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APPELLATE CASE NOTES

BY LAURA DENNIS, MELANIE LEITMAN, TARA PRICE, GIGI ROLLINI, LARRY SELLERS, SUSAN STEPHENS, AND ROBERT WALTERS

Public Records – Pro Se Litigants Assisted by Counsel Prior to Counsel's Appearance in Case Entitled to Attorney's Fees

O'Boyle v. Town of Gulf Stream, 341 So. 3d 345 (Fla. 4th DCA 2022).

Martin O'Boyle won a public records lawsuit against the Town of Gulf Stream (Town). The trial court awarded attorney's fees, but the award of fees included only work done after his attorney filed a notice of appearance in the case, not pre-appearance work. O'Boyle appealed the award amount. The Fourth District Court of Appeal reversed and remanded, holding that both pre-appearance and post-appearance work shall be used in calculating attorney's fees in public records litigation.

O'Boyle submitted a public records request to the Town for documents relating to an incident that occurred four years prior. He subsequently filed a pro se complaint under the Public Records Act, alleging that the town failed to produce all responsive documents or that it may have illegally destroyed some documents. The complaint stated that it was prepared with assistance of counsel, though no counsel signed the complaint. The day before the hearing, O'Boyle's son (an attorney) filed a notice of appearance. A year later, the trial judge entered judgment in O'Boyle's favor, which entitled him to attorney's fees pursuant to section 119.12, Florida Statutes.

A fee hearing was scheduled where O'Boyle argued entitlement to attorney's fees from the moment the "attorney-client" relationship was formed with his son, or at least from the time the complaint was filed. The Town's fee expert claimed O'Boyle should only be entitled to attorney's fees for time after the notice of appearance was entered, as the expert claimed that the Town handles pro se complaints differently. The expert claimed that the Town assesses risk based on if it was on notice as to whether an attorney is involved, even if behind the scenes. The trial court agreed, and awarded attorney's fees only for time following the notice of appearance.

On appeal, the Fourth District explained that in an action under chapter 119, Florida Statutes, "the court shall assess and award the reasonable costs of enforcement, including reasonable attorney fees, against the responsible agency if the court determines," among other things, that the "agency unlawfully refused to permit a public record to be inspected or copied." § 119.12(1)(a), Fla. Stat. (2018). While acknowledging it was an issue of first impression, the court held that section 119.12(1) does not distinguish between "pre-appearance" and "post-appearance" in regards to attorney's fees. Because the Town was also on notice that the complaint was filed with

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From the Chair

BY TABITHA G. JACKSON

Hey Y'all! I hope everyone enjoying our Newsletter is having a wonderful and productive fall thus far. I know the Administrative Law Section is! What a stimulating year we have planned for you. When I was new to Tallahassee, Judge Gar Chisenhall and Christina Shideler encouraged my participation in this Section over 6 years ago! I recall so vividly that my first Section event was the "Day at DOAH." What a fun, interactive and wonderful time that was. It is such an honor to now be the Chair of such a productive and educational section of the Florida Bar. I have learned a lot including

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FEATURE

A Step-by-Step Guide to SFGAP Board Certification

BY BRITTANY B. GRIFFITH
& GAR CHISENHALL
ADMINISTRATIVE LAW JUDGE,
DIVISION OF ADMINISTRATIVE HEARINGS

We have all seen the commercials in which personal injury attorneys talk about how they are board certified in trial practice and how you must hire them to succeed in your case. While we may have no desire to practice personal injury, we probably like the idea of being distinguished from our peers as experts in our administrative law practice. The formal name of the certification area for administrative law is the "State and Federal Government and Administrative Practice" certification area, also known as "SFGAP." We would love to see you join the distinguished group of SFGAP-certified administrative law practitioners and hope this article will motivate you to pursue this challenging endeavor and provide you with the information and motivation to do just that.

1. Start with Your "Why"

Perhaps the most important part of your SFGAP board certification journey is to find your reason for pursuing the certification. While the certificate and lapel pin that are awarded for attaining SFGAP certification are nice, we recognize that they may not be sufficient motivating factors to study for a test akin to a mini bar exam. But consider the prestige of and sense of fulfillment associated with becoming a board-certified attorney in this area. It is, after all, quite an accomplishment to join the small group of Florida attorneys who have achieved this distinction, especially when you realize just how small that group is.

As of June 1, 2022, only 78 of the more than 107,000 attorneys licensed to practice law in Florida are SFGAP certified. In other words, only about 0.0729 percent of attorneys licensed to practice law in Florida are SFGAP certified! Would that statistic make you more marketable within the legal community? As a private attorney, would that statistic help you gain clients, referrals, or a better position within a firm? As a government attorney, would that statistic help you gain recognition, a promotion, or a different position for additional compensation?

Despite the statistical bragging rights, added marketability, and inevitable financial gains associated with board certification, we believe that the greatest reason to pursue board certification is that going through the process will make you an even better attorney in the certification area. The SFGAP exam is commensurate to one day of the Florida Bar Exam in terms of the degree of difficulty, and the knowledge you gain from truly focusing on the principal issues in state and federal administrative law will be invaluable. You will sharpen your understanding of the rules, exceptions, and exceptions to the exceptions. You will also ensure your ability to navigate the underlying processes and venues based on the arguments being made.

Ultimately, seeking board certification will represent a significant investment of time but will yield significant rewards.

2. Qualify for Examination

If you have your "why," you will next need to qualify to take the examination. In order to do so, an attorney must satisfy the following requirements: (1) five years of practice as an attorney; (2) substantial involvement in Administrative Law during three of the five years immediately preceding one's application; (3) completion of 50 hours of approved SFGAP certification continuing legal education during the three years preceding one's application; and (4) peer review.

An applicant who meets the five-year practice requirement must submit a written application by October 31 to sit for the May certification exam the following year. Applications will require information about the applicant's employment history, contacts for peer review, and a demonstration of the applicant's

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substantial involvement. Substantial involvement is demonstrated through a point system indicated on the application based on work performed over the last 20 years, although a majority of this work is expected to have been performed in the last five years. The required application is quite comprehensive and requires a substantial amount of time and planning. Applicants should review the application far in advance of the due date and make time to retrieve and record the required information.

Another area worth noting is the 50-hour SFGAP continuing legal education (CLE) requirement. These credits can be hard to find, but the Administrative Law Section (Section) and some voluntary bar associations such as the Florida Government Bar Association are doing what they can to certify their CLEs for SFGAP credit when possible. Like the Section, these groups may provide discounted or free SFGAP programming to its members.

3. Pass the Exam

Once qualified, an applicant will be given an opportunity to sit for the exam. While we have not polled the 78 attorneys who are currently SFGAP certified, we would be very surprised if any of them opined that passing the SFGAP exam was not the hardest part of becoming certified.

Although the two of us are board-certified in different areas, we agree that the most important key to passing a certification exam is to formulate a realistic study plan and then stick to it.

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DOAH CASE NOTES

BY GAR CHISENHALL, MATTHEW KNOLL, DUSTIN METZ, PAUL RENDLEMAN, TIFFANY RODDENBERRY, AND KATIE SABO

Rule Challenges—Proposed Rules

Fla. Hospice & Palliative Care Ass'n v. Agency for Health Care Admin, Case No. 22-0790RP (Final Order June 23, 2022) (Stevenson, ALJ).

Facts: The Agency for Health Care Administration (AHCA) is the state agency responsible for licensing health care facilities, and AHCA may not issue a license to a hospice unless the applicant receives a certificate of need (CON) or an exemption therefrom. Prior to issuing a CON, AHCA uses a formula to determine whether a particular service area has a numeric need for a hospice. That calculation depends on AHCA obtaining the actual number of hospice admissions from hospice providers. AHCA publishes its determinations, known as a fixed need pool, twice a year. Under the current version of Florida Administrative Code Rule 59C-1.008, if a hospice discovers an error in the admissions data it reported to AHCA after the fixed need pool is published, then that hospice could submit a corrected report. If AHCA agrees with the corrected report, then AHCA will publish a revised fixed need pool.

On October 14, 2021, AHCA published proposed amendments to rule 59C-1.008. Under the proposed amendments, once the fixed need pool numbers are published, AHCA will consider no errors other than its own mathematical or data input errors in calculating the fixed need pool. The Florida Hospice and Palliative Care Association and several individual hospice organizations filed a petition alleging that AHCA's proposed amendments amount to an unlawful exercise of delegated legislative authority.

OUTCOME: The ALJ rejected the petitioners' argument that the proposed amendments were arbitrary or capricious. He found that while the proposed amendments may lead to AHCA incorporating incorrect information into its fixed need pool calculations, AHCA articulated a rational basis for the amendments. The ALJ also found that while time may ultimately prove that the petitioners were correct about the wisdom of the proposed amendments, "section 120.52(8) includes no prohibition on an agency's making a mistake."

Rule Challenges—Existing Rules

S. Marion Real Estate Holdings, LLC v. Dep't of Bus. & Prof'l Regul., Div. of Pari-Mutuel Wagering, Case No. 22-968RX (Final Order June 6, 2022) (Chisenhall, ALJ).

Facts: The Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (Division) was the state agency charged with regulating pari-mutuel facilities and cardrooms in Florida. Section 550.0251(12), Florida Statutes, provides that the Division "shall have full authority and power to make, adopt, amend, or repeal rules relating to cardroom operations, to enforce and to carry out the provisions of s. 849.086, and to regulate the authorized cardroom activities in the state." In addition, section 849.086(4), Florida Statutes, provides, in pertinent part, that the Division shall adopt rules governing cardroom operations. At least since May 5, 2004, Florida Administrative Code Rule 61D-11.005(5) has prohibited cardroom occupational licensees from participating in cardroom games at the facilities where they are employed. Rule 61D-11.005 cites sections 550.0251(12) and 849.086(4) as its rulemaking authority. The rule identified section 849.086 as the law being implemented.

On March 25, 2022, South Marion Real Estate Holdings, LLC, d/b/a Oxford Downs and Darold R. Donnelly (collectively referred to as the Petitioners) filed a petition alleging that rule 61D-11.005(5) is an invalid exercise of delegated legislative

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Florida State University College of Law Summer 2022 Update

BY ERIN RYAN,
ASSOCIATE DEAN FOR ENVIRONMENTAL PROGRAMS AND DIRECTOR OF FSU CENTER FOR ENVIRONMENTAL, ENERGY, AND LAND USE LAW

On behalf of the Center for Environmental, Energy, and Land Use Law here at FSU, I'm delighted to announce that Professor Tisha Joseph Holmes has joined our Program as a Courtesy Professor of Law. As a faculty member in FSU's Department of Urban and Regional Planning, her research focuses on promoting grassroots climate response capacity through community outreach and participatory engagement. Professor Holmes teaches climate change and community resilience, land use planning, and coastal planning. She will welcome our law students into her Land Use Planning course next fall, which will emphasize environmental justice.

Professor Holmes holds a Ph.D. in Urban Planning from UCLA, an MPA in Environmental Science and Policy from Columbia University, and a BA in Political Science and Environmental Studies from Williams College. She is the lead researcher in the Florida Building Resilience Against Climate Effects (BRACE) Program, which is working to improve public health sector efforts to respond to climate variability by incorporating the best available science into routine public health practice. The Robert Wood Johnson Foundation awarded her a 2022 research grant for her work on fostering transformative policies at the intersection of climate, health equity, and environmental change. She is also a recipient of the FSU University Community Engaged Teaching Award.

"I am excited to join the FSU Environmental Law community as a Courtesy Faculty member. I look forward to creating spaces of learning for Law and Planning students to critically engage with each other on environmental, climate change and justice issues in interdisciplinary and collaborative ways." – Professor Tisha Holmes

Recent Student Achievements and Activities

• Congratulations to our J.D. graduates who completed the Certificate Program during the spring 2022 term: Catherine Bauman and Katherine Hupp (with Highest Honors), Taylor Greenan and Barclay Mitchell (with High Honors), Keirsey Carns (with Honors), and Macie Codina, Cassidy Farach, Christopher Perrigan, Cameron Polomski, and Rylie Slaybaugh.

• We also congratulate E. Marion Brummal of Montgomery, Alabama, who completed his Environmental LL.M. degree at the end of fall semester. The LL.M. in Environmental Law and Policy enriches the education experience of LL.M. students by enabling them to acquire post-graduate expertise in the areas of environmental, energy, and land use law.

• Catherine Bauman, Katherine Hupp, and Barclay Mitchell participated in the 34th Annual Jeffrey G. Miller National Environmental Law Moot Court Competition hosted by the Pace University Elisabeth Hubb School of Law on February 23-26, 2022. The team won the Best Brief for State of the New Union. Segundo Fernandez, Tim Atkinson, and Professor Shi-Ling Hsu served as the team coaches.

• The FSU Environmental Law Society (ELS) has concluded elections and finalized the new 2022-2023 Executive Board. The officers are as follows: Juan Gonzalez Moreno as President; Melissa Gallo as Vice President; Robin Rodriguez as Bookkeeper; Ryan Stocks as Mentor Chair; and Kate Andrews as Social Media Chair. If any readers would like to reach out to the new board, please email fsuenvironmentallawsociety@gmail.com.

Faculty Achievements

• D'Alemberte Professor Shi-Ling Hsu published *Whither, Rationality?*, in 120 Mich. L. Rev. 1165 (2022), and *Adapting to a 4C World,* in 52 Envtl. L. Rep. 10211 (2022), with 17 others. Forthcoming publications include *Climate Insecurity,* in 2023 Utah L. Rev. __ (2023).

• Tricia Matthews will teach a course in Animal Law this fall. She also teaches Legal Writing and Research to first-year students. She will also continue to serve as faculty advisor for the Animal Legal Defense Fund Chapter of FSU Law School.

• Associate Dean and Elizabeth C. & Clyde W. Atkinson Professor Erin Ryan received the 2021-2022 University Teaching Award for Innovation in Teaching at the graduate level. She was recognized for her dynamic and interactive Negotiations Workshop, which introduces both the theory and practice of negotiation in a simulation clinical setting.

• Mark Seidenfeld, our Patricia A. Dore Professor, will teach a course on Administrative Law this coming fall. He published *The Limits of Deliberation about the Public's Values: Reviewing Blake Emerson, The Public's Law: Origins and Architecture of Progressive Democracy*, in 199 Mich. L. Rev. 1111 (2021).

• Dean Emeritus Donald Weidner published *The Unfortunate Role of Special Litigation Committees in LLCs* in the spring 2022 edition of The Business Lawyer.

• Courtesy Professor of Law Tisha Holmes published *Assessment of an Evacuation Shelter Program for People with Access and Functional Needs in Monroe County, Florida during Hurricane Irma*, in Volume 306 of Social Science & Medicine (2022), with Patrice Williams, Sandy Wong, Kathryn Smith, John Bandzuh, & Christopher Uejio.

Upcoming Events

The FSU Center for Environmental, Energy, and Land Use Law will be hosting a full slate of exciting environmental, land use, energy, and administrative law events and activities in the coming academic year.

Distinguished Environmental Lectures: Each year, the College of Law's nationally Distinguished Environmental Law program features some of the profession's

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what works with the membership, what may need some enhancement, and how to get our members to come out for a charitable event. I am so excited to be your Chair this year and look forward to continuing the hard work of those esteemed colleagues who have served before me. We have hit the ground running with our 2022-2023 year and have a fun-filled agenda packed with events. Here are a few updates about our committees and the work being done to enhance your Section experience.

The fabulous Brittany Dambly leads our Technology Committee and she and her team are overhauling our website, social media, and the way we reach you all through technology. Gregg Morton has been a great asset in helping move this tremendous task along. Former Executive Council member Paul Drake and Judge Chisenhall were both instrumental in getting our site created, filled with content, and up to speed several years ago. I cannot wait to see how our new and improved site turns out in a bit.

Gigi Rollini and Brittany Griffith lead our Membership Committee and are both excited for another strong year of Section growth and opportunity. The Committee will continue working to retain the Section's membership while also seeking new members who are enthusiastic about Florida administrative law. The Committee will seek to expand our community of administrative law professionals through surveys to gauge ways in which the Section can best support its members and by promoting the Section's many benefits; encouraging membership through targeted campaigns, including outreach to any lapsed members to encourage renewal; and helping to foster a welcoming environment at Section events. The Committee welcomes anyone interested in meeting new members and sharing the benefits of Section membership to join our team.

Have you seen our new logo? On theme with our fresh start initiative, Gregg Morton, Gigi Rollini, and their team have created our renewed and improved logo with more POP! Keep an eye out when your thumbing through our Newsletter and social media.

Doug Dolan and Joaquin Alvarez have been busy preparing an educational year. With the great assistance of Past Chairs Judges Brian Newman and Chisenhall, the Continuing Legal Education Committee has planned monthly CLEs with a myriad of state agencies to be held at DOAH. The topics are broad and led by DOAH ALJs and seasoned attorneys from all areas of administrative law. Brittany Griffith, with the Florida Government Bar Association, is also working on several joint CLEs with our respective sections. Keep an eye out for these FREE CLEs being offered throughout the year in person and via Zoom.

Secretary Marc Ito, Treasurer Louise St. Laurent, and Christina Shideler are busy planning events at law schools around the state as they lead our Law School Outreach Committee. The members including Past Chair Richard Shoop and Judges Chisenhall, Bruce Culpepper, and Robert Kilbride have and will continue to be incredibly involved with this bunch. Many students lack exposure to the area of administrative practice and it is imperative we reach them at this level of education. Please let the committee know if you're interested in speaking and presenting to the future of our profession. There are opportunities in person and via Zoom.

Our Publications committee is stronger than ever! Past Chair Jowanna Oates continues to lead this incredible team, which includes Tiffany Roddenberry, Lyyli Van Whittle, and Monica McCorkle. We are pleased to announce that the Committee now includes the Newsletter, the Journal, and the Bulletin. Jowanna maintains our publications with a wealth of educational and enlightening information including appellate and DOAH case notes, updates from the committee chairs, and the inclusion of the Section's current financial operations. Her experience and long-term contribution to the Section does not go unnoticed. In addition to offering fitness advice and other lifestyle pieces, Maria also serves as Editor-in-Chief of our Bulletin. Maria and Judge Chisenhall are wholly responsible for making sure we have content to publish to you all to keep you up to date with Section happenings. We have now transitioned into teams, so we can ensure you all receive timely, interesting, and though provoking content from around the State. Adrienne Vining and Elizabeth Fernandez will lead one team, while Brittany Griffith and Mallory Neumann will lead the other. Maria, Judge Chisenhall, and myself will stay on in a leadership capacity. Keep an eye out for Judge Kilbride and Richard Shoop's photos and pieces from their rides throughout Tallahassee in the next Bulletin.

We have updated our Bylaws, thanks to the extraordinary efforts by Richard Shoop and his team. This was no easy task and requires not only approval and a vote by the Executive Council, but also approval by The Florida Bar. We have enhanced some of the language, made the committees more inclusive, created a process for reprimands in the event severe conduct requires it, and streamlined the way in which we plan events. The Bylaws are currently with The Florida Bar's Evaluation Committee for final approval. Thank you to Richard and his team for planning and executing this task.

Speaking of the changes in our Bylaws, our Young Lawyers Committee has transitioned into the Events and Social Committee. That being said, of course attorneys of ALL ages are still welcome at the events per usual, as well as law students, judges, and friends/colleagues of members. This more inclusive committee is now led by a host of enthusiastic members throughout Florida. In South Florida, Paul Drake and Johnny Elhachem have been busy leading our South Florida Chapter. Adrienne Vining and Elizabeth Fernandez, with the assistance of Past Chair Bruce Lamb, have taken the Tampa Bay area by storm! Many events are in the works with our Central Florida

Chapter including a September Happy Hour welcoming Judges Livingston and Creasy to the area, a November Holiday Drive, and a Spring 2023 "Clean-Up" event. Mallory Neumann recently assisted with our 3rd Annual Back to School Drive Benefitting Boys Town. Though weather required this event turn into an online shopping event, the event raised over $1,200 and provided over 50 backpacks, and thousands of school supplies. The community really "came out" for this event.

I would be remiss if I failed to mention our Ad Hoc SFGAP Committee led by Angela Morrison and Judge Chisenhall. This Committee has been hard at work drafting language for The Florida Bar's SFGAP Committee to consider in its efforts to make the SFGAP exam more reflective of what most administrative law practitioners deal on a regular basis. That includes making the requirements to sit for the exam more inclusive and amending the exam's scope so that it is more in line with how we practice in this day and age. It's no secret the number of folks sitting for the exam has severely decreased over the years. The efforts of this ad hoc committee are necessary, timely, and much appreciated. Thank you both and your team for the work put in to date.

Finally, I want to share in the appreciation I know you all have for our Section Administrator Calbrail Banner. Ms. Banner helped me get involved with the ALS when I was a "baby" lawyer six years ago and continues to this day to help in any capacity she can. Her work ethic and kindness go beyond just "doing the job." She helps plan events throughout the State (including our recent Tampa Executive Council Meeting) and makes sure we have everything we need to plan and execute meetings. She is passionate about her work with the Sections she helps and makes clear that her skills are always at your disposal. Her guidance has been unwavering and is very much appreciated.

Overall, we are on track to make this year the best yet! We have more members than ever and what would appear to be more involvement than in years past. The visibility we crave has seen an all-time increase thanks to the wonderful events planned, our publications that are seeing a high level of readership, our membership committee, and our work on planning and executing CLEs including the DOAH Trial Academy and the Pat Dore Administrative Law Conference. These have all become a staple for the Section thanks to you all.

I look forward to serving you all in enhancing the administrative practice of law.

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assistance of counsel, the "reasonable costs of enforcement" under section 119.12 allowed for O'Boyle to be awarded attorney's fees for work done both before and after his son's notice of appearance. The court affirmed in part, and reversed in part, and remanded to the trial court to determine the amount of attorney's fees to which O'Boyle was entitled.

Public Records – Litigation Under Chapter 119 Does Not Allow "Fees for Fees"

O'Boyle v. Town of Gulf Stream, 341 So. 3d 335 (Fla. 4th DCA 2022).

This separate proceeding arose from a different public records request that O'Boyle had submitted to the Town. Much like the other action, O'Boyle filed a pro se complaint alleging that the Town had unlawfully withheld public records, and O'Boyle's attorney-son entered a notice of appearance a few weeks later. The trial court entered a judgment in favor of O'Boyle, finding that the Town's response to the public records request was incomplete. This entitled him to reasonable attorney's fees under section 119.12(1)(a), Florida Statutes.

A fee hearing was held at which the Town sought substantial reductions in the fees claimed by O'Boyle. The Town argued in part that the date on which O'Boyle had received all responsive records during the course of discovery should be the cutoff for calculating attorney's fees (almost two years before judgment was entered in his favor). The trial court disagreed and awarded attorney's fees to O'Boyle up until the month after the judgment was entered.

Though O'Boyle was awarded fees, including the fee of his testifying attorney fee expert, the award did not include fees for the non-testifying associates of the fee expert. O'Boyle appealed to the Fourth District, arguing he was entitled to all fees, including for amounts spent on non-testifying associates of his expert, and time spent litigating the fee award amount—i.e., "fees on fees."

The court rejected O'Boyle's textual argument that "fees for fees" are authorized because section 119.12 mandates attorney's fees for enforcing the "provisions" of Chapter 119, and section 119.12 is one such "provision." The court reasoned that section 119.12's reference to an action "to enforce the provisions of this chapter" means an action to compel the agency's compliance with the provisions of Chapter 119. Because an agency could not "violate" section 119.12, one could not be awarded fees for enforcing that provision. The court was also persuaded by the fact that the Legislature had not amended section 119.12 to specifically allow such an award since courts began disallowing "fees for fees."

As to the amount of expert fees, O'Boyle also argued that in litigating entitlement to "expert fees," the costs of the expert's non-testifying associates should be included in the award amount. The court found that no authority permits awarding an expert witness fee for time spent by the fee expert's non-testifying assistants to prepare the expert to testify.

Section 92.231(2), Florida Statutes, governs expert witness fees and provides that "[a]ny expert or skilled witness *who shall have testified in any cause shall be allowed a witness fee . . . and the same shall be taxed as costs." § 92.231(1), Fla. Stat. (emphasis added).* The court cited cases where only the testifying expert's costs were taxable and even the costs of attorneys who helped prep the expert witness were not taxable. The court affirmed the trial court's order awarding attorney's fees and stated that it would be improper to tax as costs the fee of associates who assisted the testifying expert but did not themselves testify as experts.

Public Records – Chapter 119 Does Not Allow "Fees for Fees" or Fee Multiplier

Stopdirtygovernment, LLC v. Town of Gulf Stream, 341 So. 3d 335 (Fla. 4th DCA 2022).

In applying the holding in *O'Boyle v. Town of Gulf Stream*, 341 So. 3d 335 (Fla. 4th DCA 2022), the Fourth District Court of Appeal affirmed the trial court's denial of a fee multiplier and refusal to award attorney's fees for litigating the amount of fees after prevailing in a public records lawsuit.

Administrative Litigation – ALJ Lacks Jurisdiction to Sua Sponte Award Attorney's Fees via Sanctions Motions after Expiration of Appeal

Agency for Pers. with Disabilities v. Meadowview Progressive Care Grp. Home, 340 So. 3d 547 (Fla. 1st DCA 2022).

The Agency for Persons with Disabilities (APD) took administrative action to revoke Meadowview's Group Home license based on a three-count administrative complaint. Meadowview requested a formal administrative hearing before the Division of Administrative Hearings (DOAH).

Following the hearing, the ALJ issued a recommended order denying APD's request to revoke Meadowview's license. In the recommended order, the ALJ reserved jurisdiction to award attorney's fees to Meadowview pursuant to section 57.105(5), Florida Statutes. Though Meadowview did not file a sanctions motion, section 57.105 allows for a judge or ALJ, upon their own initiative, to grant attorney's fees.

After APD entered the final order containing the ALJ's reservation of jurisdiction in January 2020, the ALJ took no further action to determine APD's liability for attorney's fees.

In May 2020, beyond the expiration of the appeal deadline, the ALJ filed a notice to open a new case before DOAH to determine liability for attorney's fees. APD moved for summary final order, arguing there were no genuine issues of material fact remaining to be decided on the APD's original administrative complaint.

The ALJ agreed as to one count, but ordered fees as to the other two counts, finding after an evidentiary hearing that APD knew or should have known the allegations in one count were legally groundless, and the other count factually groundless. APD appealed to the First District Court of Appeal.

APD raised multiple arguments on appeal, including that the ALJ lacked authority to initiate the fee motion proceeding because the time to file an appeal pursuant to section 120.68 had passed. The court, however, only addressed APD's argument that the ALJ exceeded his own jurisdiction by initiating a new DOAH proceeding to litigate the liability for and entitlement to attorney's fees.

The First District's standard of review was *de novo* because the issue was whether the ALJ had subject matter jurisdiction. An ALJ's jurisdiction is defined by the statutes and rules governing administrative actions, and as such, only has the power granted to him or her by the Legislature. Though section 57.105(1) allows for an ALJ to award attorney's fees on his or her own initiative, sections 120.569 and 120.57, Florida Statutes, only permit a new DOAH proceeding to be initiated by a petition, or if requested by the agency or a party to the dispute.

The court therefore held that the ALJ exceeded his authority by initiating the new DOAH proceeding. The ALJ's order was thus quashed and remanded for dismissal.

Breach of Contract—Notice to Terminate was Timely--Meetings Among Agency Staff Do not Implicate Provisions of Open Meetings Law

Fla. Envtl. Regul. Specialists, Inc. v. Dep't of Envtl. Prot., 47 Fla. L. Weekly D1194a (Fla. 1st DCA Jun. 1, 2022).

Florida Environmental Regulation Specialists, Inc. (FERS), appealed from a trial court order granting the Department of Environmental Protection's (DEP) motion for summary judgment on a claim for breach of contract relating to the termination of an agency term contract for the cleanup of petroleum contaminated sites. The court rejected both of the appellant's issues on appeal and affirmed the trial court's order.

FERS claimed DEP breached a contract because the agency failed to provide the proper notice of termination. The contract between FERS and DEP did not require any magic language, and

DEP's correspondence notifying FERS of the termination specifically cited the no-cause/convenience provision on which the agency relied in terminating the contract. The court therefore concluded that, as a matter of law, the notice was timely and served the purpose intended under the cited provision of the contract.

The court also rejected FERS's open meeting claim. Article I, section 24, of the Florida Constitution, and section 286.011, Florida Statutes, apply to collegial public bodies of the executive branch of state government when they meet to consider taking official action. Meetings among agency staff to assess and make recommendations regarding contract management do not implicate those provisions. The undisputed evidence showed that there was no delegation of policy-making authority to any group of DEP staff members, and the decision to terminate the contract was made by the agency official tasked with doing so.

The court therefore affirmed the trial court's order granting summary judgment in favor of DEP.

Utility Cost Recovery—Utility Did Not Waive Right to Challenge Conclusions Tied to Unsupported Factual Findings

Duke Energy Fla., LLC v. Clark, 47 Fla. L. Weekly S183 (Fla. July 7, 2022).

Duke Energy Florida, LLC (DEF) appealed a final order from the Florida Public Service Commission (Commission) which denied DEF's request to recover $16 million from its customers for costs incurred when its steam-powered generating unit went offline and was placed back in service at a derated capacity.

DEF's plant includes a large steam turbine which powers an electrical generator and has a steam supply capable of generating 420 MW. When the plant was initially placed online in 2009, the steam turbine used steam produced from DEF's combustion turbines, producing electricity from the attached generator above 420 MW. In 2012, DEF discovered unusual wear to the steam turbine's blades and replaced them. Thereafter, the steam turbine was not routinely operated above 420 MW; however, DEF had to replace the blades several more times. In 2017, the blades were again damaged, but instead of replacing them, DEF installed a pressure plate that derated the steam unit from 420 MW to 380 MW. This caused DEF to incur costs that it sought to recover in this case.

To protect against the disclosure of confidential matters, the Commission referred the matter to DOAH for a closed hearing. The ALJ issued a recommended order denying DEF's cost recovery. Florida law permits utilities to recover costs that result from prudent investments. § 366.06(1), Fla. Stat. (2021); *see also Sierra Club v. Brown*, 243 So. 3d 903, 908 (Fla. 2018). The ALJ found that DEF acted imprudently from the time the plant was initially placed online in 2009 to 2012 when the blades were first replaced, concluding that the evidence established that 420 MW was an operational limitation of the steam turbine and that DEF operated the turbine above that limitation. However, it was undisputed that DEF prudently operated the steam turbine following the 2012 replacement. Accordingly, at issue was whether DEF's imprudence prior to 2012 caused the 2017 outage and derating.

While the ALJ made no designated factual finding regarding causation, the ALJ in numbered "legal conclusions" determined that: (1) DEF failed to satisfy its burden in showing that its actions in operating the steam turbine before the 2012 replacement did not cause or contribute to vibrations that damaged the blades after 2012; (2) the operation of the steam turbine in excess of 420 MW likely caused or contributed to vibrations that damaged the blades after 2012; and (3) the derating was a "consequence of DEF's failure to prudently operating the steam turbine [between 2009 and 2012]." DEF submitted written exceptions to the recommended order, but did not challenge any of the ALJ's factual findings. As such, the Commission concluded that DEF waived any right to object to the ALJ's findings of facts, including the finding that the steam turbine has an operating limit of 420 MW, and likewise waived the ability to contest any conclusions of law that depended on that finding. In addition, the Commission rejected DEF's challenge to the causation discussion, concluding that the factual findings that formed the basis for such discussion were supported by competent, substantial evidence. The Commission adopted the ALJ's recommended order.

On appeal, DEF argued that the Commission and ALJ erred in concluding that DEF's imprudence caused the plant's outage in 2017. The Supreme Court agreed and reversed. The Court recognized that although it was not "legally permitted to reweigh evidence," the ALJ's discussion of causation in its "legal conclusions" were "factually contrary to the evidence." In particular, there was no evidence that operation of the steam turbine prior to 2012 caused or contributed to any vibrations following the 2012 replacement. In addition, DEF's testing revealed that no damage to any turbine component occurred prior to the 2012 replacement except to the blades which were subsequently replaced. Lastly, the expert witness for the Office of Public Counsel confirmed that there was no indication that damage to the turbine prior to 2012 caused damage to the blades thereafter. The Court therefore concluded that DEF's operation of the steam turbine prior to 2012 did not cause the outage in 2017 and any imprudence prior to 2012 could not serve as the basis to deny cost recovery. The Supreme Court remanded the matter for an entry of an order granting cost recovery.

On July 22, 2022, the Citizens of the State of Florida through the Office of Public Counsel and the Florida Industrial Power Users Group moved for rehearing, claiming the Court ignored record evidence and misapprehended the standard of review. In particular, the movants argued that the Court overlooked competent, substantial evidence that supported the ALJ's findings of fact. The movants also argued that the Court inappropriately relied on contrary evidence to overturn the final order which is outside of the Court's inquiry. The movants therefore sought affirmance of the final order. However, on August 25, 2022, the Supreme Court denied the Motion for Rehearing.

Recommended Orders—Agency Must Remand if ALJ Failed to Make Critical Findings of Fact

Kiddie Island Acad., LLC v. Dep't of Child. & Families, 337 So. 3d 1285 (Fla. 1st DCA 2022).

Kiddie Island Academy, LLC (Kiddie Island) appealed a final order of the Department of Children and Families (DCF) which imposed a fine for failure to perform the duties of a mandatory reporter of suspected child abuse.

Kiddie Island is a child care facility licensed by DCF. DCF filed an administrative complaint against Kiddie Island, alleging that child abuse occurred at the facility and that Kiddie Island failed to report the abuse pursuant to Florida law. The ALJ concluded that Kiddie Island did not fail to perform as a mandatory reporter because no child abuse occurred at the facility. The ALJ's recommended order did not include any factual findings as to whether Kiddie Island had reasonable cause to suspect child abuse. DCF issued a final order determining that the ALJ misinterpreted Florida law on the duty to report. DCF also found that Kiddie Island had reasonable cause to suspect that child abuse had occurred.

On appeal, the court agreed that the ALJ had misinterpreted the law on the failure to report. The court held that DCF did not need to prove that child abuse occurred at the facility. Under the law, a person has a duty to report once he or she has reasonable cause to suspect child abuse. *See* § 39.201(1)(a), Fla. Stat.

Notably, however, DCF erred when it failed to remand the case back to the ALJ for additional fact finding. A "reasonable cause" determination involves not only the legal interpretation of a statute but also a factual finding. Because the ALJ did not previously make any factual findings on whether Kiddie Island had reasonable cause to suspect that child abuse had occurred, DCF erred by making that factual finding in the ALJ's stead.

Thus, the court reversed DCF's final order and remanded to DCF with instructions to remand the case to the ALJ for further factfinding.

Final Orders—Remand to Agency Required Where Final Order Fails to Address Major Issues in Litigation and Explain the Agency's Rulings

LULAC Fla. Educ. Fund, Inc. v. Clark, No. SC21-303 (Order issued May 27, 2022).

LULAC Florida Educational Fund, Inc. (LULAC) appealed a final order of the Public Service Commission (PSC) that approved a settlement agreement and tariffs associated with a clean energy program by Duke Energy Florida (Duke Energy).

Duke Energy sought PSC approval to implement a clean energy connection program that would result in the creation of 10 separate solar energy plants and associated tariffs. Customers would have the opportunity to enroll in the program. In exchange for a subscription fee, participants would receive credits on their electricity bill related to the plants' generation of solar power. Duke Energy estimated that program participants would receive $67.6 million more in credits than the amount they would pay into the program.

Duke Energy conferred with several parties likely to intervene in its petition to the PSC seeking approval of the program, including Walmart, Vote Solar, and the Southern Alliance for Clean Energy, and reached a stipulated settlement agreement regarding the program's structure, funding, and operation. Duke Energy submitted the proposed settlement agreement including the proposed program for the PSC's approval.

LULAC challenged the settlement on numerous grounds. LULAC argued, *inter alia*, that customers who did not participate in the clean energy program would be subsidizing customers who did participate. LULAC argued that the program would give an unreasonable preference or advantage to those who participated, and thus the rates could not fair and reasonable, as required by law. The PSC issued a final order approving the settlement agreement. The final order addressed the settlement agreement as a whole and did not address LULAC's arguments regarding the program's funding structure.

On appeal, the Florida Supreme Court ruled that the final order failed to sufficiently explain the PSC's findings and conclusions to enable the Court to engage in meaningful judicial review. Although the PSC was authorized to review and approve a settlement agreement as a whole and need not make factual findings on every disputed issue, major issues in dispute must be addressed in the final order. An agency departs from the essential requirements of law when it fails to explain its reasoning on major issues in a final order. Because the Court did not have the benefit of the PSC's findings and analysis with regard to LULAC's arguments, the Court remanded the case to the PSC to permit the PSC to explain its findings and conclusions with regard to the major issues in the litigation.

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

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(Fortunately, at least one of us followed this advice.) When it comes to formulating a study plan, we would recommend that applicants begin by closely examining the exam specifications published on The Florida Bar's website and figure out how much time you will need. The SFGAP committee's recently revised exam specifications now provide that 80% of the SFGAP exam is based on Florida law and 20% is based on federal law. Specific topics to be addressed on the exam are provided on the certification area's Florida Bar website. Generally speaking, the specifications now primarily focus on areas practiced by Florida state administrative lawyers.

Reviewing the exam specifications will both focus you on the areas you need to study and provide you with an opportunity to determine the required time commitment to study sufficiently for the exam. In contrast to when we prepared for the Florida Bar Exam, most of us now have full-time jobs, families, and/or other commitments that make it difficult to find study time. If you know that periods of long, uninterrupted study time are going to be few and far between, then start studying several months in advance and plan to take advantage of lunch breaks and downtime on the weekends.

Although this may seem like a daunting task, if you have been substantially involved in administrative law for the previous five years and have taken 50 hours of approved SFGAP certification CLE during that timeframe, fear not; your preparation is well under way. The Section has also undertaken substantial efforts to help test-takers prepare for the exam by making study materials available on its website. Those materials are updated as new ones become available. See the Helpful Resources section at the end of this article for additional information.

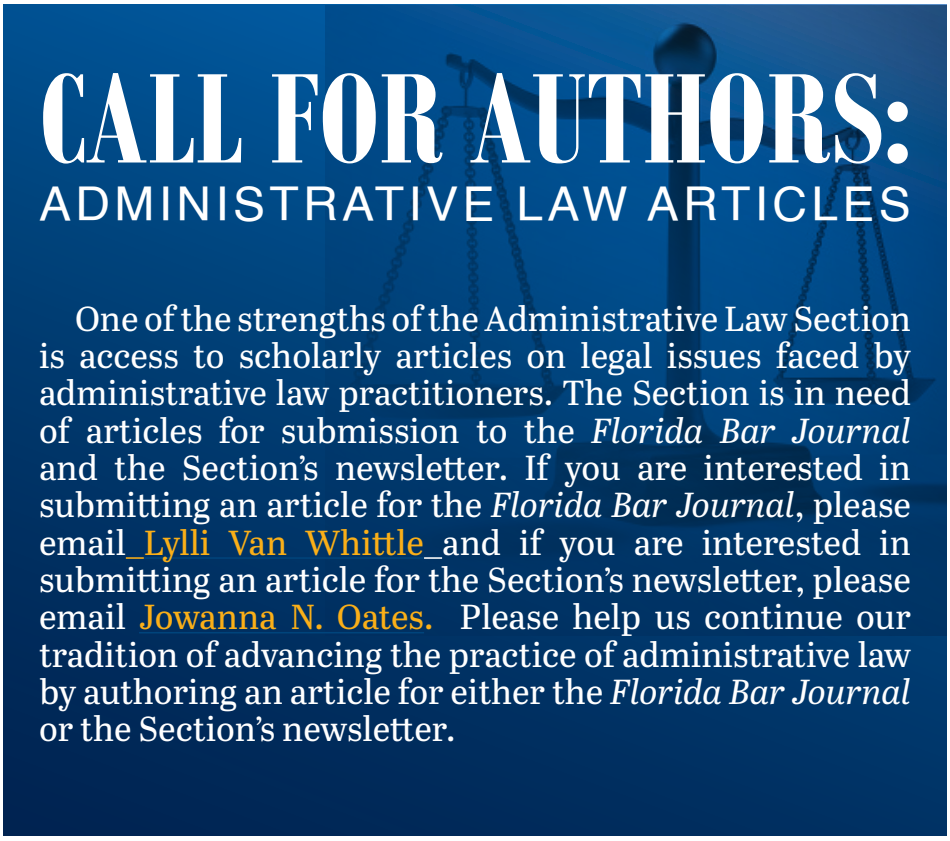
Overall, it's important to bear in mind that passing the SFGAP exam is an entirely achievable goal. In 2021 alone, five individuals with varying backgrounds and levels of experience passed the SFGAP exam and become board-certified.

Final Words

In closing, we encourage you to consider whether board certification is your next career step. If it is, be sure to focus on your reason for seeking board certification throughout the process. With a well-considered plan for documenting your qualifications, a strong study plan, and a little persistence, board certification can become a reality. Of course, you are not alone in this journey! The Section is ready and willing to support you and your success in this endeavor. See below for a list of helpful resources, and feel free to contact the authors of this article if we can be of assistance.

Helpful Resources

- Information about the SFGAP certification process and examination specifications is available from The Florida Bar at the following link: https://www.floridabar.org/about/cert/cert-applications-and-requirements/cert-ag/.
- The Administrative Law Section's ad hoc SFGAP Committee also assembled exam resources available the following link: http://flaadminlaw.org/resources/#sfgap.
- The Florida Government Bar Association sells a SFGAP CLE Series bundle at the following link: https://flagovbar.org/store.
- We are happy to be resources for you about SFGAP certification or board certification more generally. If we are unable to answer your questions, we would be happy to find someone who can.



Brittany B. Griffith *is the Assistant Deputy Secretary for Operations for the Florida Department of Health. She became certified by the Florida Bar in State and Federal Government and Administrative Practice in 2021 and is co-chair of the Administrative Law Section membership committee.*

Judge Gar Chisenhall *is an administrative law judge with the Florida Division of Administrative Practice. He became certified by The Florida Bar in Appellate Practice in 2015 and is a past Chair of the Administrative Law Section*

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authority because: (a) the Division lacks the necessary rulemaking authority; and (b) nothing in section 849.086 authorizes the Division to prohibit occupational licensees from participating in cardroom games where they are employed.

OUTCOME: In ruling in the Division's favor, the ALJ noted that "it is unnecessary for the authorizing statute to explicitly delineate every conceivable subject matter within an agency's rulemaking purview." Because prohibiting cardroom employees from gambling where they are employed is logically and integrally related to cardroom operations, the ALJ rejected the Petitioners' argument that the Division lacked the necessary rulemaking authority. As for whether rule 61D-11.005(5) enlarges, modifies, or contravenes section 849.086, he concluded that the prohibition furthers the legislative directive for the Division to regulate cardroom operations. Accordingly, the ALJ dismissed the Petitioners' rule challenge. That final order was appealed to the Fifth District Court of Appeal.

Rule Challenges—Unadopted Rules

WKDR II, Inc. v. Dep't of Revenue, Case No. 22-0117RU (Final Order July 14, 2022) (Livingstone, ALJ).

FACTS: The Department of Revenue (Department) administers Florida's sales tax statutes and performs audits to ensure compliance with sales tax laws. Prior to January 2022, the Department sent notices of proposed assessments (NOPAs) having assessments of less than $100,000 by regular mail. NOPAs having assessments over $100,000 were transmitted by fax, e-mail, and regular mail. Beginning in January 2022, the Department brought its NOPA transmittal process into compliance with section 213.0537, Florida Statutes, by transmitting all NOPAs by regular mail, unless a taxpayer requested transmission by some other means.

WKDR is a car dealership in LaBelle, Florida. On January 13, 2020, the Department issued a NOPA to WKDR assessing taxes, interest, and penalties totaling $1,168,889.88. On January 13, 2022, WKDR filed an unadopted rule challenge asserting that the Department's former practice of serving NOPAs was an unadopted rule.

OUTCOME: The ALJ issued a final order dismissing WKDR's unadopted rule challenge. In doing so, the ALJ concluded that proceedings pursuant to section 120.56(4), Florida Statutes, are intended to stop agencies from relying on unadopted rules. When an agency is no longer relying on an unadopted rule, then the purpose of section 120.56(4) cannot be accomplished.

Crotty Serv., Inc. v. Dep't of Envtl. Prot., Case No. 21-3882RU (Final Order July 14, 2022) (Early, ALJ).

FACTS: The Department of Environmental Protection (Department) administers Florida's Onsite Sewage Treatment and Disposal System (OSTDS) program. A septic system has a dosing tank that distributes effluent to a drainfield or another part of an onsite sewage treatment and disposal system. A dosing tank needs electricity to operate and has a cylindrical component known as a riser. Florida Administrative Code Rule 62-6.013(9)(c) mandates that "[t]he electrical conduit and effluent dosing pipe shall exit the dosing chamber." Rule 62-6.013(9)(c)2 provides that "[w]hen risers are used, the electrical line and the effluent dosing pipe may penetrate the riser wall provided the penetration is above the wet season high water table elevation."

Crotty Service, Inc. (Crotty) installs dosing tanks that utilize risers. Via a letter dated September 17, 2021, the Department notified Crotty that rule 62-6.013(9)(c)2 "cannot be read in seclusion to allow an electrical line to exit the riser without a conduit." On December 29, 2021, Crotty filed a petition alleging that the Department's interpretation of rule 62-6.013(9)(c) requiring that electrical lines penetrating a septic tank riser must do so through a conduit amounted to an unadopted rule.

OUTCOME: The ALJ determined that the Department's interpretation was an unadopted rule because "[t]he plain and unambiguous language of the rule leads to a single conclusion, that . . . the words 'conduit' and 'electrical line' are, and mean, different things. This conclusion may seem overly simple, but there are times in which the simplest answer is the correct answer. This is one of those times." While the Department relied on various canons of statutory construction to support its argument, the ALJ noted that "rules of construction are only to be applied when the language of the statute or rule is ambiguous."

Devil's Garden Investment, LLC/Devil's Garden Aquaculture v. S. Fla. Water Mgmt. Dist., Case No. 22-513RU (Summary Final Order of Dismissal June 2, 2022) (Schwartz, ALJ).

FACTS: Devil's Garden Investment, LLC/Devil's Garden Aquaculture (Devil's Garden) owns property in Hendry County, Florida, located within the C-139 Basin. All lands within the C-139 Basin are under the authority of the South Florida Water Management District (District). On June 7, 2021, Devil's Garden requested that the District grant it a waiver from the requirements of chapter 40E-63. The District denied that request on July 2, 2021. During the course of settlement negotiations, the District's legal counsel communicated to Devil's Garden's attorney that the District would be willing to grant a waiver upon presentment of "[a]n engineering analysis, signed and sealed by a Professional Engineer, demonstrating that the property does not discharge during the 100-year, three-day storm event." On April 5, 2022, Devil's Garden filed a petition alleging that the aforementioned statement amounted to an unadopted rule.

OUTCOME: The ALJ issued a final order dismissing the rule challenge. In doing so, he determined that the statement at issue "was not used as a basis for denial of [Devil's Garden]'s request for a waiver. Rather, the statement was made by the District's counsel, to [Devil's Garden]'s counsel, in the context of months-long settlement discussions between the parties, after the District's denial of [Devil's Garden]'s request for a waiver and after Devil's Garden had already challenged the denial." Devil's Garden has filed a notice of appeal with the First District Court of Appeal.

Substantial Interest Proceedings—Ethics Complaint

In Re: Carlos Beruff, Case No. 21-2890EC (Recommended Order May 27, 2022) (Desai, ALJ).

FACTS: Section 112.3145, Florida Statutes, requires certain public officials to annually file a statement of financial interests disclosing sources of income, real property holdings, and liabilities. Carlos Beruff served on several state, regional, and local government boards between 2013 and 2015. As a result, he was required to file a CE Form 1, "Statement of Financial Interests" for each year in question. However, Mr. Beruff's filings failed to disclose sources of income and property interests.

OUTCOME: The ALJ recommended that Mr. Beruff be publicly censured, reprimanded, and fined $1,500. In doing so, the ALJ addressed Mr. Beruff's arguments that no violation should be found because his errors were unintentional, no one was actually harmed, and one should not have to hire a lawyer in order to serve on a public board. The ALJ noted that she found no authority establishing that a violation of section 112.3145 requires proof that a citizen was actually misled by the financial disclosure form. "Furthermore, even technical failures, such as the checking of a box, are considered violations." Additionally, the ALJ found that "[i]t is not necessary to hire an accountant or an attorney to serve on a public board, if one reads and follows the Form 1 instructions."

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leading environmental, energy, and land use scholars and policymakers. This year, we will be joined by Elizabeth Kronk Warner, Dean and Professor of law at S.J. Quinney College of Law at the University of Utah, and William Buzbee, the Edward and Carole Walter Professor of Law at the Georgetown Law Center, who will share their expertise with our communities in the fall and spring, respectively.

The Center will also host an Environmental Law Career Panel, a number of enrichment seminars, and a spring semester field trip. We will share full information about our slate of events for the 2022-2023 academic year in our next newsletter, and the full list will always be updated on our webpage: https://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)

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For additional information about the Administrative Law Section, please visit our website.