ADMINISTRATIVE LAW SECTION
Newsletter
Vol. XLII, No. 3 Jowanna N. Oates and Tiffany Roddenberry, Co-Editors March 2021

Exhaustion of Administrative Remedies: How High Are the "Colorable Statutory Authority" and "Apparent Merit" Bars Actually Set?

By Andrew E. Schwartz

The First District Court of Appeal's decision in *Agency for Health Care Administration v. Best Care, LLC*, 302 So. 3d 1012 (Fla. 1st DCA 2020), was recently finalized. In that decision, the First District reversed a final judgment entered by a circuit court for Best Care against the Agency for Health Care Administration ("AHCA") in a judicial bid protest challenging the allegedly illegal award of a contract, holding that Best Care had failed to exhaust its administrative remedies under chapter 120, Florida Statutes. In the same decision, the First District affirmed AHCA's final order dismissing the chapter 120 bid protest Best Care had been simultaneously pursuing for lack of standing. The First District also affirmed AHCA's alternate ruling denying Best Care's bid protest on the merits.

In regards to exhaustion of administrative remedies, the First District explained there are three exceptions

See "Administrative Remedies," page 20

From the Chair

By Bruce D. Lamb

Despite the continuing difficulties resulting from the COVID crisis, your Administrative Law Section continues in its efforts to serve you as members. I am pleased to report that many of our standing and ad hoc committees have been very active this year in improving our services. The Executive Council conducted a Zoom meeting on February 5, 2021. In addition, several of the standing and ad hoc committees have been active in meeting to address the needs of members and to improve our membership profile. In February, the Section published its inaugural Monthly Bulletin. I would like to thank those who participated in preparing this bulletin and in organizing future bulletins including Maria Pecoraro-McCorkle, Tabitha G. Jackson, Gigi Rollini, Judge Gar Chisenhall, and Judge Suzanne Van Wyk. We look forward to future editions. Our CLE Committee is currently developing this year's webinar series.

Our Long Range Planning Retreat is currently scheduled to take place on St. George Island on April 23, 2021. We are hoping that circumstances will allow live participation by those who feel comfortable doing so. There will be remote capability

See "From the Chair," next page

INSIDE:

FROM THE CHAIR
from page 1

available as well. If necessary, the retreat will be conducted virtually. The business meeting will begin at 10:30 am with an Executive Council meeting and then the Long Range Planning meeting beginning at 1:00 pm. After the April meeting, our next meeting will be in conjunction with The Florida Bar annual convention currently scheduled for June 9 through 12 in Orlando, Florida, at the Hilton Orlando Bonnet Creek. The Bar is hoping to hold an in-person convention.

The Executive Council welcomes your contributions to the Section. We are always in need of articles both long and short, including articles that are appropriate for publication in *The Florida Bar Journal*. Thank you for your participation.

Ethics Questions?

Call The Florida Bar's Ethics Hotline

1/800/235-8619

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

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DEP and 404 Program Assumption

By Kristin Bigham

The Department of Environmental Protection's (DEP) application for assumption of the 404 Program from the federal government was approved on December 17, 2020, and became effective 30 days from that date. The "404 program" is the Federal Clean Water Act permitting program that regulates the discharge of dredged or filled material into wetlands and other waters of the United States.

Prior to state assumption, projects that affected major waterways generally needed a "404 permit" from the Army Corps of Engineers. Projects that affected water bodies that were not connected to federal waters needed a permit from DEP. Many projects required a permit from both entities.

In 2018, the Florida Legislature passed a bill that authorized Florida to start the assumption process. DEP's application demonstrated to the federal government that it had a program rigorous enough to take over the Army Corps' current role and involved an extensive federal and public review period.

Florida is only the third state to accomplish assumption, and the first to do so in decades. Michigan and New Jersey assumed the authority in the 1980s and 1990s. Arizona recently attempted (and ultimately abandoned) its efforts at assumption.

DEP believes that state assumption of this program will allow the agency to use its expertise in Florida's specialized environment to provide stringent protection of Florida's natural resources while providing regulatory efficiencies, thereby reducing delays for critical restoration and infrastructure projects.

Florida, through DEP, is known for overseeing the largest wetland restoration project in the world, as well as many other environmental projects. Assumption of this program will allow DEP to harness state resources to more quickly permit these key projects.

Practically speaking, assumption of the 404 program is expected to reduce delays previously encountered in the federal permitting program.

State assumption has been met with mixed reactions from the public. Program assumption has been met with support from Florida builders. Conversely, various environmental groups oppose the move, believing that permitting cannot be effectively absorbed by DEP and that the program assumption will result in fewer protections for the wetlands. During the assumption process, several environmental groups have signaled that they will challenge the assumption at the federal level in early 2021.

Kristin Bigham *is an attorney at the Florida Department of Environmental Protection. She is board certified in State and Federal Government and Administrative Practice and specializes in bid protests, procurements, and government contracts.*

Appellate Case Notes

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

Charter School Appeal—Grounds for Immediate Termination of Charter Under Florida Statutes
Lincoln Mem'l Acad., Inc. v. Manatee Cty. Sch. Bd., 46 Fla. L. Weekly D46 (Fla. 1st DCA Dec. 30, 2020).

Lincoln Memorial Academy ("Lincoln") appealed a final order by the administrative law judge ("ALJ"), which revoked Lincoln's charter school status and converted Lincoln back to a public middle school.

In 2018, Lincoln converted from a public middle school to a free charter school pursuant to section 1002.33(5), Florida Statutes. After one year in existence, Lincoln had a financial deficit of nearly $1.5 million and violated numerous laws, and the Manatee County School Board ("School Board") voted to immediately terminate the charter and gave the required statutory notice. Lincoln requested an evidentiary hearing. Following administrative proceedings, the ALJ issued a lengthy final order that revoked Lincoln's charter. Lincoln appealed, raising three issues.

First, Lincoln claimed that the School Board violated due process through its immediate termination of Lincoln's charter. The court, however, noted that section 1002.33 permits immediate termination if the charter school's sponsor gives notice in writing of the specific facts and circumstances that create an immediate and serious danger to the health, safety, or welfare of the charter school's students. Furthermore, the statute permits this immediate termination to precede a hearing and does not obligate the sponsor to provide the charter school with opportunities to cure any violations. The court rejected Lincoln's due process argument because Lincoln had received sufficient written notice,

continued...

APPELLATE *case notes*
from page 4

agenda items were published and publicly discussed, and the ALJ held a thorough evidentiary hearing that resulted in a 95-page final order addressing each of Lincoln's arguments.

Second, Lincoln argued that the School Board did not provide sufficient funding to Lincoln and caused its financial insolvency. The court ruled that, under the law, Lincoln's officers and governing board were solely responsible for Lincoln's operations and managing its finances. Furthermore, Lincoln was not permitted to use federal funding, such as Title I funding, to balance its budget, and even if Lincoln had received all the federal funds it had anticipated, the evidence showed it still would have run a massive deficit. The court also noted that Lincoln had failed to accept the assistance the School Board did offer.

Third, Lincoln argued that its failure to obtain clearance letters for 13 employees who should have gone through the background check process did not warrant immediate termination because the School Board had no evidence that the employees did anything wrong. The court reviewed the evidence, which showed that all 13 of the employees were unqualified because the vendor who was responsible for the background checks and screenings improperly processed the applications. At least one of the employees was a convicted felon who had violated his probation and, in violation of the statutes, was working in a role that had direct contact with students. The court held that it was sufficient that Lincoln failed to comply with the statutory requirements to obtain clearance letters, and the ALJ did not err by rejecting Lincoln's argument that its charter could not be terminated because nothing bad had happened.

Thus, the court rejected Lincoln's arguments and concluded that the ALJ's ruling was supported by competent, substantial evidence.

Charter School Appeal--State Board May Consider New Information Not Part of Record on Appeal

Sch. Bd. of Volusia Cty. v. Fla. E. Coast Charter Sch., 46 Fla. L. Weekly D225 (Fla. 5th DCA Jan. 22, 2021).

The School Board of Volusia County ("School Board") appealed from a final order by the State Board of Education ("State Board") adopting the recommendation of the Charter School Appeal Commission reversing the School Board's denial of the Florida East Coast Charter School's charter school application.

A charter school whose application has been denied by a school board sponsor may appeal the adverse decision to the State Board. Once notified of an appeal to the State Board, the Commissioner of Education convenes a meeting of the Commission to study and make recommendations to the State Board. The Commission must determine whether the school board had good cause to deny a charter school application, and then must recommend to the State Board that the applicant's appeal be granted or denied. Once the State Board reaches its decision and a final order is entered, the State Board's final order is subject to review by a district court of appeal to determine if the State Board's final order is supported by competent substantial evidence.

In this case, the court determined that the State Board's final order was supported by competent substantial evidence. The School Board, however, argued that the State Board erred in adopting the Commission's recommendation because the recommendation was based, to some extent, on new information that had not been a part of the record on appeal. The Charter School, in contrast, contended the Commission was not limited to the record on appeal, noting that the statute provides that the Commission may "gather other applicable information regarding the appeal," and "may request information to clarify the documentation presented to it." Relying on this plain language, the court rejected the School Board's argument. Accordingly, the court concluded that the Commission was not limited to the information contained within the record on appeal and that it appropriately considered other clarifying information. The court therefore affirmed the State Board's decision adopting the Commission's recommendation to reverse the School Board's denial of the charter school application.

Petition for Informal Hearing—Failure to File Timely Request—Five Days for Mailing Not Allowed.

Dixon v. Dep't of Agric. & Consumer Servs., 46 Fla. L. Weekly D231 (Fla. 3d DCA Jan. 27, 2021).

Dixon appealed from a final order issued by the Department of Agriculture and Consumer Services, Division of Licensing ("Division") revoking Dixon's security license and imposing other discipline. The final order denied, as untimely, Dixon's request for an informal hearing. Dixon appealed the Division's finding of untimeliness.

Following an investigation, the Division issued an administrative complaint alleging sixteen counts of improprieties relating to false and improper issuance of training certificates. The complaint notified Dixon of the Division's intent to take disciplinary action. The complaint was served on Dixon on January 29, 2020, and contained a "Notice of Rights" page and an "Election of Rights" form. The Notice of Rights page expressly advised Dixon that if he wished to request a hearing, he must complete the enclosed Election of Rights form and file it with the Division within 21

continued...

APPELLATE CASE NOTES
from page 5

days of receipt of this complaint. The Notice of Rights further advised, in boldface type, that the failure to file the Election of Rights form with the Division within 21 days of receipt of the administrative complaint would be considered a waiver of the right to a hearing and would result in the issuance of a final order without the benefit of a hearing. Likewise, the Election of Rights form advised, also in boldface type, that the form must be filed at the Division in Tallahassee within 21 days of receipt, and that the failure to do so would be deemed a waiver of the right to an administrative hearing.

The court concluded that Dixon therefore was expressly advised that he had 21 days—i.e., until February 19, 2020—to file an Election of Rights form. Dixon mailed the request for an informal hearing to the Division and although it was postmarked on February 19 (the due date), it was not received by the Division until February 24. Dixon argued that the form was timely filed because, under the Florida Administrative Code, he is entitled to an additional five days for mailing. The court rejected this argument, concluding that rule 28-106.111, providing for a point of entry into proceedings and mediation, falls within the category of notices that do not permit additional days to be added to the computation of time.

Given the plain language of the rule, the court concluded that the Division correctly denied Dixon's request for an informal hearing as untimely.

Pilotage Rates—Petitioners Must Allege Disputed Issues of Material Fact to Obtain Administrative Hearing
Seacor Island Lines, LLC v. Dep't of Bus. & Prof'l Regulation, 308 So. 3d 228 (Fla. 1st DCA 2020).

Numerous cargo companies appealed the Department of Business and Professional Regulation Board of Pilot Commissioners Pilotage Rate Review Committee's ("Committee") final order, which established new pilotage rates in Port Everglades based on applications filed by the Port Everglades Pilots Association ("Pilots") and Florida Caribbean Cruise Association ("FCCA").

The Pilots and FCCA filed competing applications to modify the pilotage rates in Port Everglades. After several years, the Pilots and FCCA drafted a new proposal for the Committee's consideration. The new proposal was publicly discussed during a fact-finding investigative committee meeting. After the investigative committee published a public report, the Committee held a public rate-setting hearing. The Committee reviewed the investigative committee report, and heard from the Pilots, FCCA, and cargo companies in attendance. After deliberation, the Committee voted on the new rates and subsequently issued a notice of intent to change the pilotage rates in Port Everglades.

The appellants—numerous cargo companies opposed to the rate changes—filed petitions for administrative hearing with the Committee, under sections 120.57(1) and 120.57(2), Florida Statutes. The Pilots and FCCA argued that the appellants failed to raise disputed issues of material fact, and that under section 310.151, Florida Statutes, were not entitled to a section 120.57(2) hearing. The Committee held a meeting and heard arguments from the appellants, Pilots, and FCCA. The Committee deliberated and voted that the appellants' petitions had not raised any disputed issues of material fact. In addition, the Committee ruled that section 310.151 does not permit administrative hearings under section 120.57(2). The Committee issued a final order modifying the pilotage rates.

On appeal, the appellants argued that they were denied due process during the rate-setting proceedings because the Committee did not provide sufficient notice of the Pilots' and FCCA's new proposal. The court held that the Committee provided to the appellants all the due process to which they were entitled under the statutes, and noted that Appellants learned of the new proposal at a public meeting more than one month before the rate-setting hearing, were allowed to submit comments before and participate during the rate-setting hearing, and were allowed to address their concerns with the Committee regarding their petitions for administrative hearing.

The appellants also argued that they raised disputed issues of material fact in their petitions for administrative hearing, including whether the proposed rates were fair, just, and reasonable; whether the proposed rates were in the public interest; and whether the Committee erred in failing to determine the pilots' pension fund value. The court ruled these "issues" simply parroted the statutory factors the Committee was required to consider or were challenges to the Committee's legal conclusions. Because legal disputes are not considered disputed issues of material fact, the court concluded that the Committee did not err by denying the appellants an administrative hearing under section 120.57(1).

Next, the appellants argued they were entitled to a chance to amend their petitions under section 120.569(2)(c), Florida Statutes. But the court rejected this argument, noting that the opportunity to amend a petition under section 120.569(2) applies when a petition is rejected for procedural reasons, such as failure to comply with the Uniform Rules of Procedure. Here, the petitioners substantially complied with the Uniform Rules of Procedure; the problem was that their statements did not substantively amount to disputed issues of material fact. In addition, none of the appellants showed they could cure any alleged "defects" in their petitions by citing any disputed issues of material fact that they would add in an amended petition.

Finally, the appellants argued that section 310.151 is unconstitutional because the lack of access to an administrative hearing under section 120.57(2) results in a denial of due process. The court held that section 310.151 is facially constitutional because the State's goal of compensating well-qualified pilots

continued...

APPELLATE CASE NOTES
from page 6

is rationally related to the statute's efficient setting of pilotage rates. In addition, section 310.151 is constitutional as applied because the Florida Supreme Court ruled in *School Board of Palm Beach County v. Survivors Charter School, Inc.*, 3 So. 3d 1220, 1235 (Fla. 2009), that chapter 120 is not the only means by which parties in administrative proceedings receive due process.

Thus, the court affirmed the Committee's Final Order setting new pilotage rates in Port Everglades.

Public Records—Draft Audit Reports

City of Miami Beach v. Miami New Times, LLC, 45 Fla. L. Weekly D2805 (Fla. 3d DCA Dec. 16, 2020).

On appeal from a trial court order granting a petition for writ of mandamus and directing the City of Miami Beach ("City") to provide to Miami New Times copies of draft audit reports pertaining to two Miami Beach towing companies, the court quashed the order because non-final audit reports are not public records subject to disclosure under section 119.0713(2)(b), Florida Statutes.

The documents stemmed from an internal audit of two Miami Beach towing companies. During the auditing process, the auditor met with representatives of the towing companies to discuss the draft audit reports. The City also provided copies of these draft reports to the towing companies' attorney. These audit reports were not final and had not been presented to the City Commission or any other city governmental body. They were provided to the towing companies' representatives as part of the City's "customary business practice" to permit the auditees an opportunity to review, comment upon, and provide input prior to preparation of a final audit report.

While the audit was pending, Miami New Times requested a copy of these draft audit reports from the City. The City responded that the audit was still in progress and the draft reports were not final and were not subject to public disclosure.

Before the audit was complete, the towing companies' representatives appeared before the City Commission and requested a new, external audit conducted by an independent auditing firm be commenced instead. The towing companies were concerned that the internal audit was conducted in an unfair and unethical manner. The City Commission voted to terminate the City's internal audit and hired an independent company to undertake a new external audit.

Following termination of the City's internal audit, Miami New Times again requested a copy of the draft audit reports. The City again denied the request, based on section 119.0713(2)(b), Florida Statutes (2019), providing that an audit report and audit work papers become a public record subject to disclosure only when the audit is "complete and the audit report becomes final." The City maintained that the internal City audit was never completed, the draft audit reports never became final, and, therefore, the reports were not subject to disclosure as public records.

Unbeknownst to the City, counsel for the towing companies shared the draft audit reports with a reporter from a local online news agency. The reporter published an article discussing the draft audit reports. Miami New Times renewed its request to the City, asserting that, because there was "no reasonable anticipation of resolution of the city's audit," the exemption under section 119.0713(2)(b) did not apply, and the draft audit reports were subject to disclosure. The City again denied the request, advising that because the internal audit had not been completed and the draft audit reports were not final, they were not subject to disclosure as public records.

Miami New Times petitioned for a writ of mandamus, contending that the City improperly relied on section 119.0713(2)(b) in denying the request for a copy of the draft audit reports because the City investigation had been terminated and the reports were no longer exempt from disclosure as public records. Miami New Times alternatively contended that if a statutory exemption applied, that exemption was waived when the towing companies disclosed the draft audit reports to a third party.

Following a hearing, the trial court determined that, even if the draft audit reports were exempt from disclosure under section 119.0713(2)(b), any entitlement to that exemption ceased to exist once those draft reports, provided by the City to the auditee towing companies, were disclosed by the towing companies to a third party.

The appellate court disagreed, concluding the trial court erred because, under the plain language of the statute, an audit report (like its related work papers and notes) "becomes a public record" only "when the audit . . . becomes final." Further, an audit "becomes final" only "when the audit report . . . is presented to the unit of local government." Because the audit never became final, the records were not subject to disclosure.

The court also held that the records did not become subject to disclosure when the towing companies disclosed them to a third party, finding no statutory exception to the public records exemption applicable to audit reports exists, so that the statute's provisions relating to when disclosure is required controls.

Public Records—Petition for Writ of Mandamus Pleading Requirements

Scott v. Lee Cty. Sch. Bd., 46 Fla. L. Weekly D219 (Fla. 2d DCA Jan. 22, 2021).

After a trial court summarily denied Randy Scott's petition for writ of mandamus based on his request to the School Board for public records under section 119.07, Florida Statutes, he appealed.

The court acknowledged that mandamus is the appropriate vehicle for a person to compel compliance with a public records request under section 119.07. However, as part of the burden to establish a clear legal right to performance of the act requested,

continued...

APPELLATE CASE NOTES
from page 7

a petition must be facially sufficient, and if it is not, the trial court may dismiss the petition.

Pursuant to Rule 1.630(b) of the Florida Rules of Civil Procedure, "[w]hen the complaint seeks a writ directed to a lower court or to a governmental or administrative agency, a copy of as much of the record as is necessary to support the plaintiff's complaint must be attached."

Accordingly, Florida's appeals courts consistently require a petition for writ of mandamus filed addressing a public records request to attach a copy of the public records request made. If not filed, the appropriate remedy is to affirm without prejudice to allow the filing of a facially sufficient petition that attached as copy of the public records request.

The court affirmed the trial court's order without prejudice to allow Scott's filing of a new petition that attached a copy of his public records request that he made to the School Board. The court explained that if Scott filed such a petition that stated a facially sufficient claim, then the trial court must issue an alternative writ of mandamus requiring the School Board to show cause why Scott is not entitled to the requested relief.

Stay of Agency Final Order that "Has the Effect of Suspending or Revoking a License"
Ybor Med. Injury & Accident Clinic, Inc. v. Agency for Health Care Admin., 45 Fla. L. Weekly D2554 (Fla. 2d DCA Nov. 13, 2020).

Ybor Medical Injury & Accident Clinic ("Clinic") failed to timely respond to the Agency for Health Care Administration's ("AHCA") notice that the Clinic had omitted key information in its application for licensure renewal, which triggered a notice of intent to deem the application incomplete and withdrawn from further consideration. A final order was issued after an informal hearing in which the hearing officer recommended that AHCA uphold the notice. Such a result would then cause the Clinic's license to lapse. The Clinic sought a stay from the court pending appeal to avoid the lapse in licensure pursuant to Florida Rule of Appellate Procedure 9.190(e)(2)(C) and section 120.68(3), Florida Statutes.

Section 120.68(3) provides that when an "agency decision has the effect of suspending or revoking a license, supersedeas shall be granted as a matter of right . . . unless . . . a supersedeas would constitute a probable danger to the health, safety, or welfare of the state." The Clinic argued that the order on appeal was an agency decision which had "the effect of suspending or revoking a license." That position was contested by AHCA in light of *Beach Club Adult Center, LLC v. Agency for Health Care Administration*, 303 So. 3d 582 (Fla. 1st DCA 2018), which had the same administrative posture. In *Beach Club*, the First District Court of Appeal found that the order on appeal did not suspend or revoke the appellant's license, it merely deemed the renewal application withdrawn, and as such denied the appellant's motion to stay.

The court disagreed with the First District's narrow reading of the statute. The court concluded that while the order on appeal does not directly suspend or revoke the Clinic's license, it does "ha[ve] the effect" of suspension or revocation—all that the statute requires. The court found that the Clinic's desire to maintain operations under its license paired with the agency's denial of its application for continued licensure is tantamount to a denial or revocation—an effect which would not occur if it were merely an initial application for licensure.

The court interpreted the broad statutory wording ("has the effect of") as evidencing a legislative intent to apply to more than just orders directly and explicitly revoking or suspending licenses. The court concluded that this broad statutory language also covered the circumstance raised by the Clinic, where AHCA's rejection of its application for renewal would result in the termination of its license. The court, finding that AHCA had not demonstrated that a stay would constitute a probable danger to the public, granted the stay sought by the Clinic, and certified conflict with the First District in *Beach Club*.

Stay of Agency Final Order—Standard for Vacating an Automatic Stay
Dep't of Agric. & Consumer Servs. v. Henry & Rilla White Found., Inc., 45 Fla. L. Weekly D2196 (Fla. 1st DCA Dec. 14, 2020).

The court issued an order vacating the automatic stay triggered by the appeal of the Florida Department of Agriculture and Consumer Services ("DACS") of an adverse final determination issued by an agency hearing officer. DACS had initiated an action to recover over $13 million in disbursed funds and to reject $500,000 in submitted reimbursements to which the Henry and Rilla White Foundation claimed entitlement under the U.S, Department of Agriculture's National School Lunch Program.

When DACS appealed the agency order, it triggered an automatic stay of the hearing officer's order pursuant to Rule 9.310(b)(2), Florida Rules of Appellate Procedure. The Foundation moved to vacate the automatic stay.

In granting the Foundation's motion to vacate, the court clarified the three prongs that must be satisfied to justify vacating such a stay: (1) compelling circumstances warrant vacating the stay because the equities are "overwhelmingly tilted" against maintaining the automatic stay; (2) the moving party will suffer irreparable harm if the automatic stay is maintained, which can be established by showing that any harm would be compounded by maintaining the stay; and (3) the moving party is likely to prevail on the merits of the appeal.

The court concluded that the Foundation had satisfied its burden on all three prongs, vacated the automatic stay, and expedited the appellate briefing schedule.

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Administrative Law Section
The Florida Bar

Dear Members,

The Administrative Law Section is seeking nominations for its highest awards: the S. Curtis Kiser Administrative Lawyer of the Year Award and the Administrative Law Section Outstanding Service Award.

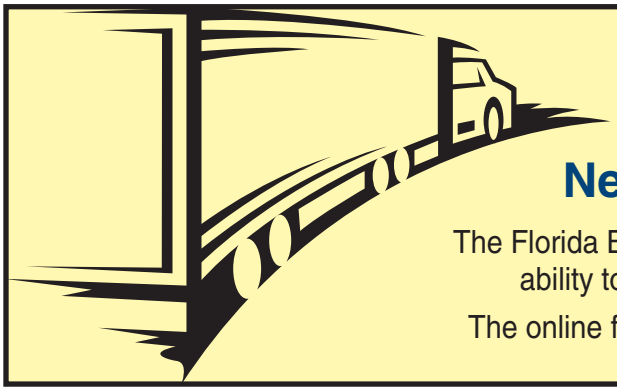
The S. Curtis Kiser Administrative Lawyer of the Year Award is named after Senator S. Curtis Kiser, a 1967 graduate of the University of Iowa and a 1970 graduate of the Florida State University College of Law. Senator Kiser has a long and distinguished career in public service to the State of Florida. His public service includes: State Representative (1972-1982); Senator (1984-1994); Public Service Commission Nominating Council (1978-1994); General Counsel for the Public Service Commission; and Commissioner, Public Employees Relations Commission. During Senator Kiser's legislative service, he was the prime sponsor of legislation that established the Florida Evidence Code and the Administrative Procedure Act.

The S. Curtis Kiser Administrative Lawyer of the Year Award will be presented to a member of the Florida Bar who has made significant contributions to the field of administrative law in Florida.

The Administrative Law Section Outstanding Service Award will be presented to a member of the Administrative Law Section Executive Council (other than the chair) who has provided outstanding leadership for the Section.

Applications for both awards are available on the Section's website at: http://flaadminlaw.org/membership/#sectionawardnominations. The deadline for applications is **March 29, 2021**.

For additional information, please contact Judge Brian Newman email: Brian.Newman@doah.state.fl.us



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DOAH Case Notes

By Gar Chisenhall, Matthew Knoll, Dustin Metz, Paul Rendleman, Tiffany Roddenberry, and Katie Sabo

Substantial Interest Proceeding—Discipline

Corcoran v. Hutton, Case No. 20-2510POL (DOAH Recommended Order Dec. 8, 2020). https://www.doah.state.fl.us/ROS/2020/20002510.pdf

FACTS: Christine Hutton was employed as a mathematics teacher at Northport K-8 School in the St. Lucie County School District ("the School District"). While conducting an investigation into alleged misconduct by Ms. Hutton, the School District placed her on Temporary Duty Assignment ("TDA") at her home. While on TDA, Ms. Hutton's only work responsibility was to check in with Aaron Clements, the School District's Director of Employee Relations, each weekday morning by phone between 7:30 a.m. and 8:00 a.m. On August 30, 2018, Mr. Clements contacted Ms. Hutton and directed her to report to the School District's human resources office in order to sign a meeting notice. Because she was unable to find a parking spot in close proximity to the entrance to the human resources office, Ms. Hutton had to walk a substantial distance from her vehicle, and the walk caused her to be in extreme pain due to her underlying medical issues. Mr. Clements noted that Ms. Hutton was very confused, paranoid, stumbling, and swaying from side to side when she walked. Those observations led him to suspect that Ms. Hutton was "under the influence of something." As a result, Mr. Clements sent Ms. Hutton to an alcohol/drug testifying facility for a reasonable suspicion test, and Ms. Hutton tested positive for marijuana and morphine. On November 5, 2019, the Commissioner of Education ("the Commissioner") issued an administrative complaint alleging that when Ms. Hutton was on TDA at her home "and subject to being called to work in the classroom, she responded to Human Resources while under the influence of drugs." The administrative complaint further alleged that had Ms. Hutton "been asked to return to the classroom, she would have jeopardized the health, safety, and welfare of students."

OUTCOME: Because there was no expert testimony demonstrating that Ms. Hutton was actually under the influence of marijuana when she reported to the human resources office on the morning of August 30, 2018, the ALJ found that the Commissioner failed to present clear and convincing evidence in support of that allegation in the administrative complaint. Moreover, even if Ms. Hutton had been under the influence of marijuana that morning, the ALJ noted that the Commissioner's allegations were premised on Ms. Hutton being called to work in a classroom. However, there was no evidence that Ms. Hutton encountered any students that morning. Accordingly, the ALJ recommended that the administrative complaint be dismissed.

Substantial Interest Proceedings—Bid Protests

Cross Constr. Serv., Inc. v. Dep't of Transp., Case Nos. 20-4214BID & 20-4216BID (DOAH Recommended Order Dec. 14, 2020). https://www.doah.state.fl.us/ROS/2020/20004214.pdf

FACTS: The Department of Transportation ("DOT") issued a request for proposals ("RFP") seeking to award two contracts for asbestos abatement, removal, and demolition services in DOT's District 5. After one bidder was disqualified for failing to meet minimum bid standards, DOT considered bids from Cross Construction Service, Inc. ("CCS"), Cross Environmental Services, Inc. ("CES"), Johnson's Excavation and Services, Inc. ("Johnson's"), and Simpson Environmental, LLC ("Simpson"). DOT's selection review committee scored the proposals and gave Simpson the highest score of 113.00, followed by CES (107.55), CCS (103.76), and Johnson's (101.76). Rather than announcing an intended award of the contracts, the selection committee requested that the project manager conduct a further analysis. Through that further analysis, the project manager ultimately concluded that Johnson's and Simpson had submitted "irregular, unbalanced pay items" resulting in their bids being nonresponsive. Accordingly, the selection committee reconvened and announced that CCS and CES were the intended awardees on June 22, 2020.

On June 24, 2020, Simpson filed a notice of protest; Simpson filed a formal written protest on July 6, 2020. CES and CCS would later contend that Simpson's formal protest was untimely, claiming that it was actually filed on July 7. After Simpson formally protested DOT's intended contract awards, DOT held a settlement conference. Simpson, CES, and CCS notified DOT soon thereafter that they had reached a settlement. However, the allegations set forth in Simpson's bid protest prompted the project manager to conduct an additional investigation, and she found material ambiguities in the RFP leading her to recommend that DOT reject all bids and re-advertise. DOT accepted that recommendation and canceled the procurement with the intention to re-advertise.

OUTCOME: CCS and CES protested the bid cancellation and argued that DOT acted illegally by using an untimely protest from Simpson as the impetus for more closely scrutinizing the RFP's language. The ALJ rejected that argument by concluding that "[w]hile the evidence indicates that Simpson's protest was the catalyst for [DOT]'s decision to further scrutinize the [relevant RFP language], [CCS and CES] do not cite any authority establishing that such action is antithetical to maintaining the integrity of the competitive bidding

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DOAH CASE NOTES
from page 10

process." CCS and CES also argued that DOT acted illegally by treating Simpson's formal protest as if it had been timely filed and conducting an informal conference in violation of section 120.57(3), Florida Statutes. The ALJ also rejected this argument by concluding that "[t]hrough their own deliberate inaction and voluntary participation in the very process that they now complain of, CES and CCS waived their right to complain that [DOT]'s failure to strictly adhere to the time requirements set forth in section 120.57(3) should be considered as evidence of [DOT]'s alleged improper favoritism towards Simpson." DOT rendered a final order on January 15, 2021, adopting the ALJ's recommendation in toto.

Substantial Interest Proceedings—Hearing Request

Dep't of Child. & Familty Servs. v. Thumbelina Learning Ctr. Corp, Case No. 20-3208 (DOAH Recommended Order Jan. 27, 2021). https://www.doah.state.fl.us/ROS/2020/20003208.pdf

FACTS: Thumbelina Learning Center Corporation, d/b/a Thumbelina Learning Center ("Thumbelina"), is a daycare provider in Miami-Dade County. During an on-site inspection on January 9, 2020, the Department of Children and Families ("the Department") cited Thumbelina for violations. In March 2020, Thumbelina's owner decided to temporarily close all of its childcare centers due to the COVID-19 pandemic, and Thumbelina's headquarters were closed as well. The Department issued an administrative complaint dated April 1, 2020, charging Thumbelina with the violations allegedly observed during the January 9, 2020, inspection. The administrative complaint was mailed to Thumbelina's headquarters via the U.S. Postal Service with a certified mail return receipt requested green card. The administrative complaint noted that a request for an administrative hearing had to be received by the Department no later than 21 calendar days after receipt of the complaint. In the beginning of April 2020, Thumbelina's accountant visited the corporation's headquarters in order to check the mail. On April 23, 2020, the accountant visited the headquarters again, retrieved Thumbelina's mail from a mailbox located outside the building, and found a certified letter from the Department. The return receipt requested green card had already been removed from the envelope. Thumbelina's head director went to the headquarters on April 24, 2020, opened the letter, read the administrative complaint, and determined that the 21-day deadline for filing a response had passed. On May 13, 2020, Thumbelina served the Department with its request for an administrative hearing. After Thumbelina responded to an order requiring it to show cause why its hearing request should not be dismissed as untimely, the Department referred the matter to DOAH for an administrative hearing regarding the timeliness of Thumbelina's hearing request.

OUTCOME: The Department asserted that a tracking receipt from the postal service demonstrates that Thumbelina received the administrative complaint on April 9, 2020. The ALJ determined that the Department failed to meet its burden of proof because the tracking receipt was hearsay evidence. In addition, the tracking receipt only indicate delivery, and when Thumbelina actually received the administrative complaint was the matter at issue. While the ALJ opined that Thumbelina should have been checking its mail on a more regular basis, the ALJ concluded that "the only direct evidence and testimony regarding receipt of the Administrative Complaint in this matter is [the accountant]'s credible testimony that as the sole employee responsible for the mail, he picked it up from the mailbox on April 23, 2020." Because it is undisputed that the Department received Thumbelina's hearing request on May 13, 2020, the ALJ ruled that Thumbelina's hearing request was timely filed.

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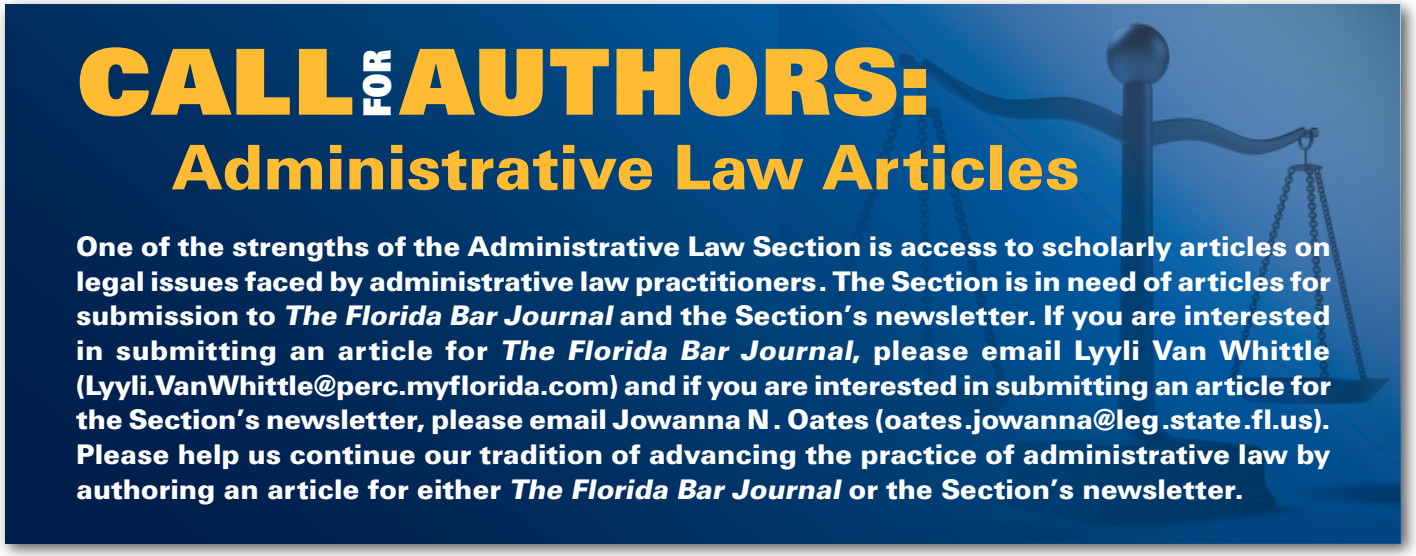

DOAH CASE NOTES
from page 11

Rule Challenges—Unadopted Rule

Daytona Beach Kennel Club, Inc. v. Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering, Case No. 20-5233RU (DOAH Summary Final Order of Dismissal Jan. 8, 2021). https://www.doah.state.fl.us/ROS/2020/20005233.pdf

FACTS: Bayard Raceways, Inc. ("Bayard") holds a pari-mutuel wagering permit to conduct business in St. Johns, Florida. On July 8, 2020, Bayard filed a Notice of Relocation with the Department of Business and Professional Regulation, Division of Pari-mutuel Wagering ("the Division") announcing its intention to use section 550.054(14)(b), Florida Statutes, and relocate its pari-mutuel wagering facility to St. Augustine, Florida. Section 550.054(14)(b) sets forth the conditions for relocating a business subject to a jai alai permit that was converted to a greyhound racing permit. After finding that Bayard had satisfied all of section 550.054(14)(b)'s criteria for relocation, the Division approved the relocation of Bayard's permit. On December 2, 2020, the Daytona Beach Kennel Club, Inc. ("Daytona Beach") filed a petition asserting that the Division's approval amounted to an unadopted rule. In support, Daytona Beach argued that the Division's approval reflected an unwritten policy to apply only the factors in section 550.054(14)(b) to relocation applications rather than the factors set forth in section 550.0555(2), Florida Statutes, which more generally concerns the relocation of greyhound racing permits.

OUTCOME: The ALJ dismissed Daytona Beach's petition by concluding that the Division simply applied section 550.045(14)(b) "to the facts set forth in Bayard's Notice of Relocation." In doing so, the ALJ noted that "where an agency statement analyzes existing law, as it applies to a particular set of circumstances, the statement is not itself a rule and is not subject to the rulemaking process." According to the ALJ, "[t]o conclude otherwise would effectively require an agency to adopt a rule for every possible circumstance that may arise."

Metro Treatment of Fla., L.P, v. Dep't of Child. & Families, Case No. 20-4323 (DOAH Recommended Order Dec. 9, 2020). https://www.doah.state.fl.us/ROS/2020/20004323.pdf

FACTS: The Department of Children and Families ("the Department") is the state agency with regulatory authority over the provision of substance abuse services. That duty includes the licensing and regulation of medication-assisted treatment ("MAT") for opiate addiction. MAT is the use of medications, in combination with counseling and behavioral therapies, to provide a comprehensive approach to substance abuse treatment. In general, providers of MAT services for opiate addiction may only be established in response to a Department determination that a need exists for additional medication treatment services. If the number of providers seeking authorization to provide MAT services exceeds the Department's need determination, then Florida Administrative Code Rule 65D-30.014(3) requires the Department to use an evaluation team of industry experts to rate the applications based on five factors: capability to serve selected areas of need, patient safety and quality assurance, scope of services, capability/experience, and revenue sources. However, the rule provides no procedure for breaking a tie between applicants. For Fiscal Year 2018-19, the Department determined that 42 new MAT clinics were needed in Florida, including one in Brevard County. A team of external evaluators reviewed the six applications submitted for Brevard County, and Metro Treatment of Florida, L.P. ("Metro") and CFSATC7 d/b/a Central Florida Treatment Centers ("Central Florida") tied for the highest score. In order to break the tie, the Department reviewed several additional factors. Based on a review of those additional factors, the Department elected to grant Central Florida's application. Metro filed a petition asserting that the Department's tie-breaking procedure was an unadopted rule.

OUTCOME: The ALJ dismissed the rule challenge by concluding that the tiebreaking procedures used by the Department did not meet the definition of a "rule" because there was no indication of general applicability. The ALJ reasoned that "[t]he record in this proceeding reveals that the Department used these tiebreaking procedures in only one of the 42 reviews of applications for MAT licensure in Florida, and there is no evidence that the Department would, or could, use these tiebreaking procedures in any other Florida county if a tie were to occur in an application for MAT licensure . . . ."

Rule Challenges—Existing Rule

Ernesto Gonzalez v. Div. of Hunting & Game Mgmt., Case No. 20-4051RX (DOAH Final Order Dec. 1, 2020). https://www.doah.state.fl.us/ROS/2020/20004051.pdf

FACTS: The Florida Fish and Wildlife Conservation Commission ("the FWC") regulates wildlife management areas ("WMAs"). During the 2020 legislative session, the Florida Legislature amended chapter 316 so that electric bicycle operators are afforded the same rights and privileges as bicycle operators. However, the new legislation specified in section 316.20655, Florida Statutes, that nothing therein should be construed as preventing a state agency from restricting the operation of electric bicycles on bicycle paths, multiuse paths, or trail networks over which the state agency has jurisdiction. Subsequently, the FWC amended Florida Administrative Code Rule 68A-15.004 so that electric bicycles could only be operated on named or numbered roads. Ernesto Gonzalez holds an FWC-issued Gold Sportsman's License and regularly visits WMAs, which are state game lands within the FWC's regulatory jurisdiction. Mr. Gonzalez file a rule challenge alleging that rule 68A-15.004

continued...

DOAH CASE NOTES
from page 12

contravenes section 316.20655(1) by restricting electric bicycles to named or numbered roads.

OUTCOME: Before considering the merits of Mr. Gonzalez's rule challenge, the ALJ addressed the FWC's argument that DOAH lacked jurisdiction because the amendment to rule 68A-15.004 was promulgated pursuant to FWC's constitutional authority rather than any statutorily-delegated rulemaking authority. The ALJ disagreed, ruling that the amendment was an exercise of the FWC's statutorily-designated rulemaking authority rather than its constitutional rulemaking authority. The ALJ observed that section 20.331(9)(c) empowers the FWC to regulate off-road vehicles on state lands, and concluded that "even if [electric bicycles] are technically not off-road vehicles, they are closely enough related to such vehicles that the power to regulate off-road vehicles on state lands (which is clearly a statutory power) cannot be meaningfully distinguished from the power to regulate [electronic bicyles] on state lands." With regard to the merits of Mr. Gonzalez's rule challenge, the ALJ ruled that "[i]t requires a strained interpretation of section 316.20655, which the undersigned rejects as unreasonable, to conclude that the law *entitles* [electric bicycle] operators, as of right, to ride on [non-road areas] that are *not* plainly suitable and set aside for vehicular traffic."

Rule Challenges—Proposed Rule

Ricky Rescue Training Acad., Inc. v. Dep't of Fin. Servs., Case No. 20-441RP (DOAH Final Order Oct. 23, 2020). https://www.doah.state.fl.us/ROS/2020/20000441.pdf.

FACTS: Section 633.216, Florida Statutes, requires the Department of Financial Services, Division of State Fire Marshal ("Department") to certify fire safety inspectors and to provide by rule for the development of a fire safety inspector training program. The Department's program is administered by Department-approved training providers. On July 10, 2019, the Department filed a notice proposing to amend Florida Administrative Code Rule 69A-39.005(1)(b)2.d. so that two training courses, "Codes and Standards" and "Construction Documents and Plans Review," would only be approved if they were taught in a traditional classroom setting as opposed to online. Ricky Rescue Training Academy, Inc. ("Ricky Rescue") is authorized by the Department to provide fire certification training courses online and in a format combining traditional, in-person learning with online learning. On January 27, 2020, Ricky Rescue filed a petition alleging that the proposed rule was an invalid delegation of legislative authority.

OUTCOME: Ricky Rescue argued in part that the proposed rule exceeds the Department's rulemaking authority because none of the statutes cited as rulemaking authority empower the Department to dictate the methodology for providing fire safety training. The ALJ noted that section 633.216, Florida Statutes, requires every fire safety inspector to satisfactorily complete, as determined by Department rule, "a fire safety inspector training program of at least 200 hours established by" the Department. The ALJ concluded that the Department did not exceed its grant of rulemaking authority because "the authority to establish a fire safety inspector training program in section 633.216 is broad enough to encompass both content and methodology." The ALJ further concluded that "it is not necessary for the Legislature to delineate every aspect of the training program it directs the Department to develop. It is enough that it requires the development of the program." As for Ricky Rescue's argument that the proposed rule is arbitrary and capricious, the ALJ stated that "[w]hile one may disagree with the ultimate position taken by the Department, it is a position taken after listening sessions and workshops held around the state over a four-to-five-year period." Thus, "[a]s long as the rule is the product of a thoughtful, open process where different viewpoints are considered, the statutory authority for this rule is broad enough for the Department to fashion a program it believes, in good faith, to best serve the public. Where reasonable people can disagree, and did so here, the Proposed Rule is not arbitrary or capricious."

Law School Liaison

Spring 2021 Update from the Florida State University College of Law

by Erin Ryan, Associate Dean for Environmental Programs

This column highlights recent accomplishments of the Florida State University College of Law students and alumni. It also lists the rich set of programs the College of Law is hosting this semester and reviews recent faculty scholarships.

Recent Student and Alumni Achievements

- The following students will be participating in administrative and environmental law externships this spring
  - * Katherine Hupp – Division of Administrative Hearings
  - * Richard Adetutu – Public Employees Relations Commission
  - * Alessandra Norat Mousinho – Department of Business and Professional Regulation Office of General Counsel
  - * Jaelee Edmond – Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco
  - * Tanner Kelsey – Department of Environmental Protection
  - * Reginald Howard – Department of Health
  - * Keirsey Carns – Florida Fish and Wildlife Conservation Commission
  - * Megan Clouden – Florida Fish and Wildlife Conservation Commission
  - * Kevin Kane – NextEra Juno Beach
  - * Kamilla Yamatova – NextEra Tallahassee
  - * Kevin Harris – Tallahassee City Attorney's Office, Land Use Division
- President of the FSU Animal Legal Defense Fund, Catherine Awasthi, recently co-authored an article with alum Ralph DeMeo ('85) that was published in the September/October issue of The Florida Bar Journal entitled *The Fading Color of Coral: Anthropogenic Threats to Our Native Reefs*.
- Katherine Hupp and Catherine Bauman will be competing the National Energy and Sustainability Moot Court Competition at West Virginia University College of Law in March 2021. The team will be coached by FSU Professor Nat Stern.
- The Environmental Law Society held its annual mentoring program for new members designed to connect students with professionals in their desired area of practice on February 19, 2021. Macie Codina chaired the Mentor Mixer program.
- The Sustainable Law Society will be hosting a socially distanced on-campus cleanup and a presentation on Fast Fashion this Spring 2021 semester. This semester's events will be headed by Brooke Boinis.

Faculty Achievements

- Professor Shi-Ling Hsu published *Prices Versus Quantities*, in Policy Instruments in Environmental Law (K.R. Richards & J. van Zeben eds., 2020). Forthcoming publication entitled *Capitalism and the Environment: A Proposal to Save the Plant* (Cambridge Univ. Press, 2021).
- Professor Emeritus David Markell published *An Empirical Assessment of Agency Mechanism Choice*, in 71 Ala. L. Rev 1039 (2020), with R. Glickman & J. Sevier.
- Associate Dean Erin Ryan published *A Short History of the Public Trust Doctrine and its Intersection with Private Water Law*, 39 Va. Envtl. L.J. 135 (2020), as well as *Rationing the Constitution vs. Negotiating It: Coan, Mud, and Crystals in the Context of Dual Sovereignty*, 2020 Wisc. L. Rev. 165 (2020). Forthcoming publications include *The Twin Environmental Law Problems of Preemption and Political Scale*, in Environmental Law, Disrupted (Keith Hirokawa & Jessica Owley, eds.).
- Professor Mark Seidenfeld published the forthcoming book review entitled *The Limits of Deliberation about the Public's Values: Reviewing Blake Emerson, The Public's Law: Origins and Architecture of Progressive Democracy*, 199 Mich. L. Rev. __ (2021), and publication *Textualism's Theoretical Bankruptcy and Its Implications for Statutory Interpretation*, 100 B. U. L. Rev. __ (2021).
- Assistant Professor Sarah Swan has two forthcoming publications: *Running Interference: Local Government, Tortious Interference with Contractual Relations, and the Constitutional Right to Petition*, 36 J. Land Use & Envtl. L. __ (2021), and *Exclusion Diffusion*, 70 Emory L.J. __ (2021).
- Dean Emeritus Don Weidner has a forthcoming publication in the Winter 2020 issue of The Business Lawyer entitled *LLC Default Rules Are Hazardous to Member Liquidity*. He also published the The Revised Uniform Partnership Act (Thomson Reuters 2020), with R. Hillman & A. Donn.

continued...

LAW SCHOOL LIAISON
from page 14

Spring 2021 Events

The FSU Environmental, Energy, and Land Use Law Program is hosting impressive environmental and administrative law events and activities via Zoom. For more information or to register, please email us at jroxas@law.fsu.edu. We hope Section members will join us for one or more of these events.

Energy Law Panel: Rooftop Solar Energy in Florida

On January 27, 2021, a panel discussing the current legal and economic environment for rooftop solar energy in Florida was held at the College of Law. Panelists discussed the various economic opportunities for the adoption of rooftop solar energy, and possible legal reforms to facilitate the expansion of rooftop solar energy. The panelists included Justine Hoysradt, President of Florida Solar Energy Industries Association; Susan Glickman, Florida Director of Southern Alliance for Clean Energy; and Bentina Terry, Senior Vice President of Georgia Power Company. This panel was moderated by Robert Schef Wright.

Spring 2021 Distinguished Lecture

Mapping the New Urban Commons: Law and Resource Stewardship in the City

Sheila Foster, Scott K. Ginsburg Professor of Urban Law and Policy and Professor of Public Policy, Georgetown Law presented the College of Law's Spring 2021 Environmental Distinguished Lecture on February 24, 2021. Professor Foster discussed her research on the urban and commons, and the idea of the city as a *commons*, meaning that the city is a collaborative space in which urban inhabitants are central actors in managing and governing city life and urban resources.

Enrichment Lectures

David Zierden, State Climatologist, Florida State University, presented a guest lecture entitled "Climate Change and Variability in Florida" on February 10, 2021.

Bob Inglis, Executive Director of Citizens' Climate Lobby will present a guest lecture entitled "How Conservatives are Positioned to Lead on Climate Change" on Wednesday, March 10 from 12:30 PM to 1:30 PM via Zoom.

The Fall 2020 speaker series bridged oceanographic science and oil spills (Ian MacDonald), administrative law and climate justice (Richard Murphy), conceptual divisibility and resource management (Lee Fennell), and sea turtle conservation (Mariana Fuentes). Please email us should you be interested in watching the lectures.

Recommended Amendments to the Uniform Rules of Procedure

By Shaw Stiller and Larry Sellers

The Administration Commission adopted the original Uniform Rules of Procedure[1] (Uniform Rules) on April 1, 1997, as Chapters 28-101 through 28-110 and 28-112, Florida Administrative Code.[2] As of that date, any existing, agency-specific rules or practices inconsistent with the Uniform Rules were subject to an automatic "legislative repeal" by operation of section 120.545(5)(a), Florida Statutes. *Dep't of Corr. v. Saulter*, 742 So. 2d 368, 370 (Fla. 1st DCA 1999); *see Madison Highlands, LLC v. Fla. Hous. Fin. Corp.*, 220 So. 3d 467, 471 (Fla. 1st DCA 2017) ("a rule cannot serve as an exception to the Uniform Rules because the Administration Commission has not approved it as an exception").[3]

The Uniform Rules have been amended several times in the 23 years since their adoption, with the most recent changes being accomplished in 2013.[4] In 2019, an ad hoc committee of the Administrative Law Section was convened to review the Uniform Rules and determine whether experience, administrative proceedings, changes in laws and rules, and judicial review illuminated any opportunities for improvement. The ad hoc committee met approximately one dozen times during 2019 and early 2020, and it solicited input from a large number of interested persons, including the administrative law judges of the Division of Administrative Hearings and members of the Administrative Law Section, the Florida Government General Counsels' Association, the Florida Government Bar Association, and the Environmental and Land Use Law Section.[5]

The committee's proposed revisions to the Uniform Rules were presented to and approved by the Administrative Law Section's Executive Council in June 2020. The individual

continued...

RECOMMENDED AMENDMENTS
from page 15

rule revisions as approved by the Executive Council are summarized below by the chapter in which they appear.

Chapter 28-101: Organization

Existing Rule 28-101.001(2)(e) requires that every agency Statement of Agency Organization and Operation (Statement) specify "whether" documents can be filed by email, vesting in each agency the discretion to accept such filings or to require delivery of hard copies for filing. The recommended rule amendment would require that the Statement "describe the manner" by which documents can be filed by facsimile or email. If this recommended amendment is adopted, an agency wishing to retain or adopt a practice of not accepting documents for filing by email or facsimile could apply for an exception.[6]

Other recommended amendments to this chapter would require the Statement to list the holidays and other days on which the agency will be closed and the manner the agency will use to notify the public of such unscheduled (*i.e.*, emergency) agency closures. Finally, the recommended amendments would add a provision requiring an annual review and update of the Statement.

Chapter 28-105: Declaratory Statements

Existing Rule 28-105.0027 does not contain an express allowance for a party granted intervenor status in a declaratory statement proceeding to submit any written filing other than a petition to intervene.[7] The recommended revision to this rule would provide a person granted intervenor status the right to file a response to the petition for declaratory statement within seven days of being granted intervention or within a longer period if specified by the presiding officer. No reply may be filed absent leave granted by the presiding officer. The only other recommended amendment to this chapter eliminates unnecessary language in Rule 28-105.003 regarding the duty of collegial bodies to take action only at duly noticed public meetings.

Chapter 28-106: Decisions Determining Substantial Interests

Part I: General Provisions

The amendment to Rule 28-106.103 proposes to place "any other days on which the agency clerk's office is closed" in the same calendar category as Saturdays and Sundays so that deadlines that fall on such days would be extended until the next day on which the agency clerk's office is open, and those days would not be included in computing periods of time less than seven days.

The recommended amendment to Rule 28-106.104 would add a requirement that every pleading submitted by a Florida attorney in a Chapter 120 proceeding include the attorney's bar number[8] and a provision requiring any pleading to have consecutively numbered pages. The other changes relocate some language from Rule 28-106.104 to Rule 28-106.110, "Service of Papers," in order to promote a clearer understanding of how pleadings subsequent to the initial submission are to be served by the parties.

Existing Rule 28-106.105 allows a potential qualified representative to file a request for hearing on behalf of a party and then file the written request for qualification as a representative at a future time "as soon as practicable, but not later than any pleading filed by the person seeking to appear on behalf of the party." The recommended amendment to this rule would require the party on whose behalf a qualified representative files an initial request for hearing to file the appropriate papers for qualification of the representative under Rule 28-106.106 not later than seven days after assignment of the presiding officer. When the qualified representative does not file the initial pleading but a party subsequently wishes such representation, the current rule requirement that the party must file the request "as soon as practicable, but no later than any pleading filed by the person seeking to appear on behalf of the party" would continue to apply.

The statutory authority for representation by a non-attorney in administrative proceedings is found in section 120.57(1)(b), Florida Statutes, which provides that all parties have the right "to be represented by counsel or other qualified representative." The recommended rule amendments clarify that counsel means a member of the Florida Bar *in good standing* and add, for the first time, a definition of "qualified representative."[9] The rule is also recommended to expressly require that an attorney licensed to practice in one or more jurisdictions other than Florida file a request to appear as a qualified representative.[10]

One of the required elements of a request for a qualified representative is an affidavit sworn to by the representative setting forth their qualifications. The amendments add six content requirements to the representative's sworn affidavit:

1. A list of all proceedings in the past two years in which the representative has been granted or denied authorization as a representative.
2. A statement as to whether the representative has been denied admission to the Florida Bar or the bar of any other jurisdiction.
3. A statement that the representative has read and will comply with Chapter 120 and the Uniform Rules of Procedure.
4. A statement that the representative has read and has knowledge of the Florida Rules of Civil Procedure relating to discovery in an administrative proceeding.
5. A statement that the representative has read and has knowledge of the Florida Rules of Evidence, including the concept of hearsay in an administrative hearing.
6. A statement that the representative is knowledgeable regarding the factual and legal issues involved in the proceedings.

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RECOMMENDED AMENDMENTS
from page 16

The first three matters listed above are not in the current rule as affidavit requirements or matters to be considered by the presiding officer, and were added based on suggestions received by the committee. Requirements four through six in this list appear in the existing rule as matters to be considered by the presiding officer but not as content requirements for the affidavit. Fla. Admin. Code R. 28-106.106(3)(b)-(c). The amendments would address this apparent incongruity. This information is included for consideration by the presiding officer; neither the current rule nor the recommended amendments provide for automatic disqualification based on a particular response.

If the proposed representative is a lawyer but not a member of the Florida Bar, that person must also include in their affidavit a list of jurisdictions in which they are licensed to practice and a certification that they (1) have not been disbarred, (2) have not resigned in lieu of discipline, (3) are not inactive due to incapacity, and (4) are not currently suspended as a disciplinary sanction from practice in any jurisdiction. A lawyer meeting any one of those four criteria would be disqualified from representing a party in an administrative proceeding. This list is an expansion of the current rule, which provides only one automatic disqualifying criterion for a non-Florida attorney seeking to be a qualified representative (being disbarred in another jurisdiction).

A recommended amendment to Rule 28-106.107 would add compliance with Chapter 120, the Uniform Rules of Procedure, and "all other applicable statutes and rules" to the code of conduct for qualified representatives.

The amendments propose to strike existing Rule 28-106.110, and replace it with a revised rule that consolidates the currently scattered provisions regarding service into one rule. This rule would govern all service in administrative proceedings unless another method is expressly required by another law, such as section 120.60(5) or 766.303, Florida Statutes. In addition to consolidating existing provision, there are several recommended amendments to the current method for service.

1. Email service is mandatory if the both filer's and recipient's address of record includes an email address.[11]
2. Email service made after 5:00 p.m. is deemed service as of 8:00 a.m. the following day.
3. Filings must be accompanied by a certificate of service.
4. If the certificate of service is in the form prescribed in the rule, the certificate is prima facie evidence of service in compliance with the rule.

Existing Rule 28-106.111(3) authorizes a person to file a motion for an extension of time to file an initial pleading so long as they file the motion with the agency within the time required for the initial pleading. However, the rule does not require the agency to advise the public of this opportunity in the notice of rights.[12] The recommended rule amendments would require that the notice of rights advise that a person may request an extension time and that such a request must state good cause shown for the extension. To ensure internal consistency with the recommended amendments to Rule 28-101.001 (Statement of Agency Organization and Operation), additional amendments to this rule are recommended to require the notice of rights to include instructions on filing by email or fax and, if applicable, instructions on how to electronically file documents.

Chapter 28-106: Decisions Determining Substantial Interests

Part II: Hearings Involving Disputed Issues of Material Fact

Rule 28-106.201 generally governs the initiation of and original parties to administrative proceedings. A recommended amendment to subsection (4) would provide that specifically-named persons who are the subject of the agency's proposed action may become a party to the proceeding by entering an appearance as a respondent and identifying how their substantial interests will be affected rather than filing a petition or request for hearing. Examples of such a specifically-named persons include the successful bidder or permit applicant named in the agency's notice or intended notice of decision. That person would generally have no sufficient reason to file a petition or request for hearing regarding a successful bid or application but would likely realize an impact to their substantial interests if a petition is filed by another party to contest the notice or intended notice. Under the recommended amendments, that person could enter an appearance, become a party to the proceeding as a respondent, and raise issues in support of the agency's determination or defenses to issues raised in a petition.[13]

A recommended amendment to Rule 28-106.204 would require the moving party to indicate in every motion whether another party intends to file a written response. The current rule requires only that the moving party indicate whether another party has any objection. Whether another party objects or not, the presiding officer can more expeditiously enter a ruling on the motion if timely informed that no response will be filed.

A recommended amendment to Rule 28-106.201 to would add a new subsection (3) to incorporate the standard for intervention developed in the case law; that is, intervention is in subordination to, and in recognition of, the main proceeding, unless otherwise ordered by the presiding officer. So that the status of intervention under this standard is clear from the initial pleading, an amendment to existing Rule 28-106.205 is recommended that would require an intervenor seeking to raise new issues to include in the motion to intervene additional information akin to a petition or request for hearing, including a statement of all disputed issues of material fact, a concise statement of ultimate facts, a statement of the statutes and rules that require reversal or modification of the agency's position, and a statement of the relief sought.

continued...

RECOMMENDED AMENDMENTS
from page 17

There are currently no rules implementing the brief statutory guidance provided to a party seeking to disqualify an administrative law judge: "Any party may request the disqualification of the administrative law judge by filing an affidavit with the division prior to the taking of evidence at a hearing, stating the grounds with particularity." § 120.569(2)(a), Fla. Stat. In this absence, administrative law judges have relied upon the procedure established in Florida Rule of Judicial Administration 2.330, "Disqualification of Trial Judges," for guidance.[14]

Recommended new Rule 28-106.2115 would provide a uniform procedure by which a party may request the disqualification of an administrative law judge. Much of the new text mirrors the provisions of Florida Rule of Judicial Administration Rule 2.330, while adjusting the process to comport with the timeframes in section 120.569(2)(a), Florida Statutes.[15] Because of this parallel, case law interpreting the Rules of Judicial Administration will be instructive in considering disqualification administrative proceedings.

Regarding taking evidence, current Rule 28-106.213 provides "[i]f requested and if the necessary equipment is reasonably available, testimony may be taken by means of video teleconference or by telephone." The recommended amendment to this rule would further specify that a party seeking to offer testimony by telephone in their case in chief must file a motion for leave with the presiding officer five days prior to the date noticed for the final hearing. The party offering the telephonic testimony would have the duty to ensure a notary is present with the witness and to file a written certification with the presiding officer from the notary "confirming the identity of the witness, and confirming the affirmation or oath by the witness." Fla. Admin. Code R. 28-106.213(5)(b). These amendments are consistent with current practice at DOAH.[16]

The Uniform Rules do not currently contain a process to designate a translator or interpreter for a witness or party, leaving to the discretion of the parties the most appropriate manner to bring the matter to the attention of the presiding officer.[17] Given the variety of persons who may be called upon to act as a translator or interpreter, sufficient notice may be desirable to ensure the accuracy of the subject testimony.[18] The new recommended rule subsection would require a party seeking to use a translator or interpreter to provide a notice to all other parties seven days prior to any hearing. This notice must contain the identity of and contact information for the translator/interpreter, the nature of the translation/interpretation services, and a disclosure of the relationship, if any, between the translator/interpreter and the person for whom these services will be performed.

Rule 28-106.217 is recommended to be amended to ensure the method of service for post-hearing submissions is consistent with new recommended Rule 28-106.110. No other substantive changes are intended.

Chapter 28-106: Decisions Determining Substantial Interests

Part III: Hearings Not Involving Disputed Issues of Material Fact

Many of the changes to this part are identical or nearly identical to their counterparts in Part II, Hearings Involving Disputed Issues of Material Fact. The most significant recommended changes are found in Rules 28-106.302 and 106.3045 (discussed below).

There is no existing rule regarding the amendments of petitions in hearings not involving disputed issues of fact. Subsection (1) of recommended Rule 28-106.3015 would establish a rule for such amendments mirroring the existing one for hearings involving disputed issues of fact (Rule 28-106.202). Subsection (2) of this new rule would permit a party to amend its petition without leave following an order relinquishing jurisdiction to the agency entered by an administrative law judge upon a finding that there are no disputed issues of material fact. The party could not add new issues of disputed fact that could not have been raised before the administrative law judge.

Recommended new Rule 28-106.3016 would add provisions for intervention and appearances by specifically-named persons that mirror those in the rule for hearings involving disputed issues of fact (Rule 28-106.205).

Rule 28-106.302 is recommended to be reorganized and revised to more closely align with section 120.57(2). Following receipt of a sufficient petition, the agency would give the parties 14 days to submit evidence in support of or opposition to the agency action or refusal to act, and 7 days thereafter to respond to the other parties' written submissions. The parties could request or the agency could schedule a hearing.

The recommended amendment conforms Rule 28-106.303 and Rule 28-106.204 and requires a motion to include a statement as to whether any party has indicated they intend to file a written response.

Recommended new Rule 28-106.3045 would add provisions for discovery that mirror those in the rule for hearings involving disputed issues of fact (Rule 28-106.206).

Rule 28-106.307, relating to post-hearing submittals, is recommended for repeal for lack of statutory authority.

Chapter 28-106: Decisions Determining Substantial Interests

Part V: Emergency Action

Rule 28-106.501, relating to emergency action, is recommended for repeal because it is substantially similar to section 120.60(6), Florida Statutes, and for lack of statutory authority.

Chapter 28-110: Bid Protests

Only minor amendments are recommended to this chapter. The recommended changes to Rule 28-110.002 update statutory cross-references. The only substantive change to Rule 28-110.003 recommended by the committee is a clarification that the notice of protest is to be filed with the

continued...

RECOMMENDED AMENDMENTS
from page 18

agency clerk unless otherwise specified in the solicitation. The recommended changes to Rule 28-110.005 would clarify that the bond is due at the same time the written protest is filed and simplify the protest bond form. Because such purchases are uncommon, the reference to "exceptional purchases" in the bond form is recommended to be removed.

What Next?

The committee's recommended changes to the Uniform Rules are just that: recommendations. The Administration Commission has the exclusive authority to propose and adopt changes to the Uniform Rules. Accordingly, any changes to the Uniform Rules may take effect if and only if adopted by the Administration Commission in accordance with the rulemaking process in the APA.

This rulemaking process will include opportunities for additional public participation. The committee's recommendations benefitted greatly from the many thoughtful suggestions it received during 2019 and early 2020, but virtually all of these suggestions were received before the pandemic. Experiences since then may reveal the need for additional changes to the Uniform Rules—such as to Chapter 28-109, relating to Conducting Proceedings by Communications Media Technology.

So, stay tuned!

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Endnotes

1 The Administrative Procedure Act directs the Administration Commission—the Governor and Cabinet—to adopt one or more sets of uniform rules of procedure to govern agency conduct. *See* § 120.54(5)(a)1., Fla. Stat.

2 Chapter 28-111 relating to Court Costs for Court Facilities was adopted separately in April 1998 and repealed in June 2012.

3 All agencies subject to Chapter 120 must comply with these Uniform Rules unless granted an exception by the Administration Commission. *See* § 120.54(5)(a), Fla. Stat.; *Gaston v. Dep't of Revenue*, 742 So. 2d 517, 521 (Fla. 1st DCA 1999). Several agencies have been granted exceptions. *See, e.g.*, Fla. Admin. Code R. 25-40.001 (Public Service Commission) & 40E-0.101 (South Florida Water Management District).

4 *See* Steve Pfeiffer, *Uniform Rules*, Admin. L. Section Newsletter (Oct. 1996); Gladys Perez, *Amendments to the Uniform Rules of Procedure*, Admin. L. Section Newsletter (Mar. 2007); Paul Amundsen, *Attention: Amendments to the Uniform Rules of Procedure Take Effect*, Admin. L. Section Newsletter (Apr. 2013).

5 Updates on the work of the ad hoc committee were provided in the June 2019, December 2019, and June 2020 issues of this newsletter.

6 The ad hoc committee received several comments from agencies highlighting the differences in cost and complexity between electronic filing and submitting documents by email. The recommended amendments to this rule recognize this difference and leave to each agency the decision on whether to accept electronic filings.

7 Even without express allowance, agencies have accepted and considered responses filed by intervenors in the course of issuing declaratory statements. See, e.g., In re: Petition for Declaratory Statement of Seascape of Little Hickory Island, Final Order No. DS19-044 (DBPR Dec. 10, 2019); In re: Petition for Declaratory Statement by the Town of Indian River Shores, Final Order No. PSC-16-0093-FOF-EU (PSC Jan. 5, 2016).

8 Florida Rule of Judicial Administration 2.515(a), which contains the requirement that an attorney's Florida Bar number be included on "[e]very pleading and other paper of a party represented by an attorney," applies only to filings in the courts of the state and not to those made with agencies.

9 "Qualified representative means a person who meets the qualifications of this section and has been authorized by order of the presiding officer to represent a party in a proceeding."

10 This amendment is consistent with current agency interpretation and application of chapter 120. *See, e.g.*, *Amelia Tree Conservancy, Inc. v. City of Fernandina Beach*, Case Nos. 19-2515GM, 19-2544GM at 5 (DOAH Sept. 16, 2019; DEO Oct. 18, 2019); *Lessinger v. Office of Fin. Regulation*, Case No. 08-3102 at 3 (DOAH Dec. 15, 2008), *rejected in part on other grounds by* No. 0340-S-9/07 (OFR Jan. 30, 2009).

11 Pursuant to Rule 28-106.104(2)(d), all filings with the agency are required to include "any e-mail address . . . of the person filing the pleading." The combination of this existing rule requirement and the recommended amendment would make service by any means other than email the rare exception.

12 The statute being implemented provides that the agency notice "shall state the time limits which apply" to filing a request for hearing. An extension directly affects time limits. *See Long Bar Point, LLP v. Lake Flores I, LLC*, Final Order No. SWF 20-005 (SFWMD Feb. 25, 2020) (petitioners' request for hearing filed and referred to DOAH after two extensions of time sought from and granted by the District).

13 A cross-reference is recommended for inclusion in amended Rule 28-106.205 for consistency and to ensure these persons will be treated by the presiding officer as a party (with independent rights) as opposed to an intervenor (with rights dependent on a party).

14 *See Palm Beach Farms Rural Preservation Comm., LLC v. Palm Beach Cty.*, Case No. 18-6308GM, Order Denying Petitioner's Motion to Disqualify at 3 (DOAH Oct. 14, 2019); *Dept. of Fin. Servs. v. Hunter*, Case No. 12-3622PL at 4 (DOAH June 26, 2013; DFS Aug. 6, 2013).

15 *Compare* § 120.569(2)(a), Fla. Stat. ("[a] ny party may request the disqualification of the administrative law judge by filing an affidavit with the division prior to the taking of evidence at a hearing"), *with* Fla. R. Jud. Admin. 2.330(d) ("[a] motion to disqualify shall be filed within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion").

16 *See, e.g.*, *PNC, LLC v. Dep't of Revenue*, Case No. 18-4464, Order Granting Request to Take Telephonic Testimony at Final Hearing at 1 (DOAH Jan. 28, 2019); *Dep't of Health v. Adebiyi*, Case No. 18-4813PL, Order Granting Motion to Take Telephone Testimony at 2 (DOAH Oct. 26, 2018).

17 See, e.g., Vogel v. Hernandez, Case No. 06-1039, Prehearing Stipulation at 4 (DOAH Sept. 29, 2006) ("The parties will need a translator for a number of witnesses that may testify during the hearing.").

18 *See Dep't of Health v. Crisp*, Case No. 17-1832PL at 3 (DOAH Sept. 28, 2017; DOH Dec. 15, 2017) ("An official translator provided by the State of Florida was sworn in to translate all testimony for Respondent as English is not her first language."); *Dep't of Bus. & Prof'l Regulation v. Honore*, Case No. 07-4601 at 3 (DOAH Jan. 2, 2008; DBPR Jan. 30, 2008) (daughter acted as translator for respondent/mother); *Dep't of Bus. & Prof'l Regulation v. Calix*, Case No. 06-2329PL at 7 n.1 (DOAH Oct. 10, 2006; DBPR Jan. 26, 2007) (husband acted as translator for respondent/wife).

19 The committee requested comment on a recommended amendment setting a seven-day deadline for the agency to issue a final order following a hearing to implement section 120.57(2)(a)3. and its directive that the agency provide a written explanation of why it overruled the parties' objections when a hearing is conducted. *See Vicaria v. Dep't of Health*, 715 So. 2d 285, 289 (Fla. 3d DCA 1998) (Schwartz, J., dissenting) (stating that it was agency's "statutory duty—minimal, but significant—to provide some reasoned explanation for its departure from the agency's recommendation as to the only question before it"). Based on the comments received, the committee removed this recommended amendment.

ADMINISTRATIVE REMEDIES
from page 1

to the general requirement that plaintiffs exhaust their administrative remedies:

> Generally, a party must exhaust available administrative remedies before filing suit in circuit court . . . . Relief is available as a remedy for adverse administrative action only in those extraordinary cases where a party has no other adequate administrative remedy to cure egregious agency errors **or** where a party's constitutional rights are endangered, **or** where the agency is alleged to have acted without colorable statutory authority and in excess of its delegated powers.[1]

As to the third exception, the First District explained:

> It is permissible to pursue relief in a circuit court—without first pursuing and exhausting administrative remedies—if an agency acts without **colorable** statutory authority that is clearly in excess of its delegated powers. However, this narrow exception is inapplicable, and exhaustion of administrative remedies will be required, where the agency's assertion of jurisdiction has **apparent** merit.[2]

The First District further held that:

> [W]e reject Best Care's claim that AHCA was acting "without colorable statutory authority that was clearly in excess of its delegated powers" when it granted Molina a contract in Region 8. As discussed below, AHCA did not violate section 409.974(1)(h), when it awarded the contract to Molina. We need not address the arguments on the merits here, other than to state that AHCA was acting **with** colorable authority. Accordingly, because Best Care had not exhausted its administrative remedies, and because no exception to the exhaustion requirement is applicable, the circuit court erred in ruling in favor of Best Care.[3]

The First District made clear in *Best Care* that an agency need only act with "**colorable** statutory authority," and its position only needs to have "**apparent** merit," to require exhaustion. Frustratingly, however, the First District did not explain what these terms actually mean in this context (nor do any of the cases it cited for this point). But, a review of cases using these terms in other contexts indicates they typically mean "non-frivolous." For example, the Florida Supreme Court has rejected arguments it expressly stated had "apparent merit."[4] Similarly, the First District has rejected an agency's interpretation of a statute that it expressly described as "colorable."[5] Whether a position is "colorable" is also often discussed in the context of sanctions.[6]

There are sound reasons for requiring exhaustion as long as the agency has a "non-frivolous" position. The purpose of the doctrine "is to assure that an agency responsible for implementing a statutory scheme has a full opportunity to reach a sensitive, mature, and considered decision upon a complete record appropriate to the issue."[7] A standard tilting more towards "actual" (as opposed to "apparent") merit would cause this exception to swallow the rule. Whether a plaintiff must exhaust its administrative remedies and whether the agency's position is correct are supposed to be separate questions. But, if exhaustion is not required whenever the agency is "wrong," it would never be required at all because the exhaustion inquiry would necessarily be a decision on the merits. In sum, while the appellate courts have not explained what "colorable statutory authority" and "apparent merit" mean in this context, it seems exhaustion is required whenever the agency's position is "non-frivolous."

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Endnotes

1 *Id.* at 1015 (alteration, internal citations, and internal quotation marks omitted; emphasis added and omitted).

2 *Id.* at 1015-16 (alterations, internal citations, and internal quotation marks omitted; emphasis added).

3 *Id.* at 1016 (alterations and internal citation omitted).

4 *See, e.g.*, *Smith v. State*, 19 So. 2d 698, 698-99 (Fla. 1944).

5 *See, e.g.*, *Carlson v. State*, 227 So. 3d 1261, 1267-70 (Fla. 1st DCA 2017).

6 *E.g.*, *Walker v. State*, 579 So. 2d 348, 350 (Fla. 1st DCA 1991); *Keyes Co. v. Friedes*, 497 So. 2d 916, 916 (Fla. 3d DCA 1986).

7 *Dep't of Revenue v. Brock*, 576 So. 2d 848, 850 (Fla. 1st DCA 1991).

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