommended Order June 12, 2020).

https://www.doah.state.fl.us/ROS/2019/19006006.pdf

FACTS: The Department of Financial Services, Division of Workers' Compensation ("the Division") enforces the statutory requirement that employers secure workers' compensation coverage. On June 24, 2019, Linda Offutt, a Division investigator, personally served a Second Amended Order of Penalty Assessment on the business office of East Coast Shutters, Inc. ("East Coast"). A Notice of Rights accompanying the Second Amended Order of Penalty Assessment informed East Coast that it had 21 days to request an administrative hearing and that failure to file a timely request would result in a waiver of its right to administrative review. The Division and East Coast employees frequently communicated between July 3 and 12, 2019. However, East Coast did not request a formal administrative hearing until August 5, 2019, well past the July 15, 2019 deadline. The Division determined that the hearing request was untimely, but referred the case to DOAH in order for a determination as to whether equitable tolling excused East Coast's failure to timely request a hearing.

OUTCOME: East Coast argued that equitable tolling should apply because its owner, Rupert L. Jones, never received the Second Amended Order of Penalty Assessment and the accompanying Notice of Rights. However, the ALJ concluded there was no evidence indicating that East Coast was "prevented in some extraordinary way from asserting its rights." While East Coast's office manager never gave the Second Amended Order of Penalty Assessment and the accompanying Notice of Rights to Mr. Jones, "[n]o evidence was presented to demonstrate that such a breakdown in communication between office manager and business owner was extraordinary in any way." Therefore, the ALJ recommended that the Division dismiss East Coast's hearing request.

In re: Diaz de la Portilla, Case No. 19-2521EC (Recommended Order May 26, 2020).

https://www.doah.state.fl.us/ROS/2019/19002521.pdf

FACTS: An investigator for the Commission on Ethics ("the Commission") submitted a report on December 4, 2018, finding that Alex Diaz de la Portilla failed to make accurate disclosures of his financial interests when he was running for the Florida Senate in 2016. For instance, Mr. Diaz de la Portilla loaned his campaign $50,000 but did not report the loans as assets. The report also found that Mr. De La Portilla valued his home at $603,357, while the Dade County Property Appraiser's website listed the 2017 market value of the home as $338,929. The Commission issued a determination finding there was probable cause to believe that Mr. Diaz de la Portilla violated article II, section 8 of the Florida Constitution and section 112.3144, Florida Statutes, by filing an inaccurate financial disclosure.

After this matter was referred to DOAH, the parties filed a joint prehearing stipulation identifying the nondisclosure of the loans and the proper valuation of the home as the allegations at issue. However, the prosecuting attorney stated in her position statement that the aforementioned allegations were only "examples" of the inaccuracies contained in Mr. Diaz de la Portilla's financial disclosure. At the outset of the final hearing, the ALJ asked the prosecutor whether she believed she was permitted to introduce new factual allegations against Mr. Diaz de la Portilla during the final hearing. Because Mr. Diaz de la Portilla had been accused of filing an inaccurate financial disclosure, the prosecutor took the position that any facts supporting that general allegation could be raised at the hearing, regardless of whether they had been set forth in a charging document prior to the hearing.

OUTCOME: The ALJ rejected the prosecutor's argument, reasoning that "[t]he mere reference to the charging statute, without supporting factual allegations, was not sufficient to place [Mr. Diaz de la Portilla] on notice of the charges against him." As a result, the prosecutor was not permitted to raise issues not alleged in the Commission's probable cause determination or the investigative report.

My First Steps of Bradenton, Inc. v. Dep't of Children & Families, Case No. 19-5286F (Final Order June 25, 2020).

https://www.doah.state.fl.us/ROS/2019/19005286.pdf

FACTS: The Department of Children and Families ("the Department") issued an administrative complaint, alleging that an incident of inappropriate discipline occurred at My First Steps of Bradenton, Inc. ("My First Steps"), after viewing a video shared by the mother of a child enrolled at My First Steps which appeared to show the facility's director, Carina Piovera, handling a child roughly. Ms. Piovera asserted that the parent's video was inaccurate and told the Department during discovery that she could obtain the original video footage. After My First Steps failed to provide the original video footage after entry of an order granting a motion to compel, the ALJ who handled the underlying proceeding issued a sanction order precluding My First Steps from objecting to the accuracy or admissibility of the moth-

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er's video. Nevertheless, Ms. Piovera testified during the formal administrative hearing that the mother's video depicted the events as occurring faster than they actually had, and the ALJ implicitly accepted her testimony by finding that the video was "a little fast." That ALJ ultimately issued a recommended order in Case No. 18-5147 finding there was not clear and convincing evidence that a violation had occurred and recommended that the administrative complaint be dismissed. After the Department issued a final order adopting that recommendation, My First Steps sought attorney's fees pursuant to section 57.111, Florida Statutes.

OUTCOME: A different ALJ presided over the fees hearing and agreed with the Department's perception that Ms. Piovera had handled the child too roughly. As to whether the Department's prosecution was substantially justified, the ALJ found that "[r]easonable persons can differ—and have differed—regarding their perceptions of the video. The allegations of fact in the Administrative Complaint are substantially supported by a reasonable perception of the video evidence, albeit that the ALJ in the underlying action saw it differently." Therefore, the ALJ concluded that "[t]he Department's perception of the video, supported by the information available to it from the investigations, provided a solid factual basis for issuing the Administrative Complaint that would satisfy a reasonable person. To rule otherwise would be to paralyze the Department in conducting the necessary and beneficial work of government." In addition, the ALJ presiding over the fees hearing found that Ms. Piovera falsely told the Department's investigators that the original video no longer existed and that Ms. Piovera had used that misrepresentation to undermine the accuracy of the mother's video. The ALJ concluded that Ms. Piovera's "misrepresentations and inconsistent statements appear to have succeeded in planting the seed of doubt as to the reliability of the video that was central to the underlying action, which may well have infected the outcome in the underlying action. Ms. Piovera's unclean hands constitute special circumstances, making an award of attorney's fees and costs unjust."

Law School Liaison

Summer 2020 Update from the Florida State University College of Law

By Erin Ryan, Associate Dean for Environmental Programs and Jella Roxas, Environmental Program Coordinator

This column highlights the recent accomplishments of our students and alumni, lists the rich programming the Florida State University College of Law will host in Fall 2020, and reviews recent faculty activities.

David Markell's Retirement

This summer, we bid a very fond professional farewell to Professor David Markell, an institution of administrative and environmental law here in Florida, who retires after 18 years at FSU. Dave Markell, Steven M. Goldstein Professor, joined the FSU Law Faculty in 2002 and greatly enriched both the law school and the lives of thousands of students during his tenure here. In addition to being a member our highly regarded environmental law faculty, Dave served as Associate Dean for Research from 2016-2018, Associate Dean for Environmental Programs from 2012-2015, and Associate Dean for Academic Affairs from 2007-2008. He taught and researched in the areas of administrative law, environmental law and policy, and legislation and regulation, and his scholarship has frequently won national recognition. As law school Dean Erin O'Hara O'Connor observed at his retirement, "Dave played a critical role in raising and maintaining the national reputation of our environmental program and keeping our faculty connected to the practicing bar. His contributions to FSU Law were countless and he will be deeply missed!" We wish Dave well in his new adventures, and we all hope he will continue to participate in environmental events at the College of Law in his capacity as Professor Emeritus.

Recent Alumni Accomplishments

- Wayne Pathman (FSU Law Class of 1985) was listed in the Best Lawyers in America 2020. He heads Land Use, Zoning, and Environmental Law Section at Pathman Lewis, a Miami-based law firm.
- Sarah Taitt (FSU Law Class of 2008) was recently appointed as the Vice Chair of The Florida Bar City, County and Local Government Law Certification Committee. She works as an assistant city attorney for the City of Orlando handling environmental, land use, and real estate projects for the city.
- Carolyn Haslam (FSU Law Class of 2009) was recently promoted to partner at Akerman LLP, where she primarily focuses on real estate and land use law.
- Forrest Pittman (FSU Law Class of 2013) serves as an attorney at the U.S. Environmental Protection Agency – Office of General Counsel, Pesticides, and Toxic Substances Law Office.

Recent Student Achievements and Activities

- The following students participated in administrative law externships this spring and summer:
  - * Sara Finnigan – Florida Commission on Human Relations
  - * Laurence Jeanlus – Florida Department of Business and Professional Regulation
  - * Carla Sanchez – Public Employees Relations Commission
  - * Jacob Imig – Division of Administrative Hearings
  - * Troy Longman – Florida Department of Financial Services
  - * Alessandra Norat Mousinho – Florida Department of Management Services
  - * Mary Brewer – Agency for Health Care Administration
  - * Carolne Nelson – Division of Administrative Hearings
  - * David Melito – Florida Department of Management Services
  - * Kamilla Yamatova – Florida Department of Business and Professional Regulation
  - * Brooke Boinis – Florida Department of Agriculture and Consumer Services
  - * Kelly Ann Kennedy – Florida Department of Agriculture and Consumer Services
- Katherine Hupp and Catherine Awasti were selected as Bill Brinton Scholars to work as legal interns with the Public Trust Environmental Legal Institute of Florida this summer. They will be analyzing the effectiveness of agricultural Best Management Practices (BMPs) with the goal of making recommendations as to how these BMPs can be improved to repair impaired waterways.
- Jonathan McGowan was elected as a member of the European Law Institute, and will serve on the Environmental Law Special Interest Group (SIG) and Administrative Law SIG.

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- The Environmental Law Society (ELS) has concluded elections and finalized the new 2020-2021 executive board. The officers are: Macie Codina as President; Cameron Polomski as Vice President; Catherine Awasthi as Secretary; Rachel Akram as Treasurer; and Taylor Reaves as Mentor Chair. If any readers would like to reach out to the new board, please email fsuenvironmentallawsociety@gmail.com.

Faculty Achievements

- Professor Shi-Ling Hsu has been on research leave this academic year, and has been working on his book, Capitalism and the Environment, which makes the case for a greener, more sustainable capitalism. This spring he published *Climate Triage: A Resources Trust to Address Inequality in a Climate Changed World*, 50 Envtl. L. 97 (2020), was a panelist for the University of Miami Law Review Symposium, What Swings the Vote, and was a participant in the University of Arizona's Workshop for Environmental Scholarship.
- Professor Erin Ryan was appointed Associate Dean for Environmental Programs and elected Vice Chair of the Florida State University Faculty Senate. She recently contributed two chapters to different scholarly books: "Federalism as Legal Pluralism," which will appear in The Oxford Handbook on Legal Pluralism (Berman, 2020); and "The Twin Environmental Law Problems of Preemption and Political Scale," for Environmental Law, Disrupted (Owley & Hirokawa, 2020). Her article, *A Short History of the Public Trust Doctrine and its Intersection with Private Water Law*, which traces the evolution of public trust principles from a doctrine of sovereign authority toward a doctrine of sovereign responsibility, will appear in the Virginia Environmental Law Journal this fall.
- Professor Mark Seidenfeld will resume teaching a course entitled "Energy Law and Policy: Regulation of Electric Power" this coming fall. His article, *Textualism's Theoretical Bankruptcy and Its Implications for Statutory Interpretation*, was recently accepted for publication in the Boston University Law Review and is scheduled to appear this fall at 100 B.U. L. Rev. ___ (2020). In January, he co-presented a webinar on "Developments in Deference to Agency Interpretation" for the Government and Administrative Law Sections of the Florida Bar, and also commented on a paper presented at the New Faces in Administrative Law, Panel of Junior and Senior Scholars, at the Annual Meeting of the AALS, in Washington, DC.

Fall 2020 Events

The College of Law is hosting a full slate of impressive environmental and administrative law events and activities this fall semester.

Fall 2020 Distinguished Environmental Lecture

Lee Fennell, Max Pam Professor of Law at the University of Chicago Law School, will present the FSU College of Law's Fall 2020 Environmental Law Distinguished Lecture on Wednesday, October 21, 2020, at 3:30 p.m. in Room 208. A reception will follow in the Rotunda.

Environmental Law Enrichment Lectures

Ian MacDonald, a biological oceanographer and professor at the FSU Department of Earth, Ocean, and Atmospheric Science, will present a guest lecture on Monday, September 28, 2020.

Richard Murphy, an AT&T Professor of Law at the Texas Tech University School of Law, and co-author of Volume 33 of Federal Practice and Procedure, Judicial Review of Administrative Action, will present a guest lecture on Thursday, October 8, 2020.

Mariana Fuentes, a marine conservation biologist and an assistant professor at the FSU Department of Earth, Ocean, and Atmospheric Science, will present a guest lecture on Tuesday, November 3, 2020.

Information on upcoming events will be made available at https://www.law.fsu.edu/academics/academic-programs/juris-doctor-program/environmental-energy-land-use-law/environmental-program-recent-upcoming-events. We hope Section members will join us for one or more of these events.

Administrative Law Section

ADMINISTRATIVE LAW SECTION
MEMBERSHIP APPLICATION (ATTORNEY)
(Item # 8011001)

This is a special invitation for you to become a member of the Administrative Law Section of The Florida Bar. Membership in this Section will provide you with interesting and informative ideas. It will help keep you informed on new developments in the field of administrative law. As a Section member you will meet with lawyers sharing similar interests and problems and work with them in forwarding the public and professional needs of the Bar.

To join, make your check payable to "**THE FLORIDA BAR**" and return your check in the amount of $25 and this completed application to:

ADMINISTRATIVE LAW SECTION
THE FLORIDA BAR
651 E. JEFFERSON STREET
TALLAHASSEE, FL 32399-2300

NAME _____ ATTORNEY NO. _____

MAILING ADDRESS _____

CITY _____ STATE _____ ZIP _____

EMAIL ADDRESS _____

Note: The Florida Bar dues structure does not provide for prorated dues. Your Section dues cover the period from July 1 to June 30.

For additional information about the Administrative Law Section, please visit our website:
http://www.flaadminlaw.org/

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time electronic or video communications. The member must provide oral, written, or electronic notice of his/her intent to appear via communications media technology to the council at least 24 hours before the scheduled meeting.

The law became effective on July 1, 2020. Chapter 2020-122, Laws of Florida.

Keep Our Graduates Working Act

CS/CS/CS/HB 115 creates a new provision in the APA, section 120.82, Florida Statutes, entitled Keep Our Graduates Working Act.

The bill prohibits any licensing department, board, or agency from denying a license, refusing to renew a license, or suspending or revoking a professional license based solely on an individual being delinquent on a payment or defaulting on his/her student loan. The bill also removes the provision authorizing the Department of Health (DOH) to impose specified penalties on a healthcare practitioner for failure to repay a student loan or to comply with the terms of a service scholarship. It repeals the requirement that DOH obtain a monthly list from the United States Department of Health and Human Services of the healthcare practitioners who have defaulted on their student loans, and the resulting requirement to notify licensee that his/her license will be suspended, pending new payment terms. In addition, it requires the Department of Education, in its efforts to collect delinquent and defaulted debt, to comply with the protections for an individual's license established in the bill.

The law became effective on July 1, 2020. Chapter 2020-125, Laws of Florida.

The legislature also enacted some other measures of interest to administrative lawyers.

Patient Brokering Act

Just last year, the legislature made a significant change to the Florida Patient Brokering Act, which generally penalizes certain compensated patient referrals. The Act contained a number of exceptions, including a provision that allowed discounts, payments, and other arrangements "not prohibited" by the federal Medicare/Medicaid anti-kickback statute and regulations. The 2019 legislation changed the statute so that this exception applies only to arrangements "expressly authorized" by a subsection of the anti-kickback statute and its related regulations.[1] There was a concern that this change to "payment practices" that are "expressly authorized" rendered the exception less clear, because the referenced statute and regulations do not expressly authorize but instead prohibit certain business and payment practices. **CS/CS/SB 1120** returns the pre-2019 language to the Patient Brokering Act.

The law became effective on July 1, 2020. Chapter 2020-38, Laws of Florida.

Occupational Freedom and Opportunity Act

CS/HB 1193 deregulates a number of professions and occupations, including hair braiders, hair wrappers, body wrappers, nail polishers, make-up artists, boxing announcers and timekeepers. The bill also eliminates the additional business license required for the following licensees—architects, interior designers, landscape architects, and geologists—and it reduces the hours of training required to obtain a license for barbers and restrictive barbers and nail, facial, and full specialists. In addition, the bill would provide new ways for certain out-of-state professionals to obtain a license in this state.

The law became effective on July 1, 2020. Chapter 2020-160, Laws of Florida.

DEP Biosolids Rule Requires Legislative Ratification

CS/CS/CS/SB 712 is a lengthy and comprehensive measure dealing with water quality protection. Among other things, it requires the Department of Environmental Protection (DEP) to adopt rules for biosolids management. The APA generally requires that any proposed rule that is expected to have a million dollar impact may not become effective until ratified by the legislature.[2] The legislature apparently did not want to leave any doubt that the required biosolids rules must be ratified, as the bill expressly provides that these rules may not take effect until ratified by the legislature. The bill also requires the adoption of a number of rules relating to water quality, including stormwater, potable reuse and septic tank setbacks.

The law became effective on July 1, 2020. Chapter 2020-150, Laws of Florida.

Public Procurement of Services

The Consultants' Competitive Negotiation Act (CCNA) requires state and local government agencies to procure the professional services of an architect, professional engineer, landscape architect, or registered surveyor and mapper using a qualifications-based selection process. The CCNA permits the use of a continuing contract—a contract for professional services entered into between an agency and a firm whereby the firm provides professional services to that agency for several projects. **CS/CS/HB 441** amends the definition of "continuing contract" to increase the maximum dollar amount for each individual project and each individual study under the contract for construction projects. The maximum dollar amount for each individual project is increased from $2 million to $4 million, and the maximum dollar amount for each individual study is increased from $200,000 to $500,000.

The law became effective on July 1, 2020. Chapter 2020-127, Laws of Florida.

Housing Discrimination

Among other things, **SB 374** clarifies that under the Florida Fair Housing Act a victim of housing discrimination is not required to exhaust administrative remedies before filing a civil action. A victim of housing

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discrimination may file a civil action regardless of whether he/she has filed a complaint with the Florida Commission on Human Relations, the Commissioners resolved a complaint (if the victim chose to file one), or any particular amount of time has passed since the victim filed a complaint with the Commission. In the alternative, a victim may proceed directly to filing a petition with the Division of Administrative Hearings (DOAH).

The law became effective September 4, 2020. Chapter 2020-164, Laws of Florida.

Bills That Failed

JAPC Recommendations for Changes to the APA

Prior to the 2019 legislative session, the Joint Administrative Procedures Committee (JAPC) developed a number of recommendations for changes to the APA to increase transparency in rulemaking, provide a mechanism to ensure that agencies reduce unnecessary rules, and ensure that rulemaking costs are considered for every rule. Measures incorporating these recommendations were filed in 2019 in both the House and Senate, but neither was enacted. Similar legislation again was filed in 2020 in the House in the form of a committee substitute for **HB 729**.[3] Here are some of the key provisions:

Review and repromulgation of agency rules: The bill requires each agency to review its rules for consistency with the powers and duties granted by the agency's enabling statutes. If, after reviewing the rule, the agency determines substantive changes to update a rule are not required, the agency must repromulgate (or re-adopt) the rule using a process that does not require the full republication of the rule in the *Florida Administrative Register* or subject the rule to an administrative challenge.

Regulatory Costs: The bill requires an agency to prepare a statement of estimated regulatory costs (SERC) for the adoption or amendment of any rule, other than an emergency rule, and it specifies the economic impacts and compliance costs an agency must consider in creating an SERC. Each agency is required to have a website where all of its SERCs may be viewed in their entirety.

The bill clarifies the elements an agency must consider in a SERC when evaluating the economic impacts of the rule. In addition, the bill replaces the term "transactional costs" with "compliance costs," requires agencies to consider all direct and indirect costs of compliance, and provides 18 specific types of compliance costs as examples for agencies to consider in their evaluation. In addition, if an agency holds a hearing on a proposed rule, the bill requires the agency to ensure that the person responsible for preparing the SERC be made available to respond to questions or comments.

The bill authorizes agencies to hold workshops for the purpose of gathering information to aid in the preparation of the SERC. In addition, the bill describes what constitutes an adverse impact on small business, and it provides that a lower cost regulatory alternative (LCRA) may be submitted after a notice of proposed rule or a notice of change.

Rulemaking Procedure: The bill seeks to define what constitutes a "technical change" and requires technical changes to be documented in the history of the rule. The bill requires publication of a notice of correction and it distinguishes between a notice of correction and a notice of change. The bill also streamlines the petition to initiate rulemaking procedure. And the bill reestablishes the mandatory seven-day period between the publication of a notice of rule development and the publication of a notice of proposed rule in the *Florida Administrative Register*.

Mandatory Rulemaking: The bill also requires any legislatively-required rulemaking to be completed within 180 days. A similar provision was removed from the APA in 2015.

Emergency Rules: The bill also revises a provision governing emergency rules. The bill requires an agency to publish notice of the renewal of an emergency rule in the *Florida Administrative Register* prior to the expiration of the emergency rule. The bill also requires the text of an emergency rule to be published in the Florida Administrative Code. In addition, the bill allows technical changes to be made within the first seven days after adoption of the emergency rule, but expressly prohibits an agency from making changes to an emergency rule by superseding the previous emergency rule.

Annual Regulatory Plan: The bill requires the annual plan to identify and describe each rule, by rule number or proposed rule number, which the agency expects to develop, adopt, or repeal for the 12-month period beginning October 1 and ending September 30. The bill also requires the plan to contain a declaration that the agency head and the general counsel understand that regulatory accountability is necessary to ensure public confidence in the integrity of state government and to that end the agency is diligently working toward lowering the total number of rules adopted.

CS/HB 729 was approved by two of the three referenced committees. No similar measure was filed or considered in the Senate in 2020.

Red Tape Reduction Advisory Council

SB 1238, relating to regulatory reform, establishes the Red Tape Reduction Advisory Council within the Executive Office of the Governor. The bill would require an agency adopting a rule to submit a rule replacement request to JAPC. JAPC would be required to examine the rule replacement request and existing rules. JAPC also would be required to establish a regulatory baseline of agency rules, and a proposed rule may not cause the total number of rules to exceed the established regulatory baseline.

The bill was never heard in committee. The House companion, **HB 729**, was amended in its first committee of reference with a committee substitute that contains the JAPC recommendations described above.

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Sunrise Act/Legislative Review of Proposed Regulation of Unregulated Functions

HB 1155 would provide for legislative review of the proposed regulation of unregulated functions. The bill amends Florida's Sunrise Act (enacted in 1991) to provide that, in addition to applying to legislation that regulates an unregulated professional occupation, the Sunrise Act also applies to legislation that substantially expands the regulation of an already regulated profession or occupation. The bill would require proponents of a regulation to provide certain information to the President of the Senate, the Speaker of the House of Representatives, and the state agency that is proposed to have jurisdiction of the regulation, no later than 30 days prior to the session in which the legislation is to be filed. The bill also would require the state agency proposed to have jurisdiction to provide certain information to the President of the Senate, Speaker of the House of Representatives, and the proponents of the regulation within 25 days after receiving the legislation.

The House bill passed the House. The Senate companion (**SB 1614**) was never heard in committee.

Legislative Review of Occupational Regulations

CS/HB 707 would schedule the repeal of specified professions over four years, beginning July 1, 2021. It would affect over 100 professions and occupations. In 1981, Florida repealed the Sunset Reviews for occupations, professions, businesses and industries under the Regulatory Reform Act, and for entities under the Sundown Act.

The bill would establish the intent of the legislature to complete a systematic review of the costs and benefits of certain occupational regulatory programs prior to the date set for repeal to determine whether the program should be allowed to expire, be fully renewed, or be renewed with modifications. The bill also would prohibit any local government from regulating any occupational profession of any repealed regulatory program, and preempt such regulation to the state, unless local regulation of such occupation is expressly authorized by law.

The House bill passed the House. **CS/SB 1124**, the "Occupational Regulation Sunset Act," passed the first three committees of reference.

Economic Costs/Endangered or Threatened Species

Among other things, **CS/HB 1360/ HB 1067** would prohibit the Fish and Wildlife Conservation Commission and the Department of Agriculture and Consumer Services from considering certain costs when designating a species as endangered or threatened. More particularly, the bills provide that these agencies may not consider the economic cost of protecting a species as a factor in designating a species as endangered or threatened.

The Senate bill passed two of the three committees of reference; the House bill was never heard.

Executive Branch/Unitary Executive/Administration Commission/DOAH

SB 1758 is a lengthy and comprehensive bill relating to the executive branch. The stated legislative purpose of the bill is to pursue a state executive structure more in line with the federal system, to wit a unitary executive. To this end, the bill would transfer many of the functions of the Governor and Cabinet to the Governor or other agencies controlled by the Governor.[4] Of interest to administrative lawyers, the bill makes changes to the responsibilities of the Administration Commission, which currently is comprised of the Governor and the three members of the Cabinet (i.e., the Attorney General, the Chief Financial Officer and the Commissioner of Agriculture) and which currently appoints the head of the Division of Administrative Hearings (DOAH). The bill would assign the responsibility to appoint the head of DOAH to the Governor, who would select a director from a list of three qualified candidates recommended by the Supreme Court Judicial Nominating Commission. The bill also would transfer various powers from the Administration Commission to DOAH, including the authority to adopt uniform rules.

The bill was not heard during the 2020 Regular Session, although a more modest measure that would have transferred the Office of Energy from the Commissioner of Agriculture to the DEP, **HB 5401**, passed the House.[5]

Florida's cabinet long has been the subject of criticism[6] and there have been various efforts to increase the relative power of the Governor.[7] So, don't be surprised if these and some of the other measures that failed are considered again in 2021.

Larry Sellers *is a partner in the Tallahassee office of Holland & Knight LLP.*

Endnotes

1 Ch. 2019-159, Laws of Fla.

2 *E.g.*, 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); Eric Miller & Donald Rubottom, *Legislative Rule Ratification: Lessons from the First Four Years*, 89 Fla. B.J. 36 (Feb. 2015).

3 As originally filed, HB 729, relating to regulatory reform, would have created a Red Tape Advisory Council.

4 *See* Steve Bousquet, *Streamlined Government or a Power Grab? DeSantis Seeks Control Over DEP, Highway Safety*, WFSU, Jan. 23, 2020.

5 *See* Samantha J. Gross, *Nikki Fried to Ron DeSantis: Lay Off Energy Office*, Tampa Bay Times, Jan. 28, 2020.

6 *See* Ira W. McCollum, *The Florida Cabinet System - A Critical Analysis*, 33 Fla. B.J. 156 (Mar. 1969); Jon C. Moyle, *Why We Should Abolish Florida's Elected Cabinet*, 6 Fla. St. U. L. Rev. 591 (1978); Joseph W. Landers, Jr., *The Myth of the Cabinet System: The Need to Restructure Florida's Executive Branch*, 19 Fla. St. U. L. Rev. 1089 (1992); Stephen T. Maher, The Florida Cabinet: Is it Time for Remodeling?, 18 Nova L. Rev. 1123 (1994).

7 For a description of the implementation of the 1998 amendment to the Florida Constitution that changed the structure of the Florida Cabinet from the Governor and six Cabinet officers to the Governor and three Cabinet officers, see Edwin A. Bayo & Kent J. Perez, *Florida's Cabinet System: Y2K and Beyond*, 75 Fla. B.J. 68 (Nov. 2000); Kent J. Perez, *The New Constitutional Cabinet "Florida's Four,"* 82 Fla. B.J. 62 (Apr. 2008).