VOL. XLIV, NO. 1 JOWANNA N. OATES AND TIFFANY RODDENBERRY, CO-EDITORS SPRING 2024

APPELLATE CASE NOTES

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

Appellate Review—Motion for Reconsideration Required to Preserve Error

Citizens of State v. Clark, 373 So. 3d 1128 (Fla. 2023).

Appellant, the Office of Public Counsel (OPC), sought review of the Public Service Commission's (PSC) decision granting partial replacement power costs to Duke Energy Florida, LLC (Duke). The court affirmed PSC's decision on the ground that the OPC failed to properly preserve its legal challenges for appellate review.

In 2020, Duke's coal-fired steam power plant suddenly went offline. The attempt to bring the plant back online resulted in damage due to synchronization issues and certain equipment failure. Following the incident, Duke petitioned the PSC to recover all replacement power costs, asserting that its actions were reasonable and prudent given the circumstances.

OPC and other parties opposed Duke's petition, leading to an evidentiary hearing to determine Duke's prudence in the matter.

After the hearing, the PSC held an agenda conference where mitigating circumstances and the division of financial responsibility were discussed. The PSC unanimously granted Duke recovery of fifty percent of the replacement power costs associated with the plant outage in a final order.

OPC filed a motion for reconsideration with the PSC, arguing that considering mitigating factors was not authorized by law and there was insufficient evidence to support an equal division of financial responsibility. Before the PSC ruled on the motion, OPC appealed to the Florida Supreme Court for judicial review pursuant to the court's jurisdiction over the rates of electric utilities (Art. V, § 3(b)(2), Fla. Const.) and withdrew the motion for reconsideration.

In reviewing the PSC's decision, the court first considered whether OPC properly preserved its legal challenges for review. Duke contended that OPC failed to do so, asserting that issues not properly preserved are waived.

The court concurred, noting that when a final order introduces substantive issues or legal conclusions not previously raised or challenged, a party must a file a motion for rehearing to preserve those alleged errors for appellate review. The alleged errors that OPC asserted on appeal first surfaced in the PSC's final order. Although the OPC originally filed a motion for reconsideration, it withdrew the motion without affording the PSC an opportunity to correct the alleged errors. Consequently, OPC failed to preserve these arguments,

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

DOAH CASE NOTES

BY GAR CHISENHALL, MATTHEW KNOLL, TIFFANY RODDENBERRY, AND KATIE SABO

LICENSING

Dep't of Child. & Fams. v. Impact Learning Ctr., Case No. 23-2780 (Recommended Order Jan. 8, 2024) (Early, ALJ).

FACTS: The Department of Children and Families ("the Department") is the state agency responsible for licensing and regulating childcare facilities. In furtherance of its regulatory function, the Department inspects childcare facilities twice a year. Impact Learning Center ("Impact") operates a licensed childcare facility in Jacksonville, Florida, and was inspected by Department personnel on June 6, 2023. That inspection led the Department to issue an amended administrative complaint alleging that Impact's outdoor areas were not fenced to prevent access to a water hazard. During the formal administrative hearing at DOAH, the Department did not offer the report from its June 6, 2023 inspection into evidence. There was also no evidence from any Department witnesses regarding the contents of the inspection report.

OUTCOME: The ALJ noted in his recommended order that Florida Administrative Code Rule 65C-22.010(1)(e) defines a "violation" as "noncompliance with a licensing standard as described in an inspection report resulting from an inspection under Section 402.311, F.S." Because there was no competent, substantial evidence that the alleged gate violations were described in the inspection report, the ALJ ruled that the Department failed to prove that a "violation" had occurred.

PERMITTING

Falkenberg Real Estate, LLC v. Dep't of Transp., Case No. 23-3202RU; (Final Order Nov. 6, 2023) (Stevenson, ALJ).

FACTS: The Florida Department of Transportation ("the Department") is responsible for establishing, controlling, and prohibiting points of ingress to, and egress from, the State Highway System. In 2006, McCullagh & Scott Development, Inc. ("McCullagh") sought to develop a property in Ruskin, Florida, named "South Shore Plaza." The property was to include a gas station, a convenience store, and space for offices and/or retail stores. On August 17, 2006, McCullagh applied to the Department for a permit to connect the property to State Road 674. On February 19, 2008, the Department issued the permit, and McCullagh constructed the driveway connection shortly thereafter. However, McCullagh never constructed the South Shore Plaza and sold the property to Pinzon LLC on January 10, 2011. Falkenberg Real Estate, LLC ("Falkenberg") purchased the property on March 30, 2022, intending to construct the South Shore Plaza contemplated by McCullagh. During subsequent communications between Falkenberg and the Department, the Department took the position that the permit issued to McCullagh on February 19, 2008, had automatically expired because: (a) the property had not been fully developed within one year of the permit's issuance; and (b) a "significant change" had occurred on the property within the meaning of section 335.182(3)(b), Florida Statutes. As a result, the Department informed Falkenberg that it would have to go through a lengthy and expensive permit review process. On August 21, 2023, Falkenberg filed a petition arguing that the Department relied on unadopted rules to determine that the permit had automatically expired.

OUTCOME: The ALJ rejected the Department's argument that the "last antecedent" rule should be used in interpreting section 335.182(3)(b). The ALJ also rejected the Department's argument that section 335.185(2), Florida Statutes, required an entire project, rather than just a driveway connection, to be completed within one year. Therefore, the ALJ determined there was no basis to support the Department's position that the permit automatically expired because the South Shore Plaza had not been constructed within one year of the permit's issuance. Accordingly, the ALJ ruled that the Department relied on unadopted rules to

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Florida State University College of Law Winter 2024 Update

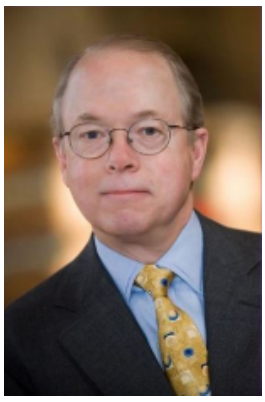
BY ERIN RYAN,
ASSOCIATE DEAN FOR ENVIRONMENTAL PROGRAMS AND DIRECTOR OF FSU CENTER FOR ENVIRONMENTAL, ENERGY, AND LAND USE LAW

Erin Ryan, Associate Dean for Environmental Programs

Happy New Year to all, from FSU! Around the start of each calendar year, we like to celebrate the scholarly contributions of our vibrant program faculty, including Brian Slocum's publications in the *Harvard Law Review, Columbia Law Review,* and *University of Pennsylvania Law Review*, Mark Seidenfeld's in the *University of Michigan Law Review, Boston University Law Review*, and *University of Arizona Law Review*, Shi-Ling Hsu's in the *Utah Law Review* and *Yale Journal on Regulation*, Tisha Holmes' extraordinary grants, and recognition by the Environmental Law Institute for my own article, "Privatization, Public Commons, and the Takingsification of Environmental Law," as one of the best in the field in 2023. Below, we proudly celebrate these accomplishments, selected accomplishments by our students and alumni, and the enriching contributions of our program visitors.

The Center has hosted several compelling programmatic series this spring, headlined by our Spring 2024 Distinguished Lecturer and renowned property law theorist, Professor Gregory Alexander of Cornell University, who presented *Reversing Means and Ends: The Human Flourishing Theory in Conditions of Climate Change* on February 7. We were also honored to be joined by David Bookbinder, former Chief Climate Counsel for the Sierra Club and Niskanen Center, for a fascinating and timely discussion on January 24 about the constitutional and common law claims that citizens, cities, and states are bringing against the fossil fuel industry, and by Timothy Bass, Assistant Chief Counsel in the Office of Chief Counsel for NASA, for a lively conversation on March 6 about environmental issues in space. All events are open to the public and registration information is offered on our website. Finally, all FSU Law students are invited to join the Environmental Program for a Spring Field Trip to the Wakulla Springs State Park on April 3, where we'll visit alligators, anhinga, and hopefully manatees on a specially themed river boat tour for students of environmental law. Look for more information about how to register in the coming months! Sending warmest wishes for all good things in the year to come.

Spring 2024 Distinguished Lecture



Gregory S. Alexander, A. Robert Noll Professor of Law, Emeritus Cornell Law School

On February 7, the Center proudly welcomed our Spring 2024 Distinguished Lecturer, Gregory S. Alexander. Professor Gregory S. Alexander is the A. Robert Noll Professor of Law, Emeritus at Cornell Law School. An internationally renowned expert in property law and theory, Professor Gregory has taught at Cornell Law School since 1985. Professor Alexander's lecture focused on his upcoming article, *Reversing Means and Ends: The Human Flourishing Theory in Conditions of Climate Change*, which will be featured in FSU Law's *Journal of Land Use and Environmental Law*.

As Professor Alexander discussed, the human flourishing theory of property posits that property is necessary for the development of the capabilities necessary for humans to flourish. Climate change creates conditions in which it may be possible and necessary to reverse this means-end relationship. That is, at least in some circumstances resulting from climate change capabilities may be the means, rather than the ends. Certain human capabilities have become the necessary means for achieving the goal of protecting property, both human and natural. Of these capabilities, sociability, or cooperativeness, is especially important to protecting property. In his lecture, Professor Alexander illustrated how cooperativeness facilitates the goal of property protection in a concrete context of disasters brought about by climate change, namely, wildfires in California. Connecting this discussion with Elinor Ostrum's work on the conditions of cooperation, he will point out the limits the capabilities approach to addressing the problems brought about by climate change.

Fall 2023 Distinguished Lecture

On November 9, 2023, the Center proudly welcomed our Fall 2023 Distinguished Lecturer, Michael Gerrard. Professor Gerrard is the Andrew Sabin Professor of Professional Practice at Columbia University, and the faculty director of the groundbreaking Sabin Center for Climate Change Law. A widely respected expert on climate law and policy, Professor Gerrard's lecture focused on his

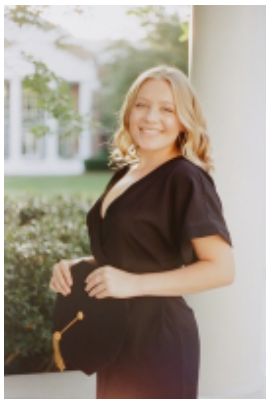
upcoming article, Urban Flooding: Legal Tools to Address a Growing Crisis, which will be featured in FSU Law's Journal of Land Use and Environmental Law.

As Professor Gerrard discussed, climate change is making extreme precipitation events more intense and frequent in many parts of the world. This has led to damaging and often life-threatening flooding in many cities. Urban drainage systems were designed to accommodate rainfall patterns that no longer exist. A host of actions are required to help cities cope with the flooding that is now happening and that will become more severe in the decades to come: improved drainage systems; more "green infrastructure" to allow stormwater to infiltrate the soil; systems to store water temporarily; barriers to hold back water; elevating and otherwise redesigning buildings so that critical elements are above flood levels; and relocation of some uses away from vulnerable areas. His lecture explored the legal issues that arise with each of these types of actions, discussed how they can be financed, and made recommendations for legal reforms. It also considered the difficult task of setting priorities and making tradeoffs among potential actions.

Michael Gerrard, Andrew Sabin Professor of Professional Practice
Columbia University

Alumni Highlight

Rylie Slaybaugh, who graduated from FSU Law's Environmental Certificate Program in 2022, has taken her passion for environmental law to Colorado. After graduating, Slaybaugh first worked as a Fellow for the Denver City Attorney's Office in their Municipal Operations Section. That opportunity soon led to another, as she joined the Colorado Department of Law in 2023, working as an Assistant Attorney General in the Air Quality Unit of the Natural Resources Section.



Rylie Slaybaugh
Assistant Attorney General
Colorado Department of Law

Faculty Spotlight

Professor Erin Ryan's recent article, *Privatization, Public Commons, and the Takingsification of Environmental Law*, 171 U. Penn. L. Rev. 617 (2023), was selected by the Environmental Law Institute (in partnership with Vanderbilt Law School) as one of the 20 best pieces in the field in 2023. The article "takes on the critical but undertheorized question of how to balance private and public interests in critical natural resource commons, including air, water, public lands, energy, and biodiversity resources, all of which are prone to forms of diminution by private exploitation." In doing so, it identifies "a set of legal biases, which we might call 'the privatization paradox,' that effectively create a one-way ratchet toward privatization at the expense of environmental values in public natural resources." The article argues that this "one-way conversion of public resources into private interests can survive policy transitions after elections, because it relies on private law norms—such as property and contract law tools—that are more enduring than public regulatory norms."

Student Organization Spotlight: Student Animal Legal Defense Fund

We are proud to introduce the 2023-2024 leaders of FSU Law's Student Animal Legal Defense Fund, which provides a forum for education, advocacy and scholarship aimed at protecting the lives and advancing the interests of animals through the legal system, raising the profile of the field of animal law. From top left:

Savannah Sherman (President) is a 3L who has always had a passion for animal welfare. She has held the position of SALDF President for her 2L and 3L years. Coming to law school, she discovered that an attorney can have a powerful role in advocating for the humane treatment of animals. She plans to relocate to Honolulu, Hawaii, upon graduation.

Shawn Soscia (Vice President) is a 2L who has an interest in advocating for animal rights. His interest comes from his love of dogs, he currently has a three-year-old golden retriever named Samson.

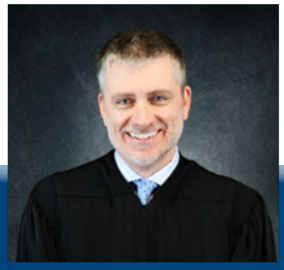
Mitchell Tozian (Executive Editor) is a 2L interested in animal rights and welfare. Mitchell hopes to pursue these interests as a member of SALDF and through pro bono work when he graduates law school. Mitchell has a five-year-old Husky, Kylo, who loves to explore the outdoors.

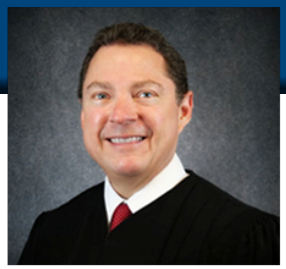
(L-R) Savannah Sherman (Pres.), Shawn Soscia (VP), and Mitchell Tozian (Executive Editor)

FEATURE

DOAH Welcomes Four New Administrative Law Judges and a New Chief in 2023

BY TIFFANY RODDENBERRY

(L-R top row) Judge Brandice D. Dickson, Judge William D. Horgan, and Judge Sara Marken
(L-R bottom row) Judge Nicole D. Saunders and Judge Darren A. Schwartz

In the latter half of 2023, the Division of Administrative Hearings saw the addition of four new ALJs and welcomed its newest chief following the departure of former Chief Judge Brian Newman.

In July 2023, DOAH welcomed four new administrative law judges, in part based on DOAH's expanded caseload associated with the enactment of 2022 Senate Bill 2A, which provides that many Citizens Property Insurance Corporation disputes will be heard and decided at DOAH.

The four new administrative law judges appointed in 2023 are:

Judge Brandice D. Dickson joined DOAH as an administrative law judge after spending more than a decade at Pennington, P.A. in Tallahassee, Florida, where she was born and raised. She is a magna cum laude graduate of the Florida State University College of Law. She is currently assigned to the Middle District.

Judge William D. Horgan also joined DOAH after about a decade at Pennington, P.A. in Tallahassee. Judge Horgan was born in Rhode Island but raised in Florida, and he has resided in Tallahassee since 1991. Judge Hogan practiced law in the private sector for over 25 years, and has significant experience handling first-party insurance coverage disputes. He is the Managing Administrative Law Judge for the new Property Insurance Claims Unit, and like Judge Dickson, he is assigned to the Middle District.

Judge Sara Marken joined DOAH after serving as associate general counsel for the School Board of Miami-Dade County, where she earned board certification in Education Law. Judge Marken was born in Colombia, and her family migrated to New York when she was nine years old. Judge Marken is handling Exceptional Student Education ("ESE") cases at DOAH.

Judge Nicole D. Saunders joined DOAH after serving as a litigator for the Florida Department of Education. Judge Saunders graduated from Jacksonville University summa cum laude and from the University of Florida Fredric G. Levin College of Law. She previously served as a senior staff attorney at the Florida Supreme Court and as an assistant state attorney. Before joining DOAH, she worked for the Department of Education, Division of Vocational Rehabilitation. Judge Saunders is also handling ESE cases.

Finally, in late December 2023, Governor DeSantis and the state Cabinet named Judge Darren A. Schwartz as interim director of DOAH. Judge Schwartz has been an ALJ since 2013, and he had been serving as acting director and chief judge since former Chief Judge Brian Newman left earlier the same month to become general counsel of the state's Citizens Property Insurance Corporation.

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limiting the scope of the court's review to fundamental errors. In totality, the court determined that even assuming some error, the PSC's recovery award did not rise to the level of fundamental error.

Exhaustion of Administrative Remedies—Local Government Contract with DOAH Triggers Whistleblower Act's Mandatory Pre-suit Requirement

S. Broward Hosp. Dist. v. Stratos, Case N. 4D2023-0443, 2023 WL 7367935 (Fla. 4th DCA Nov. 8, 2023).

The South Broward Hospital District (District) sought certiorari review of the trial court's denial of its motion for summary judgment on Stratos's claim under the Florida Whistleblower's Act (Act) found in section 112.3187, Florida Statutes. In her claim, Stratos alleged that the District's board of commissioners retaliated against her for reporting alleged Sunshine Law violations and other improper conduct. She asserted that the Board violated the Act by holding meetings to review her performance and by voting at a public meeting to terminate her employment.

The District moved for summary judgment arguing that Stratos failed to exhaust an administrative remedy before filing suit, as required by section 112.3187(8)(b). The District explained that it contracted with DOAH to conduct hearings under that statute and provided a copy of its contract. The District argued that Stratos's failure to exhaust this administrative remedy precluded her from bringing a civil action.

The trial court denied the motion for summary judgment and the District petitioned for certiorari review to the Fourth District Court of Appeal. The Fourth District determined it had jurisdiction to review on a petition for certiorari whether the presuit requirements of section 112.3187(8)(b) had been met.

The court concluded that there was no genuine issue of fact to preclude summary judgment. There was no dispute that the District had contracted with DOAH for hearings as expressly contemplated by section 112.3187(8)(b). The appellate court looked to its precedent and the decisions of other district courts of appeal to explain that Florida courts have read this provision as creating a mandatory, presuit administrative exhaustion requirement. Courts have also concluded that the local governmental authority is not required to affirmatively place employees on notice that they must exhaust that local governmental authority's administrative remedy; rather, the Act's plain language puts an employee on notice.

Because Stratos presented no evidence that she exhausted the administrative remedy created by the District's DOAH contract, the Fourth District granted the petition for certiorari and quashed the trial court's order denying summary judgment.

Home Venue Privilege

Fla. Fish & Wildlife Conservation Comm'n v. Gulf Cnty., 369 So. 3d 756 (Fla. 1st DCA 2023).

After the Fish and Wildlife Conservation Commission (Commission) promulgated a rule restricting oyster harvesting in the Apalachicola Bay, the Gulf County Board of County Commissioners and an individual sought to enjoin the rule in circuit court. The Commission sought to transfer the case to Leon County on the basis of the home venue privilege. The circuit court denied the request, reasoning that the home venue privilege did not apply because the Commission is not an "agency" for purposes of chapter 120, Florida Statutes, and, alternatively, the sword-wielder exception applied.

The appellate court disagreed on both grounds. First, the court explained that consistent with existing Florida case law, the Commission qualifies for the privilege as a commission created by the Florida Constitution, vested with the "regulatory and executive powers of the state." Under the privilege, venue in civil actions brought against the state or one of its agencies or subdivisions, absent waiver or exception, properly lies in the court where the state, agency, or subdivision maintains its principal headquarters. Citing sections 20.331(3)(a) and 379.10255, Florida Statutes, the court concluded that the Legislature has fixed the headquarters of the Commission in the state capital in Tallahassee, located in Leon County, Florida.

Second, the court concluded that the circuit court erred in applying the sword-wielder exception. The exception applies where "direct judicial protection is sought from an unlawful invasion of a constitutional right of the plaintiff, directly threatened in the county where the suit is instituted." *Fla. Dep't of Child. & Fams. v. Sun-Sentinel, Inc.*, 865 So. 2d 1278, 1287 (Fla. 2004). But the sword-wielder exception to home venue privilege does not apply if the primary purpose of the litigation is to obtain a judicial interpretation or declaration of a party's rights or duties under rules and regulations promulgated by the agency. *Id*. In this case, the complaint sought declaratory relief and a preemptive declaration of invalidity of the Commission's rule on constitutional grounds. Use of the words "injunction" and "enjoin" did not change the fundamental nature of the complaint as one seeking preemptive declaratory relief.

The court collected Florida cases stemming from a challenge to official acts of a state officer or agency rules wherein Leon County was consistently held to be the proper venue. Under that case law, the court determined that the only official action challenged in this case was the adoption of the rule. The Commission had not charged anyone with a rule violation. There was no pending case alleging a rule violation, and the Commission had not pursued enforcement or penalties. Without any such action by the Commission directed at the plaintiffs in Gulf County, the protection of the venue of Gulf County was unavailable.

Accordingly, the court vacated the circuit court's order and remanded that the case be transferred to Leon County.

Judicial Review – Authority to Remand for Further Agency Proceedings to Provide Sufficiently Reasoned Explanation for Decision

Floridians Against Increased Rates, Inc. v. Clark, 371 So. 3d 905 (Fla. 2023).

Appellants sought review of the Public Service Commission's (Commission) decision approving a settlement agreement between Florida Power & Light Company (FPL) and seven other intervening parties that would allow FPL to raise rates for electricity services incrementally over a period of at least four years and make various changes to FPL's operations. The Court remanded the Commission's decision on the ground that the Commission failed to provide a reasoned explanation in its decision required for judicial review.

The settlement agreement permitted FPL to increase its base rates and

service charges, resulting in a projected additional revenue of $692 million in 2022 and $560 million in 2023, with further rate increases expected in 2024 and 2025 related to solar projects. The agreement also set parameters for equity-to-debt ratios and return on equity, and introduced a minimum base bill of $25.00 for certain customers. Additionally, the agreement authorized increased investment in FPL's power generation facilities, transmission and distribution systems, and pilot programs for electric vehicles and renewable energy.

During the Commission's hearings, various parties raised concerns and objections to the settlement agreement. Appellants argued the agreement was not in the public interest and would result in unreasonably high rates. Appellants questioned the need for rate increases, the equity-to-debt ratio, and the handling of surplus funds, and raised concerns about FPL's planned investments and the impact on residential and small business customers, particularly regarding the minimum bill requirement. In response, FPL and other parties who signed the settlement agreement defended its benefits, emphasizing that it provided stable, predictable, and reasonable rates, and expanded necessary programs and infrastructure improvements.

The Commission ultimately concluded that the settlement agreement was in the public interest, and was fair and reasonable, citing various reasons such as FPL's performance, the reduction in requested rate increases, and the stability it provided to customers. However, the Commission's reasoning was extremely brief, covering less than 2 pages of the over 70,000 in the record. The Court explained that the Commission's determination that a particular rate is sufficient to produce a "fair return" is a mixed question of law and fact, and requires judicial review to ensure it is within the delegated legislative authority of the Commission.

In reviewing the decision, the Court considered the reasons given by the Commission for its decision, noting that courts may not supply a reasoned basis for the agency's action not from the agency itself. The Commission must therefore provide a decision that is "reasoned and articulated enough to allow us to assess on what basis it has concluded that the settlement agreement is in the public interest and results in rates that are fair, just, and reasonable."

In doing so, the Commission must discuss the major elements of the settlement agreement, detailing why it is in the public interest, and must include competing arguments made by the parties in light of the factors relevant to the decision. Further, the Court stressed that the Commission must demonstrate that it considered the statutory factors in sections 366.06(1) and 366.82(10), Florida Statutes. The Commission may also consider discretionary statutory factors under sections 366.041(1) and 366.91(1), Florida Statutes, to provide for more meaningful judicial review.

Finding that there was no such evidence that these factors were considered in the Commission's decision, the Court remanded for further agency proceedings, requiring the Commission to provide a more comprehensive and well-reasoned explanation for its determination.

Licensure—Agency Order Properly Declined to Modify Restrictions where Settlement Agreement Lacked Term Permitting It

Levy v. Dep't of Health, 369 So. 3d 767 (Fla. 2nd DCA 2023).

Levy challenged two orders from the Florida Department of Health, Board of Medicine (Board) which denied two petitions he filed to remove or modify restrictions placed on his Florida physician assistant license. Those restrictions were the product of a settlement agreement reached in disciplinary proceedings brought by the Board pursuant to section 456.072(1)(f), Florida Statutes (2013), after Levy's Texas license was restricted. His Texas license was restricted after he pled guilty to a misdemeanor charge stemming from his nontherapeutic prescribing of controlled substances to 11 patients without appropriate evaluations at a pain management clinic. The Texas order restricting Levy's license included a provision expressly allowing for the future modification or termination of the restrictions after one year.

After the Florida settlement agreement was entered into, Levy was able to successfully modify the restrictions on his Texas license. Thereafter, Levy sought to terminate the Florida order or modify it. He argued that termination or modification was warranted because Texas terminated its original order, which was the basis of the Florida disciplinary action.

The Board held a meeting on Levy's petition and denied it, reasoning that the restrictions on his Florida license were based on a settlement agreement between Levy and the Board, and modifying the settlement agreement absent a change in circumstances would set a bad precedent.

Levy then filed a renewed petition alleging three changes in circumstances that warranted modification of the restrictions on his Florida license. In addition to the argument stemming from the Texas modification, Levy also pointed to an increasing refusal by insurers to credential providers with any license restrictions, and the increased need for healthcare providers due to COVID-19. The Board denied the renewed petition finding that Levy did not show a material change in circumstances and that the Florida order stemmed from a settlement agreement that contained no option for future modification.

On appeal, the court explained that imposition of a penalty is reviewed under an abuse of discretion standard, and the appellate court's role is to determine whether there are valid reasons in the record in support the agency's order. Likewise, the determination of whether a significant change in circumstance has occurred lies primarily within the discretion of the agency. The court also explained that administrative agencies have inherent power to reconsider final orders still under their control, such as those which involve conditions implying continuing oversight and jurisdiction by a Florida board. They may alter a final decision "under extraordinary circumstances," citing *Richter v. Fla. Power Corp.*, 366 So. 2d 798 (Fla. 2d DCA 1979).

The court found that rather than determining it had no jurisdiction to consider the issue, the Board properly considered the petition and its merits, and found a material change in circumstances to warrant modification was not met, including due to the fact that the settlement agreement did not contemplate later modification. The Board commented in denying his renewed petition that Levy was also working and was employed notwithstanding the restrictions on his Florida license.

The court agreed that record evidence supported the Board's decision that no material change in circumstances was shown. The court also agreed with the Board's conclusion that the settlement

agreement was not predicated or impacted by the Texas modifications. Rule 64B8-30.015(2), Fla. Admin. Code, provides that cases resolved by settlement agreements are not bound by the disciplinary guidelines, so the Florida Board was not bound by the guidelines in determining whether to modify or terminate the restriction. Nor did the settlement agreement contemplate later modification of the restrictions agreed to therein.

The court therefore declined to second-guess the Board's decision where competent, substantial evidence supported the Board's findings. As such, the Board did not abuse its discretion in denying Levy's petitions for modification.

Medicaid Lien Reduction Motions—Subject-matter Jurisdiction

Agency for Health Care Admin. v. Payas, 372 So. 3d 787 (Fla. 6th DCA 2023).

The Agency for Health Care Administration (AHCA) appealed a trial court order granting Payas's motion to reduce a lien and denying AHCA's motion to dismiss for lack of subject matter jurisdiction.

K.T. received Medicaid benefits from AHCA beginning in 2009. In 2011, K.T. filed a lawsuit for medical malpractice, and AHCA asserted a statutory lien to recover the Medicaid benefits AHCA expended on K.T. out of any recovery that K.T. received from third parties. K.T. entered into a settlement with the defendants, which the trial court approved in January 2022.

K.T. filed a motion to reduce the amount of AHCA's lien. AHCA objected, arguing that the trial court lacked subject matter jurisdiction over the motion to reduce the amount of the lien. The trial court held a hearing, granted K.T.'s motion to reduce lien, and denied AHCA's motion to dismiss. AHCA appealed.

On appeal, AHCA and K.T. disputed which version of section 409.910(17), Florida Statutes, applied. The parties agreed that the trial court had jurisdiction if the 2009 version of the statute applied, but that only DOAH had jurisdiction if the 2021 version applied.

AHCA argued that the 2021 version applied, because that was the version in effect when the trial court approved K.T.'s settlement agreement. AHCA relied on *Suarez v. Port Charlotte HMA, LLC*, 171 So. 3d 740 (Fla. 2d DCA 2015), wherein the Second DCA held that AHCA has no vested right to any recovery until a settlement or other recovery of third-party benefits occurs. K.T. argued that the 2009 version applied, claiming that a Medicaid recipient's right to challenge a lien accrues on the first date of the payment of Medicaid benefits.

The Sixth DCA held that both the 2009 and 2021 versions of section 409.910(17) make clear that a recipient's right to challenge an AHCA lien arises after a settlement. The appellate court rejected K.T.'s argument because it was based on when an agency's independent cause of action against a third party accrues based on the payment of Medicaid benefits, which the court concluded has no bearing on AHCA's dispute with K.T., a recipient of Medicaid benefits. Because AHCA's right to recovery accrued when the trial court approved the settlement in January 2022, the 2021 version of the statute applied. Thus, the appellate court reversed and remanded the trial court's order with directions to vacate the order and enter an order dismissing K.T.'s motion to reduce lien for lack of subject-matter jurisdiction.

Remand Orders—ALJ's Rejection of Agency's Remand Order to Consider Additional Evidence Not Appealable

St. Johns River Water Mgmt. Dist. v. Cece, 369 So. 3d 730 (Fla. 5th DCA 2023).

After the ALJ issued an order recommending the St. Johns River Water Management District (District) deny a stormwater management system permit (Permit), the District and the Cedar Island Homeowners Association of Flagler County, Inc. (HOA), as the permit applicant, filed exceptions to the recommended order. The District and HOA also sought remand to the ALJ to make additional findings of fact and conclusions of law not contained in the initial permit application or presented at the final hearing. The ALJ declined the District's order of remand, and the District and HOA sought intermediate review with the appellate court.

The District and the HOA had initially sought a stormwater management system permit that would increase the allowable impervious surface area within the development, as there were concerns whether the existing system could handle increased development. In its application for the permit, however, the HOA did not propose any physical changes to the structure or composition of the existing stormwater management system. Rather, the HOA submitted a recalculation, performed by its retained engineering expert, purporting to demonstrate that the stormwater system—as designed and permitted in 2001—could effectively manage an increased load associated with a greater amount and percentage of impervious surface area. The HOA's engineering expert did not base any of the calculations on the existing system as constructed, but instead based them on the originally permitted design. However, in 2002 when the stormwater management system was constructed, there were several significant deviations from the originally permitted design. Additionally, there were continuous compliance issues with the existing system. As a result, three homeowners in the HOA opposed the issuance of the Permit, expressing concerns that it would overwhelm the development's stormwater management system. Nevertheless, the District proposed to issue the Permit, and the homeowners filed a petition for administrative hearing challenging the proposed issuance.

At the hearing, the HOA and the District relied on the stormwater calculations of the HOA's stormwater engineer to support permit issuance. In his recommended order denying the permit, the ALJ agreed with the homeowners that the HOA did not carry its burden of providing reasonable assurance that the proposal would comply with applicable rules, holding that the treatment capacity of the stormwater management system must be based on its current condition, not its design condition. The ALJ noted that while the HOA could bring the system into compliance, there was not a definitive intent the HOA would bring the system up to its design specifications. The HOA and the District filed exceptions to the recommended order of denial. On review of the exceptions, the District ordered a remand to the ALJ directing it to make findings of fact based on the proposed project rather than the existing system—in other words, to assume that the system in place was the system designed in 2001, not the system actually installed.

On remand, the ALJ issued an order declining to accept the District's premise that the never-built design system was the "proposed system" addressed in the permit application. Further, the ALJ refused to consider the application as though the 2001 as-designed system

would be put in place at some unspecified time, because the HOA had not proposed to do so, meaning no "proposed project" could be analyzed in accordance with the remand order.

The District and HOA sought immediate review of the ALJ's order on remand pursuant to section 120.68(1)(b), Florida Statutes, as a "preliminary, procedural, or intermediate order" of an ALJ that is "immediately reviewable if review of the final agency decision would not provide an adequate remedy." The District and the HOA argued the appellate court had jurisdiction because the ALJ's order following remand departed from the essential requirements of the law and would result in irreparable harm which cannot be remedied on appeal of the District's final order. The District argued it could not issue a final order on whether to issue the permit because the ALJ's order failed to make the additional factual findings requested by the District. This, the District and HOA argued, resulted in a "stalemate" and left the parties at an impasse.

The appellate court denied the relief sought by the District and the HOA, and instructed the District to issue a final order either granting or denying the permit on the existing record. The court explained that to do otherwise would result in an endless cycle of remand, additional evidence, and exceptions. A final order would allow the losing party to appeal.

The court noted the basic requirement that the ALJ is required to base findings of fact and conclusions of law on competent, substantial evidence, and the District acknowledged that the ALJ's findings that the HOA had not provided reasonable assurances were based on competent, substantial evidence. The court explained that the permit application the District asked the ALJ to consider "simply does not exist." The HOA did not propose in its application to bring the existing system into compliance with the permitted design or to otherwise construct a permittable system, but rather chose to rely solely on its recalculations. Thus, there was no "proposed system" for the ALJ to consider, and the ALJ's failure to making findings of fact about a non-existent "proposed system" did not depart from the essential requirements of law.

Further, the court found no stalemate and no irreparable harm. The District could enter its final order either granting or denying the permit based on the ALJ's findings and could not remand for the ALJ to consider an application for a system never proposed on information never submitted. To hold otherwise would result in "endless litigation" with further hearings, recommended orders, and another appeal.

Thus, the court remanded the matter to the District for entry of final order either issuing or denying the permit, which would allow the losing parties to appeal.

Unpromulgated Rules—Agency Memorandum That Went Beyond Statutory Text Constituted a Rule

Dep't of Health v. Leafly Holdings, Inc., 369 So. 3d 333 (Fla. 1st DCA 2023).

Leafly Holdings successfully challenged a Department of Health (DOH) memorandum warning against Florida medical marijuana treatment centers (MMTCs) contracting with Leafly for online ordering services as an unpromulgated rule. DOH appealed, arguing Leafly lacked standing and that the memorandum was not a rule because it restated the prohibition in section 381.986(8)(e), Florida Statutes.

Leafly operates an online website that provides cannabis and medical marijuana sales information. Licensed MMTCs contract with Leafly to host online sales-order services. Qualified patients can view available MMTC products on Leafly's website and order them online. Leafly then communicates to the MMTC about the product and customer information and the MMTC communicates back to Leafly when the order was ready for the customer to pick up. The customer would go directly to the MMTC dispensing facility and purchase the product directly from the MMTC.

Section 381.986(8)(e), Florida Statutes, provides that a licensed MMTC may not contract for services directly related to the dispensing of marijuana or marijuana delivery devices. The DOH memorandum cited the statute, considered Leafly's online order hosting services to be a statutorily prohibited dispensing-related service, and warned MMTCs against violating the statute.

On appeal, the court held that Leafly had standing to challenge the DOH memorandum because it explicitly targeted Leafly's online ordering business and warned MMTCs against using Leafly's online ordering services, causing a loss of business.

The court also found that DOH's memorandum was an unpromulgated rule. The statute on which DOH relied establishes specific constraints on an MMTC's ability to contract for services. DOH's prohibition on the use of third-party online order hosting services was not "readily apparent" from and did not "simply reiterate" the statute. The court explained that an MMTC's arrangement with Leafly did not make it readily apparent that the dispensing language in the statute prohibits an MMTC from using online ordering services in support of its work. The court affirmed the ALJ's determination that the DOH memorandum was an unadopted rule.

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Susan Stephens and Robert Walters *practice in the Tallahassee office of Stearns Weaver Miller P.A. and were assisted by Fatou Calixte and Alyssa Hawthorne.*

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support its determination that the permit had automatically expired.

RULE CHALLENGE

FTG Dev., Inc. d/b/a Earkus L. Battle v. Dep't of Health, Office of Med. Marijuana Use, Case No. 23-2948RU (Amended Summary Final Order Nov. 7, 2023) (Newton, ALJ).

FACTS: The State of Florida established a statutory preference for granting medical marijuana treatment center ("MMTC") licenses to African American farmers certified as classes in *Pigford v. Glickman*, Case No. 987-1978 (D.D.C.) ("Pigford"), and *In re Black Farmers Discrimination Litig.*, Case Misc. No. 08-0511 (D.D.C. 1999) ("BFL"). Specifically, section 381.986(8)(a)2.b., Florida Statutes, directs the Florida Department of Health, Office of Medical Marijuana ("the Department") to award one MMTC license to an applicant recognized as a member of the *Pigford* or *BFL* classes. Earkus L. Battle, Sr. was a member of the *BFL* class, and John Allen is the majority owner of FTG Development, Inc. ("FTG"). Mr. Battle assigned his rights as a member of the *BFL* class to Mr. Allen and FTG in exchange for 660 shares of FTG common stock. FTG subsequently applied for an MMTC license as a *BFL* class member. On September 20, 2022, the Department notified FTG of its intent to deny FTG's application because the Department did not recognize FTG as a *BFL* class member. FTG responded by petitioning for an administrative hearing pursuant to section 120.57, Florida Statutes. After conducting an informal administrative hearing under section 120.57(2), Florida Statutes, the Department issued a final order denying FTG's application, and FTG appealed the Department's denial to the First District Court of Appeal. Pursuant to section 120.56, Florida Statutes, FTG also filed a petition with DOAH asserting that the Department uses an unadopted rule to exclude assignees of *BFL* class members from receiving the statutory licensing preference set forth in section 381.986(8)(a)2.b.

OUTCOME: The Department argued to the ALJ in the 120.56 proceeding that FTG's pending appeal before the First District Court of Appeal divested DOAH of jurisdiction over FTG's unadopted rule challenge because the denial in the Department's final order relied upon the allegedly unadopted rule. The ALJ rejected that argument because proceedings pursuant to section 120.56 and section 120.57 have different objectives. While the latter is intended to determine a party's rights, the former "seeks a determination that rulemaking was required but not conducted." As for whether the Department's denial of FTG's application was based on an unadopted rule, the ALJ observed that Florida Administrative Code Rule 64ER21-16(3)(a) incorporated instructions for MMTC applicants, and the instructions identified what materials had to be submitted to demonstrate *BFL* member status. In addition, the instructions prohibited any additional documents from being submitted. Because rule 64ER21-16(3)(a) prevented an applicant from submitting documents demonstrating that rights had been assigned, the ALJ concluded that the denial of FTG's application was not based on an unadopted rule. FTG appealed the ALJ's decision to the First District Court of Appeal, and the Department filed a cross-appeal.

DISCRIMINATION

Johnson v. Humana, Case No. 23-1287 (Recommended Order Dec. 27, 2023) (Desai, ALJ).

FACTS: Humana provides health care services, insurance products, and health plans to members and patients on a nationwide basis. Humana must comply with federal guidelines established and monitored by the Center for Medicare and Medicaid Services ("CMS"). CMS's ratings of insurance companies are partially based on the speed by which those companies pay claims. As a result, Humana requires its claims representatives to process 11 claims an hour and prohibits them from having five or more unscheduled absences during a rolling six-month period.

Retrina Johnson began working as a claims representative for Humana on September 8, 2020. In December 2020, Johnson and other employees in Humana's Claims Department began working remotely from home due to the COVID-19 pandemic. On March 15, 2021, Humana placed Johnson on a Performance Improvement Plan ("PIP") due to attendance issues, and Johnson successfully completed the PIP in June of 2021. Johnson was absent from work from August 23, 2021, to September 4, 2021, due to COVID. On five occasions during that period, Johnson violated company policy by failing to give advance notice to her supervisor that she would be unable to work that day. On September 7, 2021, Humana terminated Johnson because of her attendance-related issues. On August 29, 2022, Ms. Johnson filed an employment complaint of discrimination with the Florida Commission on Human Relations ("the Commission") alleging, in part, that Humana discriminated against her on the basis of a disability. After determining there was no reasonable cause to believe that Humana had discriminated against Ms. Johnson, the Commission referred this matter to DOAH for a formal administrative hearing.

OUTCOME: Ms. Johnson argued that having COVID from August 23, 2021 to September 4, 2021, rendered her "disabled" within the meaning of the Florida Civil Rights Act. In determining that Ms. Johnson failed to establish a prima facie case of disability discrimination, the ALJ noted that several courts in Florida and the Eleventh Circuit have held that having COVID is not a disability unless it is especially severe and substantially limits major life activities.

DISCRIMINATION

McGinley v. Barry Univ. Law Sch., Case No. 23-1960 (Recommended Order of Dismissal Nov. 8, 2023) (Desai, ALJ).

FACTS: Barry University School of Law ("the Law School") is located in Orlando, Florida, and is part of Barry University ("the University"), a Florida not-for-profit corporation headquartered in Miami, Florida. The University is sponsored by a Catholic Congregation based in Michigan, and the University's articles of incorporation require that the congregation must approve all major changes to the University's structure, finances, and mission. The University's mission statement identifies the

University as "[a] Catholic institution of higher education" and references the University's commitment to "Catholic beliefs and values."

Patrick McGinley was an adjunct law professor at the Law School for six years. He began and ended all of his classes with a Catholic prayer. At some point, the Law School prohibited McGinley from praying in his classes. After McGinley requested an accommodation (being allowed to pray in his classes), the Law School denied his request and then terminated him. McGinley filed a charge of discrimination with the Florida Commission on Human Relations ("the Commission") alleging that the Law School violated the Florida Civil Rights Act ("the Act") by: (a) failing to accommodate his request to pray during his classes; and (b) retaliating against him for requesting an accommodation.

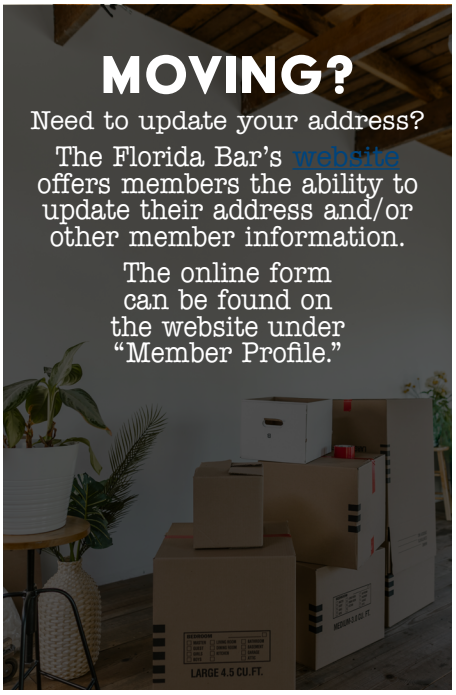
OUTCOME: The Act prohibits employers from discharging or refusing "to hire any individual, or otherwise to discriminate against any individual concerning compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion." However, the Act has an exception for religious discrimination claims against religious employers. The ALJ applied the nine factor test set forth in *LeBoon v. Lancaster Jewish Community Center Assocation*, 503 F.3d 217 (3d Cir. 2007), and determined that the Law School qualifies as a religious educational institution exempt from the Act. As a result, the ALJ recommended that the Commission issue a final order dismissing McGinley's case.

RULE CHALLENGE

Sanctuary Cannabis v. Fla. Dep't of Health, Case No. 23-4268RE (Summary Final Order Nov. 29, 2023) (Horgan, ALJ).

FACTS: Section 381.986(8)(b), Florida Statutes, requires applicants seeking licensure as medical marijuana treatment centers ("MMTCs") to apply to the Department of Health ("the Department"). The statute also requires the Department to adopt rules establishing a procedure for the issuance and biennial renewal of such licenses. That procedure must include "initial application and biennial renewal fees sufficient to cover the costs of implementing and administering this section." Pursuant to its authority under section 381.986(8)(b), the Department published Emergency Rule 64ER22-10 ("the Emergency Rule") which established a formula to determine the biennial license renewal fee for MMTCs. Sanctuary Cannabis ("Sanctuary") holds a MMTC license that was scheduled to expire in January of 2024. On October 26, 2023, Sanctuary filed a petition alleging that certain provisions within the Emergency Rule are invalid because the formula does not consider other medical marijuana-related fees and fines received by the Department. If the formula considered those other fees and fines, then the MMTC license renewal fee would be lower.

OUTCOME: Given the fact that the Legislature directed the Department to establish initial application and biennial renewal fees that would be sufficient to cover the costs of implementing and administering section 381.986, the ALJ concluded that it was not arbitrary and capricious for the Department to publish a rule "which does exactly that, and nothing more or less." Sanctuary has appealed that decision to the First District Court of Appeal.



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