NEWSLETTER

VOL. XLII, NO. 6 JOWANNA N. OATES AND TIFFANY RODDENBERRY, CO-EDITORS MARCH 2023

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

Administrative Complaint—ALJ Errs in Refusing to Allow Amendment

Dep't of Health v. Khan, 350 So. 3d 87 (Fla. 1st DCA 2022).

The Department of Health (DOH) appealed a final order of the Board of Medicine (Board) that dismissed DOH's administrative complaint against Dr. Saeed Akhtar Khan.

DOH filed an administrative complaint against Dr. Khan alleging that he engaged in inappropriate sexual conduct with a current patient in his office. DOH alleged that Dr. Khan violated section 458.331(1)(n), Florida Statutes, which authorizes disciplinary action against physicians. Before the administrative hearing, DOH described its position in a joint pre-hearing stipulation that Dr. Khan engaged in sexual misconduct (1) within a patient-physician relationship, or alternatively, (2) as a result of exploiting the trust, knowledge, influence or emotions that derives from a professional relationship with a former patient.

Dr. Khan filed a motion in limine, arguing that the administrative complaint alleged that the victim was a patient at the time of the sexual incident and now DOH was advancing a new alternative theory of prosecution that was not previously charged or presented to the Board's probable cause panel. Dr. Khan sought to preclude evidence or argument related to the new alternative theory, and DOH subsequently sought a continuance and to amend the administrative complaint. The ALJ granted Dr. Khan's motion in limine and rejected DOH's request to amend the administrative complaint, reasoning that the final hearing on the merits was less than two days away. After the final hearing, the ALJ issued a recommended order concluding that the victim was a former patient when the sexual incident occurred and DOH was prohibited from disciplining a physician for actions that were not specifically alleged in the administrative complaint. The ALJ recommended that the Board enter a final order dismissing the administrative complaint.

DOH filed exceptions to the recommended order, arguing that the ALJ violated DOH's due process rights by denying DOH's request to amend the administrative complaint. DOH also argued that Dr. Khan would not have been prejudiced by a continuance of the proceedings. The Board entered a final order accepting the recommended order and dismissing DOH's administrative complaint, and DOH appealed.

On appeal, Dr. Khan argued that the court was obligated to affirm the final order because there was no transcript of the motion hearing where the ALJ denied DOH's motion to amend the administrative complaint. The court rejected Dr. Khan's

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From the Treasurer

BY BRITTANY DAMBLY

It is officially 2023! Happy New Year! I hope all of the Section members had an enjoyable holiday season and are ready for all of the exciting initiatives that the Section is working on under our new Chair Tabitha Jackson's leadership. In addition to being busy as the Chair of the Administrative Law Section, practicing as a junior partner at Luks, Santaniello, Petrillo, Cohen & Peterfriend, and tending to her chickens and dog CoCo, Tabitha was blessed this past month by becoming a mother to a beautiful baby boy! Please join me in congratulating Tabitha and her husband Matt on their new bundle of joy! And for any other members who themselves recently added a future member of the Section to their

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DOAH CASE NOTES

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

Substantial Interest Proceedings—Agency Remand

Agency for Health Care Admin. v. Murciano, Case No. 19-3662MPI (Recommended Order Sept. 1, 2022) (Van Laningham, ALJ).

FACTS: The Agency for Health Care Administration (AHCA) is responsible for administering Florida's Medicaid program. In order to preserve the integrity of the Medicaid program, AHCA audits past payments to Medicaid providers in order to ensure that those payments were proper. Before initiating "any formal proceedings" to recover improper payments, section 409.9131(5), Florida Statutes, requires that AHCA "[r]efer all physician service claims for peer review when the agency's preliminary analysis indicates a potential overpayment." Section 409.9131(2)(c), Florida Statutes, defines a "peer" as "a Florida licensed physician who is, to the maximum extent possible, of the same specialty or subspecialty [as the physician being audited], licensed under the same chapter, and in active practice." In order to be in "active practice," section 409.9131(2)(a), Florida Statutes, requires that "a physician must have regularly provided medical care and treatment to patients within the past 2 years."

At all relevant times, Dr. Alfred Murciano was a Medicaid provider who treated neonatal and pediatric patients suffering from infectious diseases. AHCA audited Medicaid claims submitted by Dr. Murciano for services provided to Medicaid recipients between January 1, 2011 and June 30, 2014 (the Audit Period). On July 19, 2017, AHCA retained Morgan Jenkins, M.D. to conduct the peer review of Dr. Murciano's claims. Dr. Jenkins has been board certified in general pediatrics since 1988 and became board certified in pediatric infectious diseases in 1997. However, Dr. Jenkins allowed that certification to lapse in 2004. At the time of the final hearing, Dr. Jenkins was working in a telehealth practice and had not provided medical care or treatment to pediatric patients in a hospital setting since 2014. AHCA issued a Final Audit Report on October 16, 2017, alleging that Dr. Murciano had been overpaid by $1,846,120.10 for treatment rendered to Medicaid recipients during the Audit Period. After Dr. Murciano requested an administrative hearing and the matter was referred to DOAH, Dr. Murciano argued that AHCA's audit was invalid because Dr. Jenkins was not qualified to act as a "peer." In support thereof, Dr. Murciano argued that Dr. Jenkins was not, to the maximum extent possible, of the same specialty or subspecialty. Dr. Murciano also argued that Dr. Jenkins was not in "active practice" at the relevant time.

OUTCOME: The ALJ concluded in a recommended order that a physician qualifies under section 409.9131(2)(a) as a "peer" if that physician was regularly seeing patients at the time of the peer review and throughout the two-year period immediately preceding the peer review. Because Dr. Jenkins had not regularly provided medical care and treatment to patients as a Florida physician throughout the entire two-year period leading up to his selection as Dr. Murciano's "peer," ALJ Van Laningham concluded that Dr. Jenkins was ineligible to serve as a "peer" pursuant to section 409.9131. Because AHCA failed to strictly comply with section 409.9131(5)(b), ALJ Van Laningham recommended that AHCA issue a final order withdrawing its Final Audit Report and dismissing the proceeding "because the physician claims at issue [had] not been peer reviewed in accordance with section 409.9131." On September 22, 2022, AHCA issued an order remanding the case back to DOAH so that specific findings can be made regarding every disputed Medicaid claim at issue. On October 14, 2022, ALJ Van Laningham issued an order rejecting that remand because: (a) AHCA lacks authority under the APA to remand the case without exceptional circumstances being present; and (b) making additional findings would have required ALJ Van Laningham to violate the Florida Constitution by deferring to AHCA's statutory interpretation.

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Florida State University College of Law Fall 2022 Update

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

Erin Ryan, Associate Dean for Environmental Programs

Here on the Gulf Coast, we rang in the fall semester with a visit from Hurricane Ian, one of the strongest storms ever to make landfall in the United States. Tallahassee was fortunate to be missed entirely by the storm, but our hearts go to out to friends and neighbors along the path of destruction that Ian carved across our state. If anything, an emergency like Ian reminds us of the important roles that environmental, energy, and land use lawyers all have to play in helping us mitigate and forestall future natural disasters of this magnitude—and where we cannot avoid them, to design our communities for adaptation and resilience. In happier news, I am delighted to welcome our new faculty member, James Parker-Flynn, who will shepherd the Center for Environmental, Energy, and Land Use Law as its next Director. In addition to teaching Energy Law, Land Use, and Environmental Justice this year, he is hard at work creating an Environmental Policy Clinic to expand opportunities for students and faculty to contribute to the discourse on environmental solutions. James comes to us from a career in environmental and energy law practice, with a focus on climate change. He earned an LL.M. in Environmental Law from FSU after receiving his J.D. from Georgia State University. Please join me in welcoming him and look for his regular environmental policy column in this newsletter, starting below with a brief assessment of the Inflation Reduction Act.

"I could not be more excited to join the incredible faculty in the Center for Environmental, Energy, and Land Use Law, and to work alongside them to continue and expand on the center's mission. I am equally thrilled to work with FSU Law's remarkable students, and to help prepare them for the challenges faced by attorneys and policymakers in the areas of environmental, land use, energy, and natural resources law—challenges that become more critical every day."

Professor James Parker-Flynn

Student Spotlight

Catherine Awasthi, of Jupiter, Florida, graduated in December 2022. In fall 2022, she externed for Judge Scott Makar at the First District Court of Appeal and serving as a research assistant for Professor Erin Ryan. Catherine was one of 37 students in North America awarded the Foundation for Natural Resources and Energy Law Scholarship Award for 2022. She was also awarded the 2021 Law School Achievement Award by the Florida Bar Animal Law section. As President of the Student Animal Legal Defense Fund, she helped to earn national recognition as Chapter of the Year for FSU Law in 2021. Catherine has published two animal law articles in the Florida Bar Journal and a forthcoming publication at *the Journal of Land Use and Environmental Law.* She is also graduating with a joint-pathway Master's Degree in Aquatic Environmental Science. After taking the bar, Catherine plans to remain in Florida, pursuing a career in environmental, coastal and ocean, or administrative law.

"In the Summers of 2020 and 2022, I had the opportunity to work for a public interest nonprofit with a mission to protect Florida's public trust resources. There I gained valuable experience in the complexity of the Clean Water Act, as well as research and analyze rules and regulations pertaining to septic and agricultural pollution. In my role as a legal intern for the National Oceanic and Atmospheric Administration, I provided an in-depth analysis of the constitutionality of broadening marine sanctuary statutes and coral reef conservation statutory reauthorization.

As Vice President and a member of the Moot Court Team, I advocated in an international space law competition where I earned the title of a semifinalist. My time on the Moot Court team provided me with research, writing, and oral advocacy skills that helped me to publish articles on environmental topics I am passionate about. Additionally, I am grateful for the unique joint-pathway degree program, as it has so far opened doors for a career path that encompasses both law and science in the environmental field and has set me apart as a job candidate."

Catherine Awasthi

(L-R) Savannah Sherman, SALDF President, Diana Olsen (recent graduate and 3rd place winner), Catherine Awasthi (1st place), and FSU Professor Tricia Matthews

In August, Catherine's article, "Staving off Starvation: How Florida's Invasive Plants Could Sustain the State's Marine Mammal," won first place in the Tenth Annual Animal Law Writing Competition. The competition was sponsored by the Florida Bar Animal Law Section, Pets Ad Litem, and the Student Animal Legal Defense Fund (SALDF) chapter at FSU Law. The competition seeks to foster legal scholarship and provide law students with an incentive and opportunity to research and learn more about the intersections of animals and the law. Spring 2022 graduates Catherine Bauman and Diana Olsen bagged second and third place respectively. Congratulations!

Alumni Highlight

• Land use and local government attorney Mark Barnebey ('83) received the Best Lawyers in America 2023 "Lawyer of the Year" award in Land Use and Zoning Law in the Sarasota metro area. Mark has been practicing in land use and local government for 35 years and is Board Certified in City, County, and Local Government Law. Mark currently leads Blalock Walters, P.A. land use and local government practice groups. He serves the Manatee/Sarasota area.

• Crystal Anderson ('10) has joined the Department of Environmental Protection Office of General Counsel as Assistant General Counsel. She provides legal advice to staff in the Office of Resilience and Coastal Protection, mostly related to permitting, contract administration, legislative proposals, and agency rulemaking. Her practice focuses on matters associated with coastal development, aquatic preserves, coral protection and restoration, and the beaches, inlets, and ports program.

• Holly Parker Curry ('21) has joined Theriaque & Spain as an Associate Attorney in Tallahassee, FL. She will practice land use, zoning, local government, and environmental law. Prior to joining Theriaque & Spain, Holly served as a law clerk for the Honorable Robert L. Hinkle in the United States District Court for the Northern District of Florida.

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).

• Associate Dean Erin Ryan has forthcoming publications including Privatization, Public Commons, and Takingsification in Environmental Law, in 171 U. Penn. L. Rev. __ (2023), and How the Success and Failures of the Clean Water Act Fueled the Rise of the Public Trust Doctrine and Rights of Nature Movement, in 73 Case Western Res. L. Rev. __ (2022).

• Dean Emeritus Donald Weidner has a forthcoming publication in Bus. Lawyer (2022), The Unfortunate Role of Special Litigation Committees in LLCs.

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

(L-R) Mark Barnebey, Crystal Anderson, and Holly Parker Curry

Fall 2022 Distinguished Environmental Lecture

Elizabeth Kronk Warner, Professor of Law and Dean of S.J. Quinney College of Law at the University of Utah, presented the Fall 2022 Distinguished Environmental Lecture entitled "Effective Consultation in Indian Country." A nationally recognized expert in the intersection of Environmental and Indian Law, Dean Kronk Warner is a citizen of the Sault Ste. Marie Tribe of Chippewa Indians, and served as an appellate judge for the tribe and as a district judge for the Prairie Band Potawatomi Tribe. Dean Kronk Warner's lecture introduced federal Indian law, highlighted consultation requirements, and demonstrated that the existing legal structure provides inadequate guidance on effective consultation, concluding with suggestions for potential reform.

IRA Will Spur Significant New Energy Projects

James Parker-Flynn, Director of FSU Center for Environmental, Energy and Land Use Law
jparkerflynn@law.fsu.edu

Last summer, Congress passed, and President Biden signed into law, the Inflation Reduction Act ("IRA"). Among other things, the IRA contains numerous provisions:

- Renewing old or implementing new tax credits for renewable and "clean" energy projects,
- providing funding for loans or grants for renewable energy projects and electric transmission facilities, and
- opening certain offshore lands for new wind power projects.

The IRA also has several sections:

- tying wind and solar development to new oil and gas development on federal lands, and
- requiring the Department of Interior to reinstate certain offshore oil and gas leases that previously had been canceled or nullified.

Not surprisingly, given the conflicting provisions, perspectives on the IRA vary. Because of the significant new investments in renewable and "clean" energy development and the transmission grid, some groups view the IRA as a monumental advancement in the United States' efforts to combat climate change and transition to a clean energy future, notwithstanding the oil and gas provisions. Some others view it as a piecemeal and inadequate response to the greatest environmental challenge of our times, one that unnecessarily ensures further fossil fuel development at a critical climate juncture. Still others in the fossil fuel industry feel that the "considerable tax increases and new government spending in the IRA amount to the wrong policies at the wrong time."

Whatever perspective one may have on the IRA, one thing is clear: the act will lead to significant new energy developments in this country and spirited debate in the legal community about the act's long-term implications.

Recent Programs Events

Every year, the FSU Law Externship Office hosts an Externship Luncheon for students interested in externship and volunteer opportunities in environmental, energy, and land use law. Students had the opportunity to speak with representatives and attorneys from non-government organizations and several local and state agencies and understand their offices and program offerings.

This year's luncheon was held on September 16, 2022, at the FSU Law Rotunda. Individuals who participated,

(L-R) Savannah Sherman, SALDF President, Diana Olsen (recent graduate and 3rd place winner), Catherine Awasthi (1st place), and FSU Professor Tricia Matthews

and their organizations, include Lou Norvell, Senior Assistant City Attorney, City of Tallahassee; Matthew Knoll, Assistant Deputy General Counsel, Florida Department of Environmental Protection; Judge Francine Ffolkes, Division of Administrative Hearings; Keith Hetrick, Senior Attorney, Florida Public Service Commission - Office of the General Counsel; Allan Charles, Senior Attorney, Florida Department of Agriculture and Consumer Services; Quilla Miralia, Intern/Extern Coordinator, Florida Fish and Wildlife Conservation Commission; LaShawn Riggans, Deputy County Attorney, Leon County; Janet Bowman, Senior Policy Advisor, The Nature Conservancy; and Jordan Luebkemann, Senior Associate Attorney, Earthjustice.

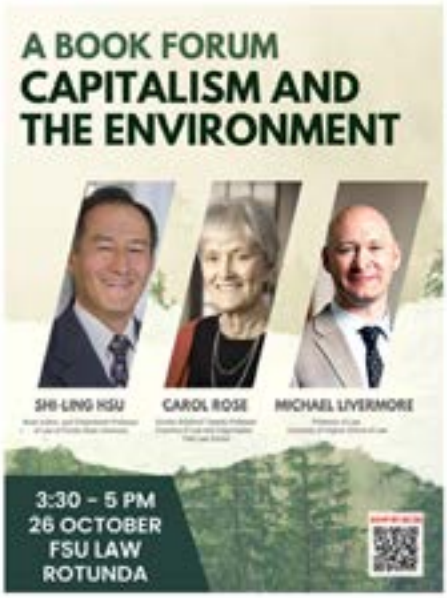
An **introductory session** was held on September 2, 2022, to welcome students and give information on the processes of earning the Environmental Law Certificate, share opportunities after graduation, and the Center's activities and programs for this academic year. Center Director James Parker-Flynn shared his experience practicing law with Carlton Fields, where he specialized in appellate practice, land use litigation, and environmental law, assisting clients with a wide array of regulatory and litigation issues. FSU Law Alum and Adjunct Professor Preston McLane shared his work as Program Administrator of the Air Resource Management Division of the Florida Department of Environmental Protection. Other members of the Environmental Law faculty were also present, including Professor Tricia Matthews, Professor Mark Seidenfeld, and Professor Shi-Ling Hsu. The session was hosted by Professor Erin Ryan, the Associate Dean for Environmental Programs.

Additional Events

On October 26, 2022, the Center hosted a forum discussing FSU Law Professor Shi-Ling Hsu's latest book, **Capitalism and the Environment: A Proposal to Save the Planet**. Guest discussants included Carol Rose, the Gordon Bradford Tweedy Professor Emeritus of Law and Organization at Yale Law School, and Michael Livermore, the Professor of Law and Director of the Program in Law, Communities and the Environment ("PLACE"n) at the University of Virginia School of Law.

On November 2nd, we hosted Abena Ojetayo to discuss efforts by our home city, Tallahassee, to pursue clean energy alternatives and foster community resilience. Abena is the Assistant City Manager for the City of Tallahassee and was the first Chief Resilience Officer for the City.

The Center will also be hosting an Alumni Career Panel in Spring 2023, a Distinguished Environmental Lecture by William Buzbee, the Edward and Carole Walter Professor of Law at Georgetown University Law Center, and a series of enrichment lectures (in-person and remote). Information on upcoming events will be available at https://rb.gy/jyvrzd or reach out to Jella Roxas for more information (jroxas@law.fsu.edu). We hope Section members will join us for one or more of these events.



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family, you can now get them a baby onesie with our new logo! Check out all of the fun Section swag from apparel to mugs to office products at our new online store at https://www.cafepress.com/thefloridabar/17339306.

Since Tabitha's last message in the October newsletter, the Section wrapped up 2022 with some excellent community outreach events in Tallahassee and with the new Central and Southern Florida chapters of the Section. The Section signed up a plethora of new law school student affiliate Section members at the civic fair at the FSU College of Law and at a great event at Cooley Law School in Riverview, Florida, which included Judge Kilbride and Elizabeth Fernandez. In November the Administrative Law Section continued the wonderful tradition of providing food to school children before the Thanksgiving holiday for the fourth annual food donation drive. Section members gathered and packaged food purchased with donated funds and dropped it off to elementary school children in need. I want to thank everyone who donated money and donated their time which helped make this event such a success, especially Brittany Griffith for helping plan and coordinate the donations, planning the packing party, and dropping the food off at the elementary school. I know from experience how much work goes into this event and her assistance is greatly appreciated!

The Central Florida chapter of the Section also got into the giving spirit with a toy drive benefiting the Guardian Ad Litem program. Central Florida attorneys were treated to a happy hour with shuffle board and drinks while donating toys to a good cause. Thank you to Elizabeth Fernandez and Adreienne Vining, our Young Lawyer Section Tampa co-chairs, for offering Central Florida attorneys such a fun and philanthropic event! For the Southern Florida chapter, Paul Drake also organized a great holiday happy hour for attorneys in the South Florida area. I'm so pleased to see the Administrative Law Section expanding its outreach efforts throughout the state of Florida. Thank you to Johnny Elhachem, Paul Drake, Joaquin Alvarez, Elizabeth Fernandez and Adreienne Vining for all the great work they are doing for the Section in the Central and Southern Florida chapters. The first month of the year isn't even over and there are already several events scheduled for Section members outside of the Tallahassee area. For example, if you are in the Tampa area after the Gasparilla parade, consider joining the Central Florida chapter of the Section to help clean up beads on January 29, 2023. As a Tampa native, I know how many beads can be left behind after the parade and am glad to see the Section helping keep Tampa beautiful!

For anyone interested in keeping up with the Section and its projects and committees, or anyone interested in applying to become a Section member, check out the redesigned website! Section membership applications, newsletters and bulletins, committee member contact information, resources for practitioners, a link to our Section store—it's all on the website! The final stage of the website revamp will include the creation of a calendar to keep Section members apprised of scheduled events—so keep an eye out for more to come. In the meantime, the Section's Facebook page and Instagram account always have up to date information about Section events. If you are planning something and want to have it posted to the Section's social media accounts and put on the website, be sure to reach out to the Technology Committee. I'm currently the chair and can be reached at brittany.dambly@gmail.com and would love to help promote future section events.

Speaking of events, for the month of February, on February 8, 2023, several DOAH judges took their talents to the Stetson Law School for a Division of Administrative Hearing judges panel. The Administrative Law Section will also be co-hosting a speed networking event with the Florida Government Bar Association at the FSU College of Law on February 28, 2023. The Section's Agency Open House series will continue with meetings at the Department of Management Services on March 2, 2023, at the Public Employee Relations Commission on April 6, 2023, and the Attorney General's Office on May 4, 2023. Anyone interested can reach out to Calbrail Banner at CBanner@floridabar.org for additional information. The Pat Dore Administrative Law Conference will also be held May 18-19, 2023, in Tallahassee, Florida. So many amazing opportunities for CLEs and networking coming up! And join us for the Section's spring meeting on March 9, 2023, at 3:30 pm at Proof Brewing Company.

I am encouraged by the number and quality of events that the Section is planning for 2023 and am hopeful non-members who attend these events will come to the conclusion that Section membership has so many benefits. Please be sure to encourage any non-members you meet to join the Section! And for those attorneys who are already members, please consider getting involved in one of our many wonderful committees this year. Committee information is available at https://flaadminlaw.org/committees-liaisons-projects/, or feel free to reach out to me or any of the Section's executive council members to get more information about how to get more involved!

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argument because the record on appeal was clear as to DOH's motion to amend and the reasons for the ALJ's rejection of the motion.

The court then analyzed the ALJ's denial of DOH's motion to amend. The court noted that the refusal to grant a motion to amend an administrative complaint, absent exceptional circumstances, constitutes an abuse of discretion. A petitioner may amend an administrative complaint, even during an administrative hearing, so long as there is no prejudice to the opposing party. Furthermore, the court explained that the analysis is done "on a case-by-case basis, based on the totality of the circumstances." In Dr. Khan's case, the court noted any delay would be minimal, as DOH's new alternative theory was based on the same sexual incident alleged in the administrative complaint, and Dr. Khan could have received a short continuance if he needed additional discovery following amendment. Moreover, Dr. Khan had not shown that he would have been prejudiced by DOH's amendment of the administrative complaint. Thus, the court concluded that the ALJ committed an abuse of discretion by denying DOH's motion to amend. The court reversed the final order and remanded the case for additional administrative proceedings.

Benefits Denial - APD Application for Support Denied Based on Misconstruction of Rule

Fatigato v. Agency for Pers. with Disabilities, 344 So. 3d 627 (Fla. 2d DCA 2022).

Mr. Fatigato is an elderly man suffering from a variety of cognitive and mental health challenges, including autism spectrum disorder. The Agency for Persons with Disabilities (APD) denied Mr. Fatigato's application for support benefits, and subsequently affirmed the denial after Mr. Fatigato petitioned for and received an informal hearing pursuant to section 120.57(2), Florida Statutes. Mr. Fatigato appealed the benefits denial to the Second District Court of Appeal.

Mr. Fatigato submitted documentation to APD pertaining to his previous Medicaid waiver services while residing in Illinois, along with additional physician evaluations concluding he met the criteria for autism spectrum disorder. After acknowledging the records from Illinois would satisfy the requisite findings for eligibility, the APD hearing officer nevertheless affirmed APD's denial because Mr. Fatigato's documentation was not validated by a qualified professional, as that term is defined in the agency rule. The hearing officer construed the term "validation" as used in rule 65G-4.017(3)(b) as a substantive rule of evidence, trumping any further judicial consideration.

In reversing and remanding the case for further proceedings, the court explained that the hearing officer's decision relied on a misapplication of rule 65G-4.017(3)(b) in excluding the documents from consideration. The court explained that although the rule contains a definition of "validation," it does not state that a hearing officer cannot receive into evidence or rely upon documents not validated pursuant to the rule. To the contrary, the court found that the hearing officer's exclusion of these documents from consideration violated the rules of evidence and thwarted the appellate court's review authority.

Comprehensive Plan Amendments—Reversal Required Where Amendments Are Not In Compliance with Florida Law

Mattino v. City of Marathon, 345 So. 3d 939 (Fla. 3d DCA 2022).

Permanent residents of the Florida Keys (Appellants) appealed a final order of the Department of Economic Opportunity (DEO) that determined comprehensive plan amendments adopted by the Cities of Key West, Marathon, and Islamorada (Cities) were in compliance with Florida law.

DEO developed the Keys Workforce Housing Initiative to allow for up to 1,300 new building permit allocations for workforce-affordable housing in the Keys, which were to be split between the Cities. DEO determined that the Cities would need to amend their comprehensive plans to create the additional building permits.

The Cities' comprehensive plans contained evacuation plans for hurricanes that designate when visitors, tourists, and permanent residents can evacuate during two separate 24-hour phases (Phase I and Phase II). Phase I designated a mandatory evacuation for visitors, non-residents, recreational vehicles, military personnel, hospital and nursing home patients, mobile home residents, and more. Phase II included mandatory evacuation for all permanent residents living in site-built homes.

The Cities' comprehensive plan amendments added the permanent residents living in the new 1,300 units to the categories of individuals who must evacuate during Phase I. After the Cities approved the comprehensive plan amendments, Appellants filed petitions for formal administrative hearing with DOAH, asserting that the Cities' comprehensive plan amendments did not comply with Florida law requiring a 24-hour evacuation time for permanent residents. Following a hearing, the ALJ issued a recommended order determining that the comprehensive plan amendments did not violate Florida law. DEO issued a final order adopting the ALJ's recommended order. Appellants sought judicial review.

Among other issues, the court analyzed Appellants' argument that the comprehensive plan amendments failed to comply with the Florida Keys Area Protection Act, which requires all amendments to comprehensive plans to "maintain[] a hurricane evacuation clearance time for permanent residents of no more than 24 hours." § 380.0552(9)(a)2., Fla. Stat. The court reasoned that the Florida Keys Area Protection Act thus capped the number of permanent residents (including any additional permanent residents as a result of affordable housing developments) to ensure that all permanent residents could be safely evacuated within a 24-hour period. Because the comprehensive plan amendments evacuated the permanent residents in the affordable housing units in Phase I and other permanent residents in Phase II, the Cities were evacuating permanent residents over a 48-hour

period, which was not in compliance with the statute.

The Cities argued that the court should defer to prior administrative determinations of compliance for the existing comprehensive plans, which already allowed for permanent residents to be evacuated in two 24-hour phases (mobile home residents were evacuated during Phase I). But the court rejected this argument, noting that the validity of the existing comprehensive plans was not before the court and that following Florida voters' adoption of Article V, § 21 of the Constitution, administrative determinations of compliance were no longer entitled to deference.

The court noted, however, that although the Cities of Marathon and Islamorada were subject to the Florida Keys Area Protection Act because they are located within the Florida Keys Area of Critical State Concern, the City of Key West was not. Instead, the City of Key West was designated an Area of State Concern and is subject to different development requirements, not those found in section 380.0552(9)(a)2. Thus, the court reversed the final order with regard to Marathon and Islamorada and affirmed with regard to Key West.

Emergency Rule Challenge – Judicial Review Standard

Alvarez v. Dep't of Health, 343 So. 3d 694 (Fla. 3d DCA 2022).

Alleging that the Board of Medicine (Board) had not sufficiently demonstrated an emergency, Petitioners, who were board certified plastic surgeons and a non-profit representing the interests of plastic surgeons in Florida, challenged an emergency rule addressing gluteal fat grafting procedures (also known as a "Brazilian butt lift"). Emergency rule 64B8ER22 limited gluteal fat grafting procedures to three per day and required use of ultrasound guidance in performing the procedure.

The court noted that its review of an emergency rule is limited to the four corners of the rule itself—emergency rules are required to contain specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and reasons for concluding that the procedure used in the emergency rule is fair under the circumstances. The Board's basis for implementing the emergency rule at issue in this case was its concern over the high number of mortalities resulting from the procedure; this justification was spelled out in the emergency rule.

Petitioners argued that the number of mortalities alone was not sufficient to constitute an emergency when there was no effort to quantify the number of mortalities as a fraction of the total number of procedures. The court rejected Petitioners' argument and refused to substitute its judgment for that of the Board. Because the emergency rule contained plausible and rational statements for the requirement it imposed, the court denied the petition.

Licensure—Agency Denied Licensee Due Process By Imposing A Penalty For An Uncharged Violation

McQueary v. Dep't of Health, 346 So. 3d 738 (Fla. 1st DCA 2022).

Under Florida law, each practice board must adopt disciplinary guidelines that provide reasonable notice of the likely penalties that may be imposed for proscribed conduct. The Florida Board of Nursing's (Board) guidelines provide for disciplinary action if a nursing license is revoked or suspended by another state. The Board's guidelines also provide for disciplinary action based on unprofessional conduct, which includes violating patient confidentiality. The penalties for unprofessional conduct previously ranged from a $250.00 fine and continuing education to a $500.00 fine and probation. The Board later amended the maximum penalty for unprofessional conduct to revocation of the license.

In 2017, Kimberley McQueary's Louisiana nursing license was suspended for violating patient confidentiality. In 2018, the Department of Health (Department) filed an administrative complaint against Ms. McQueary charging her with violating section 464.018(1)(b), Florida Statutes, based solely on the suspended Louisiana license. Ms. McQueary requested a formal hearing at DOAH, but the Department suggested there were no facts in dispute, and the ALJ relinquished jurisdiction to the Board for an informal hearing. The Department also informed Ms. McQueary that the facts alleged in the complaint were uncontested and that she would be limited to legal argument if any. The notice of hearing sent to Ms. McQueary explained that her attendance at the informal hearing was not mandatory, and Ms. McQueary did not attend. Following the informal hearing, the Department recommended revocation, citing violation of a patient's confidentiality as an aggravating factor. The revocation was approved by the Board.

Ms. McQueary challenged the Board's final order, claiming she was denied due process because the Department failed to notify her of the allegation of a violation of patient confidentiality. The First District Court of Appeal agreed, characterizing the Board and Department's conduct as a "game of bait-and-switch." The court found that the Department provided no notice to Ms. McQueary of its intent to seek revocation. While there was no mention of a violation based on unprofessional conduct in the administrative complaint, the Board nevertheless punished Ms. McQueary for that uncharged violation. The court also determined that the Department relied on the wrong guidelines in its final order. The Board should have applied the 2012 version that set the maximum penalty for unprofessional conduct at $500.00 and probation, and not the version that was amended after Ms. McQueary's Louisiana license was suspended. Lastly, the court concluded that whether there was actual harm to the patient was an issue of fact that should have been determined by the ALJ. Accordingly, the court reversed the Board's revocation of Ms. McQueary's nursing license and remanded for further proceedings.

Medical Marijuana Treatment Center Licensure—Applicant Was Ineligible For License As A Matter of Law And Failed To Exhaust Administrative Remedies

TropiFlora, LLC v. Dep't of Health, 346 So. 3d 1271 (Fla. 1st DCA 2022).

TropiFlora appealed the district court's grant of final judgment, which denied TropiFlora's request for a declaration that it was entitled to a Medical Marijuana Treatment Center (MMTC) license under section 381.986(8)(a)2.1., Florida Statutes.

In July 2015, TropiFlora applied for a dispensing organization (DO) license under the now-repealed Compassionate Medical Cannabis Act of 2014 (the 2014 Law). However, because TropiFlora's application failed to provide the required certified financial statements, the Department of Health (Department) denied the application prior to scoring. Instead of curing the deficiency, TropiFlora filed a formal written protest (the 2015 Petition); however, it subsequently instituted an action in circuit court and voluntary dismissed the 2015 Petition.

TropiFlora later filed an amended complaint as "agent for" MariJ, a separate corporate entity, and the Cathcarts, the proprietors of TropiFlora, relying on a 2016 statutory amendment which authorized a limited expansion of available DO licenses. While the amended complaint was pending, the legislature amended section 381.986 to implement the 2016 constitutional amendment authorizing medical marijuana (the 2017 Law). The 2017 Law no longer provided for the licensure of DOs, but replaced them with MMTCs. The 2017 Law also permitted the Department to issue MMTC licenses to former DO applicants whose applications were "reviewed, evaluated, and scored by the Department" under the 2014 Law. Based on the 2017 Law, TropiFlora filed a second amended complaint, seeking a declaratory judgment that TropiFlora, MariJ, and the Cathcarts were entitled to MMTC licensure. TropiFlora argued that its application under the 2014 Law should have been scored by the Department and, if it were scored now, TropiFlora would be entitled to an MMTC license.

While the second amended complaint was pending, TropiFlora sent a formal request to the Department for MMTC licensure under the 2017 Law. The Department denied the request, and TropiFlora filed an administrative petition challenging that denial (the 2018 Petition), raising the same arguments as the second amended complaint. The Department dismissed the 2018 Petition and TropiFlora did not appeal.

Following a bench trial, the circuit court denied TropiFlora's request for declaratory judgment, and the First District Court of Appeal affirmed. First, the court concluded that TropiFlora did not have standing to bring the action as "agent for" MariJ and the Cathcarts because they were not the real parties in interest, as required under Florida Rule of Civil Procedure 1.210(a). Neither MariJ nor the Cathcarts applied for a license and they had no stake in the DO licensure. Second, the court concluded that TropiFlora failed to challenge the circuit court's determination that it did not satisfy the statutory requirements for licensure under the 2017 Law, which limits licensure to those applicants whose applications were scored. Because TropiFlora's application was never "scored" by the Department, TropiFlora was ineligible as a matter of law for a licensure under the 2017 Law. Third, the court determined that because TropiFlora abandoned its 2015 Petition and did not appeal the denial of its 2018 Petition, it could not "use a declaratory judgment action to collaterally attack those decisions." In reaching this conclusion, the appellate court rejected TropiFlora's argument that the Department had a non-discretionary duty to score its application. Section 381.986, Florida Statutes, has always required an applicant to provide certified financial statements as a condition of licensure, and the Department appropriately denied the application for failing to meet this requirement. Lastly, the court held that it could not compel the Department to score TropiFlora's application. The court explained that it must apply the licensure law in effect when the licensing decision is made, not when the application is submitted. Because the present law authorizes the licensure of MMTCs, and not DOs, the Department could not grant TropiFlora's application for a DO license under the now-repealed 2014 Law.

Medical Marijuana Treatment Center Licensure—Applicant Was Not Entitled To Default Licensure When The Application Window Was Not Open

Louis Del Favero Orchids, Inc. v. Dep't of Health, 346 So. 3d 231 (Fla. 1st DCA 2022).

Louis Del Favero Orchids appealed the trial court's order dismissing its complaint which sought a Medical Marijuana Treatment Center (MMTC) license under the default licensure provision in section 120.60(1), Florida Statutes. Section 120.60(1) requires an application for a license to be approved or denied within 90 days after the agency receives a completed application; otherwise, the application is "considered approved." The trial court dismissed the complaint, finding that section 120.60(1) was inapplicable to MMTC licenses as described in section 381.986, Florida Statutes.

The appellate court affirmed, noting that it considered the same issue in *MedPure, LLC v. Dep't of Health*, 295 So. 3d 318 (Fla. 1st DCA 2020). Relying on *MedPure*, the court determined that the Department of Health's emergency rule, which has not been successfully challenged, notified applicants that applications were not being accepted. Additionally, as held in *MedPure*, the court determined that allowing the appellant to file for a license "during an undesignated period for filing would contravene the competitive structure for licensing contemplated in section 381.986, Florida Statutes," by automatically excluding other applicants from consideration.

Judge Bilbrey concurred in result with the majority panel's opinion, but urged the Department to either open the application window or promulgate a superseding rule allowing for license applications. Judge Bilbrey specifically noted that while the emergency rule was issued nearly five years ago, the MMTC license application window remained closed, despite the Department's representation in the *MedPure* proceeding that it intended to open the application window following the conclusion of another case (*Dep't of Health v. Florigrown, LLC*, 317 So. 3d 1101 (Fla. 2021)), that was resolved over a year ago. Lastly, Judge Bilbrey suggested

that if the Department fails to open the application window, applicants should "seek judicial relief to compel compliance with the Department's constitutional duties."

Medicaid Provider Termination—Court Cannot Interfere in Matters of Agency Discretion

Cabrera v. Agency for Health Care Admin., 347 So. 3d 1288 (Fla. 3d DCA 2022).

Dr. Varinia F. Cabrera appealed a final order of the Agency for Health Care Administration (AHCA) that terminated her from the Florida Medicaid program for 20 years.

Dr. Cabrera was a Medicaid provider of behavioral analysis services, along with her company Advanced Behavioral Association, LLC (Advanced Behavioral). AHCA entered a final order finding that the Florida Medicaid Program had overpaid Advanced Behavioral by $207,082.92 and requiring repayment plus statutory interest, fines, and costs. Advanced Behavioral did not appeal this final order.

AHCA offered Advanced Behavioral a repayment plan of $35,956.34 per month. Dr. Cabrera offered to repay AHCA at a rate of $800.00 per month. AHCA rejected Dr. Cabrera's offer. The outstanding $207,082.92 was not repaid within 30 days, and AHCA entered a final order terminating Dr. Cabrera with cause from the Florida Medicaid program for 20 years.

On appeal, Dr. Cabrera sought review of the terms of AHCA's proposed repayment plan. But the court rejected Dr. Cabrera's request, noting that the court was not authorized to evaluate matters within an agency's discretion. Under section 409.913(30), Florida Statutes, AHCA is required to terminate a provider from the Florida Medicaid program if an overpayment is not repaid within 30 days of a final order not subject to further appeal, "unless the provider and the agency have entered into a repayment agreement." See also Fla. Admin. Code R. 59G-9.070(7)(s). The court noted that matters regarding mitigation under section 409.913 expressly fall within an agency's discretion, and section 120.68(7), Florida Statutes, prohibits the court from substituting its judgment on a matter of agency discretion. Because Dr. Cabrera did not show that AHCA exercised its discretion in excess of that delegated to the agency by law, or any other legal error, the court affirmed AHCA's final order terminating Dr. Cabrera from the Florida Medicaid program.

Public Records – Agency Must Follow Procedures for Fee Entitlement in Discovery

Miami Dade Coll. v. Nader + Museu I, LLLP, 47 Fla. L. Weekly D1814a (Fla. 3d DCA Aug. 31, 2022).

Nader + Museu I, LLLP (Nader) filed a petition for writ of mandamus and declaratory relief against Miami-Dade College (MDC) for failing to make public records available. MDC originally requested Nader to provide narrower search terms after Nader initially submitted a broad request, which MDC determined would be costly. Nader did not follow up with MDC and instead sought judicial intervention. During the course of litigation, MDC produced the records in discovery, but failed to provide Nader with an invoice for its efforts or an estimate of the anticipated costs. After the trial court granted Nader's request for a writ of mandamus, MDC filed a motion for award of attorneys' fees and costs of the production pursuant to section 119.07, Florida Statutes, although the cost of producing the public records had not previously been discussed between the parties. The trial court denied MDC's request.

In its de novo review of MDC's entitlement to fees based on its interpretation of section 119.07, the appellate court focused on MDC's failure to follow its own policies and procedures in responding to Nader's public records request. MDC had a policy in place that required that the record custodian and requestor agree to a duplication fee in advance of production. Not only is an agency required to follow its own rules, but section 119.07(4) also provides that public record custodians must furnish

copies of records upon payment of the duplication fee prescribed by law.

While section 119.07(4)(d) provides that an agency may also charge a special service charge for technology and clerical fees incurred prior to duplication, the court explained that the parties did not agree in advance to a special service charge. The court distinguished Agency for Health Care Admin. v. Zuckerman Spaeder, LLP, 221 So. 3d 1260 (Fla. 1st DCA 2017)—the case MDC primarily relied on in support of its appeal—on the basis that the Agency for Health Care Administration had provided the requestor with invoices reflecting the special service charge prior to the production of the records.

Here, MDC never provided an estimate of duplication fees or an invoice for a special service charge prior to production. Therefore, the court affirmed the trial court's denial of fees.

Statutory Interpretation - Legislative Intent - Florida Crimes Compensation Act

Raik v. Dep't of Legal Affairs, 344 So. 3d 540 (Fla. 1st DCA 2022).

Nancy Raik's husband was killed in a vehicular homicide. The State charged the driver with second-degree vehicular homicide. Raik filed a claim with the Bureau of Crimes Compensation (Bureau), which denied her claim, interpreting the

Florida Crimes Compensation Act (Act) to exclude claims for victims of vehicular homicide unless the perpetrator committed first-degree vehicular homicide or intentionally caused the victim's death.

On appeal, the court began its analysis by highlighting the Legislature's explicit intent that the State provide aid, as a matter of moral responsibility, for victims of crime. As such, each section must be interpreted to effectuate this intent. From here, the court outlined the Legislature's long history of amending the Act to expand the definition of compensable crimes, thereby furthering the Legislature's intent.

Next, the court looked to the Act's text in section 960.13(3)(a)-(c), Florida Statutes, which broadly defines compensable crimes to include (a) felonies and misdemeanors which result in physical injury or death, (b) violations of six articulated statutes—including first-degree vehicular homicide—and, (c) acts involving the operation of a motor vehicle with intent to cause personal injury or death. In interpreting "compensable crimes," the Bureau read subparagraphs (b) and (c) above as limitations on subparagraph (a), thereby excluding unintentional second-degree vehicular homicide from compensation. The court disagreed with this reading, explaining it must not literally interpret a provision if doing so would lead to an absurd conclusion or defeat legislative intent.

The court explained that an isolated and literal reading of subparagraph (c) would not only nullify much of subparagraphs (a) and (b), but it would contradict the legislative intent to compensate victims of crime. Ultimately, the court interpreted subparagraph (c) to mean the statute does not cover non-criminal offenses involving negligence, or other civil wrongs, perpetrated with motor vehicles. The court reversed the Bureau's decision denying Raik compensation with directions to approve her claim.

Judge Makar dissented, arguing that where a general and specific provision on the same topic exists, the specific provision operates as a qualification upon the terms of the general provision. He explained that section 960.03(3)(a), Florida Statutes, defines compensable crimes generally, but that subparagraph (b) explicitly lists first degree vehicular homicide—not second degree—as a compensable crime. Further, he explained that the plain text of subparagraph (c) limits victim compensation for injuries or deaths arising from the operation of motor vehicles to only those that were "intentionally inflicted." Read in conjunction, Judge Makar agreed with the Bureau that the plain text of subparagraphs (b) and (c) have a limiting effect on subparagraph (a), prohibiting compensation for unintentionally inflicted second-degree vehicular homicide.

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

Duke Energy Fla., LLC v. Clark, 344 So. 3d 394 (Fla. 2022).

Duke Energy Florida (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.

The Commission referred the matter to DOAH, where 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) that 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) that the derating was a "consequence of DEF's failure to prudently operate 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 fact, 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, the Supreme Court reversed, finding the Commission and ALJ erred in concluding that DEF's imprudence caused the plant's outage in

2017. The Court recognized that although it was not "legally permitted to reweigh evidence," the ALJ's discussion of causation in its "legal conclusions" was "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. On August 25, 2022, the Supreme Court denied the motion for rehearing.

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Substantial Interest Proceedings—Attorney's Fees

Bradley v. Fla. Fish & Wildlife Conservation Comm'n, Case No. 22-1561F; *Wilson v. Fla. Fish & Wildlife Conservation Comm'n*, Case No. 22-1562F (Final Order Oct. 12, 2022) (Van Wyk, ALJ).

FACTS: The Florida Fish & Wildlife Conservation Commission (Commission) has designated the gopher tortoise as a threatened species. Accordingly, gopher tortoises must be relocated before any land clearing or development occurs on property where gopher tortoises are located. The Commission issued permits to Drew Kaiser and John Wilson (Petitioners) enabling them to "mark, transport, and release captured gopher tortoises at recipient sites." On June 4, 2021, the Commission issued agency action letters which initiated disciplinary cases against Petitioners based on alleged violations of guidelines for managing recipient sites. After Petitioners requested administrative hearings and the cases were referred to DOAH, Petitioners filed separate motions for attorney's fees pursuant to section 120.569(2)(e) and 120.595(1), Florida Statutes. After the ALJ considered the consolidated cases and recommended dismissal of the agency action letters, the Commission entered a final order on May 16, 2022 adopting that recommendation. Petitioners then renewed the motions for attorney's fees.

OUTCOME: Section 120.569(2)(e) provides for sanctions if a pleading, motion, or other paper is "filed in the proceeding" for an improper purpose. In their renewed motions for attorney's fees, Petitioners identified the agency action letters as the pleadings allegedly filed for an improper purpose pursuant to section 120.569(2)(e). However, the ALJ concluded the agency action letters were not "filed in the proceeding" because there was no proceeding until Petitioners requested administrative hearings. The other basis for the renewed motions for attorney's fees, section 120.595(1), provides for an award of fees and costs if "the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose." A "nonprevailing adverse party" is defined as "the party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of [the] proceeding." Accordingly, the ALJ noted that "[a]ttorney's fees are, by definition, not recoverable against an agency under [section 120.595(1)]."

Rule Challenges—Standing

Jacaranda at Cent. Park Master Ass'n v. S. Fla. Water Mgmt. Dist., Case No. 22-0849RX (Final Order Sept. 2, 2022) (Creasy, ALJ).

FACTS: The South Florida Water Management District (District) is a government entity that regulates the construction, operation, and maintenance of surface water/stormwater management systems within its geographic regions. The Environmental Resource Permit Applicant's Handbook Volume II (Handbook) applies to areas within the District's jurisdiction and is incorporated by reference into Florida Administrative Code Rule 40E-4.091. Section 5.4.2(d) of the Handbook (Side Slope Rule) provides in pertinent part that "for purposes of public safety . . . all [stormwater ponds] shall be designed with side slopes no steeper than 4:1 (horizontal:vertical) from top of bank out to a minimum depth of two feet below the control elevation or an equivalent substitute." The Jacaranda at Central Park Master Association, Inc. (Jacaranda) consists of 12 residential homeowner's associations within the District's jurisdiction. Jacaranda filed a petition alleging that the Side Slope Rule is an invalid exercise of delegated legislative authority.

OUTCOME: The ALJ held that Jacaranda failed to demonstrate that it had standing to challenge the Side Slope Rule and dismissed the petition. With regard to the injury-in-fact prong of the *Agrico* test, ALJ Creasy noted that Jacaranda was unable to prove that it owned the land constituting the side slopes of stormwater ponds regulated by the District. In addition, the ALJ determined that the potential for the District to initiate an enforcement action

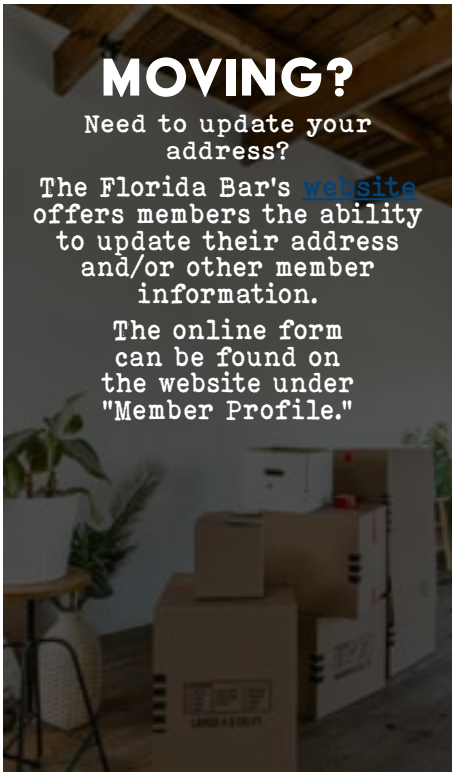
against Jacaranda was "at best, unclear." As for the zone-of-interest prong, the ALJ concluded that Jacaranda's interests, such as avoiding future personal injury lawsuits and rising insurance premiums, were economic in nature and that such interests are not protected by Chapter 373, Florida Statutes.

Rule Challenges—Unadopted Rules

Tampa Bay Downs, Inc. v. Fla. Gaming Control Comm'n, Case No. 22-1121RU (Final Order Aug. 9, 2022) (Peterson, ALJ).

FACTS: On July 1, 2022, the Florida Gaming Control Commission (Commission) assumed the duties previously assigned to the Department of Business and Professional Regulation's Division of Pari-Mutuel Wagering. Those duties include adopting rules regulating the pari-mutuel industry and administering Chapter 550 of the Florida Statutes. Intertrack wagering occurs when wagers are accepted at a Florida pari-mutuel wagering facility on a race or game being broadcast from another Florida pari-mutuel wagering facility. The facility broadcasting the race is the host track, and the facility receiving the broadcast is the guest track. Section 550.0951(3)(c)1., Florida Statutes, imposes taxes on the "handle," i.e., the aggregate amount wagered on a particular race or game. However, that tax is only 0.5 percent "if the guest track is located outside the market area of the host track and within the market area of a thoroughbred permitholder currently conducting a live race meet." Tampa Bay Downs, Inc. (Tampa Bay Downs) holds a pari-mutuel thoroughbred horseracing permit and conducts intertrack wagering. Tampa Bay Downs is a guest track located outside the market area of the host track, and Tampa Bay Downs is within its own market area when conducting live thoroughbred racing. However, the Commission interprets section 550.0951(3)(c)1. as requiring that a 5.5 percent tax rate be applied to Tampa Bay Downs's intertrack wagering activities with out-of-market host tracks because Tampa Bay Downs does not lie within the market area of *another* thoroughbred permitholder conducting a live race meet. Tampa Bay Downs has sought tax refunds and argues that the Commission's interpretation of section 550.0951(3)(c)1. is an unadopted rule.

OUTCOME: The ALJ issued a final order ruling that the interpretation at issue is an unadopted rule. In doing so, he concluded that "[t]he word 'another' does not appear anywhere in the statutory language of section 550.0951(3)(c)1., and it is *not* readily apparent from reading the plain language of the statute that the guest-track has to be within the market area of another thoroughbred track to receive the lower tax rate." The ALJ further concluded that the Commission's interpretation "clearly requires reading the word 'another' into the statute even though that word is not contained in the law." The Commission has appealed that decision to the First District Court of Appeal.



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