NEWSLETTER

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FEATURE

Citizens Property Insurance Corporation Arbitrations before DOAH

BY KEN TINKHAM

I. Background

Citizens Property Insurance Corporation ("Citizens") is a governmental entity created to provide property insurance to "applicants who are in good faith entitled to procure insurance through the voluntary market but are unable to do so." *See* § 627.351(6)(a)1., Fla. Stat. Citizens is like other insurance companies in many regards. It charges premiums in exchange for policies. These premiums, and the interest earned from the investment thereof, are the primary sources of income for Citizens. It adjusts claims and is subject to lawsuits when claims are disputed. However, as a governmental entity, there are ways in which Citizens is distinct from private carriers. One of those distinctions is that Citizens may contract with the Division of Administrative Hearings, or DOAH, to conduct hearings.

In 2023, recognizing that DOAH would be an ideal forum to allow for alternative dispute resolution ("ADR"), the Florida Legislature passed HB 799, creating section 627.351(6)(ll), Florida Statutes, specifying that Citizens may adopt policy forms providing for the resolution of claim disputes before DOAH. *See* Ch. 2023-175, § 3, Laws of Fla. Disputes regarding the scope and value of a claim as well as disputes regarding coverage may be heard before DOAH.

ADR is not new to the insurance industry or to Citizens. For example, Citizens has long utilized appraisal as a mechanism to economically and quickly resolve disputes regarding the value of a claim. The DOAH procedure authorized per section

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627.351(6)(ll), Florida Statutes, is binding arbitration, a form of ADR in which an ALJ serves as the arbitrator.

II. Procedure

To implement this new provision, last year Citizens incorporated an endorsement into policies issued on or after October 1, 2023. Under that endorsement, either party may invoke the arbitration provision to resolve a dispute. Once invoked, the matter is referred to DOAH and an ALJ is assigned. Although the hearing is like a traditional trial, the proceeding takes place before the assigned ALJ. The hearing and discovery are conducted pursuant to the Florida Rules of Civil Procedure and the Florida Evidence Code, except as may be modified by the ALJ. The ALJ may issue any orders necessary to prevent delay and to promote the just, speedy, and inexpensive resolution of all aspects of the dispute. The final hearing must be held within 75 to 100 days from the date that the proceeding is initiated, unless extended by the ALJ for good cause. Within 30 days of receipt of the hearing transcript, the ALJ must render an arbitration award, unless the time is extended for good cause in a detailed written order.

Because Citizens is a government entity, the ALJ may not award bad faith, consequential, or extracontractual damages, from which Citizens is immune. Furthermore, attorney's fees are not recoverable except for limited scenarios. A party may recover fees under section 57.105, Florida Statutes (sanctions), or section 768.79, Florida Statutes (offer of judgment). A party seeking attorney's fees under either of these provisions must file a verified motion within 30 days of the arbitration award. The opposing party has 15 days to respond to such a motion. An evidentiary hearing will be promptly scheduled and, if the ALJ finds that the party seeking fees is entitled thereto, the ALJ will render an amended arbitration award within 30 days after such hearing.

III. Advantages to Policyholders and Citizens

The DOAH procedure provides certain advantages over litigation in county or circuit courts. Probably the most significant advantage is the timeline. Currently, the average lifecycle for Citizens' litigated claims disputes is just under 650 days. The DOAH procedure cuts that drastically by scheduling hearings within 75 to 100 days. This helps aggrieved policyholders by ensuring that their cases are heard faster. This also considerably reduces attorneys' time and costs on both sides of the dispute.

Additionally, the procedure allows for a greater degree of specialization. The ALJs that DOAH has hired to hear these matters specialize in first-party property disputes. These are the only cases these ALJs will hear. Florida's county and circuit courts cannot provide such a level of specialization.

Furthermore, the DOAH procedure is more economical than other forms of arbitration. Policyholders do not need to pay for DOAH arbitration. Just as other state entities that utilize DOAH, Citizens pays DOAH's fees. However, DOAH employs a total cost recovery method whereby DOAH does not charge more than what it costs to provide the personnel to hear the cases. Thus, the process is more economical than using other arbitration services.

Finally, the process is fair. DOAH has a longstanding history of judicial independence. It was created by the Florida Legislature almost 50 years ago. Before that time, hearing officers were employed directly by the governmental agency that was a party to the case. The "central panel" approach Florida adopted when DOAH was created removed the hearing officers from state agencies and placed them with an independent agency to prevent government employees from influencing their decisions. A cutting-edge law at the time, the "central panel" approach Florida helped pioneer has now become the norm in many other jurisdictions. Like any other party to a dispute at DOAH, Citizens does not get to "pick" the ALJs it wants to hear its matters.

IV. Current Status

The DOAH endorsement became effective on October 1, 2023. However, claims that are eligible for a referral to DOAH are only now beginning to mature. In March of this year, the first cases started to be referred to DOAH from Citizens. As of the date of writing, over 50 claim

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APPELLATE CASE NOTES

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

Administrative Law Judges—Authority and Requirements

Fla. Agency for Health Care Admin. v. Murciano, 381 So. 3d 1283 (Fla. 1st DCA 2024).

The Agency for Health Care Administration ("AHCA") audits claims filed by Medicaid providers to determine whether those providers have received overpayments for medical services provided to Medicaid patients. Dr. Murciano received a final audit report stating that he was overpaid by more than $1.8 million. Dr. Murciano disputed AHCA's allegations and requested a formal administrative hearing.

Following the hearing, the ALJ issued a recommended order that included no findings of fact and instead included a conclusion of law that Dr. Jenkins, the doctor who peer reviewed the claims, did not qualify as a "peer" under section 409.9131(5)(b), Florida Statutes. The ALJ's ruling conflicted with an appellate court's ruling on the same legal issue, which the ALJ explained was "wrongly decided." The ALJ "reluctantly" followed that decision and made another legal conclusion as to why Dr. Jenkins was not a peer. The ALJ recommended that AHCA dismiss the proceeding.

AHCA remanded the case, informing the ALJ that AHCA planned to reject the ALJ's conclusions of law regarding whether Dr. Jenkins was a "peer," and requesting the ALJ to issue findings of fact on the Medicaid claims in dispute. AHCA cited case law on the same issue, with the same parties, wherein the appellate court had required the ALJ to make factual findings. First, the court determined that it had jurisdiction to consider AHCA's petition seeking non-final review of the ALJ's order.

Next, it ruled that the ALJ was required to issue a recommended order containing findings of fact, explaining it would be a due process violation were AHCA to issue a final order without "specific factual findings upon which its ultimate action is taken," citing *State v. Murciano*, 163 So. 3d 662, 665 (Fla. 1st DCA 2015). The court also concluded that, as a member of the executive branch, administrative law judges lack the ability to ignore the law until an Article V court has held that a particular statute is unconstitutional.

The court granted AHCA's petition, requiring a supplemental recommended order from an ALJ containing "findings of fact on each Medicaid claim for which overpayment was identified in the Final Audit Report." The court declined to remand to another ALJ but copied the DOAH Chief Judge on the appellate decision to "take whatever action he determines appropriate."

Agency Deference—Motor Fuel Marketing Practices Act, Deference to Agency Interpretation No Longer Permitted

Sun Gas Mktg. & Petroleum LLC v. BJ's Wholesale Club Inc., 383 So. 3d 118 (Fla. 4th DCA 2024).

This was an appeal by Sun Gas Marketing & Petroleum LLC ("Sun Gas") from a final summary judgment in favor of BJ's Wholesale Club, Inc. ("BJ's") holding that BJ's is not a "retail outlet" under the Florida Motor Fuel Marketing Practices Act ("MFMPA") because BJ's does not sell to the general public.

BJ's is a membership-only wholesale club. BJ's operates a gas station at its Parkland location, where it sells motor fuel to members of its wholesale club. Sun Gas operates a Chevron gas station approximately 0.1 miles away from BJ's.

Under the MFMPA, it is unlawful for any nonrefiner engaged in commerce in this state to sell any grade or quality of motor fuel at a "retail outlet" below nonrefiner cost, where the effect is to injure competition. A "retail outlet" is defined as "a facility, including land and improvements, where motor fuel is offered for sale, at retail, to the motoring public." The term "motoring public" is not defined under the MFMPA.

Sun Gas filed a complaint for injunctive relief, declaratory judgment, and damages against BJ's, alleging that BJ's was violating the MFMPA by selling mo-

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DOAH CASE NOTES

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

Unadopted Rule Challenge—Administrative Complaint Not an Unadopted Rule

Adams v. Dep't of Bus. & Prof'l Reg., Case No., 24-0215RU/RX (Summary Final Order Apr. 1, 2024) (Nelson, ALJ)

FACTS: Adams did business as Vinyl Pools R Us. However, neither Adams nor Vinyl Pools R Us was properly authorized to perform construction contracting. Adams, via Vinyl Pools R Us, installed a custom pool liner. A little more than a month later, the Department of Business and Professional Regulation ("the Department") issued an administrative complaint alleging that Adams violated section 489.13(1), Florida Statutes, by engaging in unlicensed contracting. Adams filed a petition asserting that the Department relied upon an unadopted rule in alleging he engaged in unlicensed contracting by installing a custom pool liner. Adams' petition also asserted that Florida Administrative Code Rule 61G4-15.032 is an invalid exercise of delegated legislative authority.

OUTCOME: The ALJ issued a summary final order dismissing Adams' petition. In doing so, the ALJ ruled that the statement at issue in the Department's administrative complaint was not a rule because it was not a statement of general applicability. "The Administrative Complaint was not issued to the general public, it was filed against [Adams]. It does not subject anyone but [Adams] to sanctions, and whether sanctions will be imposed will be determined in the section 120.57(1) hearing currently pending as DOAH Case No. 24-0567. The allegations in the Administrative Complaint are statements based on facts particular to [Adams], and as pleaded in the Second Amended Petition, the agency statements contained within the Administrative Complaint do not meet the definition of a rule." As for the assertion that rule 61G4-15.032 is an invalid exercise of delegated legislative authority, the ALJ noted that the rule was adopted by the Construction Industry Licensing Board ("the Board"), and not the Department. As a result, "the Board is an indispensable party to any challenge to its rules."

Rule Challenge—Standing

Boydstun v. Dep't of State, Div. of Licensing, Case No. 23-4487RP (Final Order Mar. 27, 2024) (Creasy, ALJ).

FACTS: The Department of State, Division of Elections ("the Division") is charged with ensuring fair and accurate elections in Florida. In 2023, the Florida Legislature amended section 101.62, Florida Statutes, to require the Division to issue a rule adopting a uniform statewide application for requesting, by writing, a mail-in ballot. With regard to such requests, the Division proposed a rule providing that a mail-in ballot can be requested if the voter or the voter's designee provides: (1) the voter's name; (2) the address where the mail-in ballot is to be sent; (3) the voter's date of birth; (4) the voter's driver's license number or the last four digits of the voter's social security number; (5) the designee's name; (6) the designee's address; (7) the designee's driver license number or the last four digits of the designee's social security number; (8) the designee's relationship to the voter; and (9) the voter or designee's signature, "as applicable."

Boydstun is a registered voter in Florida who challenged the Division's proposed rule. Boydstun argued that the words "as applicable" enable someone to gain complete control over a voter's mail-in ballot with no "direct, actual, or express authorization" from that voter. Boydstun asserted that someone would simply need "a few personal pieces of data about a voter which are easily available to any person that has access to a voter's residence or a computer."

OUTCOME: The ALJ determined that Boydstun lacked standing to challenge the proposed rule because Boydstun's alleged injury was "speculative and conjectural at best." Specifically, Boydstun's alleged harm depended on a series of "unlikely" events occurring: (1) someone illegally making a written request for Boydstun's mail-in ballot; (2) that person illegally receiving or intercepting Boydstun's mail-in ballot; (3) that person illegally casting Boydstun's

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Florida State University College of Law Summer 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

This spring we enjoyed one of my favorite traditions here at the Center—our biannual field trip to visit the Wakulla Springs State Park. Our quiet ponton riverboat allowed us to commune with the manatees, alligators, anhinga, turtles, and flying fish, all while bearing witness to the hundreds of thousands of gallons of fresh water heaving above ground every second from the vast Floridan Aquifer below. Wakulla is one of the largest freshwater springs in the world, and it is a spectacular sight to behold. What you can't quite see, but we know lies just beneath, are the multiple mastodon fossils that have been found onsite, including one that still rests just below where the river boats dock. Afterward, as if that cake needed any more icing, we met with rangers at the park headquarters to talk about the rewards and challenges of environmental management at Wakulla and beyond. We invite all law students to join us on these trips, so if you missed it this time, don't miss the next one! The field trip is a jewel in our program, a real-world complement to the rich intellectual discourse that we sponsor every semester.

In the spring semester, we were joined for several outstanding presentations, headlined by Cornell Law Professor Gregory S. Alexander's Distinguished Lecture, *Reversing Means and Ends: The Human Flourishing Theory in Conditions of Climate Change*. In January, legal legend David Bookbinder discussed climate litigation involving state and local governments as both plaintiffs and defendants, and in March, NASA Assistant Chief Counsel Tim Bass offered us an introduction to environmental law in space. If you could not join us at the time, I invite you to enjoy these excellent programs by accessing the recordings available on our website.

Finally, this spring we bid farewell to another jewel in our program, Professor Tricia Matthews, who will be retiring after years of dedicated service as a member of our team and the faculty leader of our Animal Law program. She has led one of our winningest moot court teams in memory and supervised countless student papers and projects. We are all sad to see her go, but also excited for this next chapter of her story!

Annual Meeting of the Society for Environmental Law and Economics

FSU Law hosted the 15th Annual Meeting of the Society for Environmental Law and Economics, held March 22 and 23, 2024. Among the presentations were papers on artificial intelligence, meat taxes, the inclusion of animal welfare in cost-benefit analysis, climate resilience, and empirical studies of judicial behavior. The meeting was capped by a tour of the Wakulla Springs watershed and a boat tour, and a sighting of the locally famous Joe Junior, a 16-foot alligator believed to be more than 70 years old.

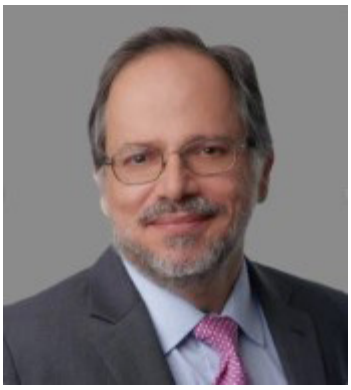
Distinguished Lecture Secures

Tim Bass on Environmental Concerns in Space Exploration

On March 6, the Center welcomed Tim Bass, Assistant Chief Counsel at NASA's Kennedy Space Center, for his Environmental Enrichment Lecture, *An Introduction to Environmental Law in Space*. Bass discussed the environmental concerns in the ongoing development of space exploration.

Professor Jonathan Wiener, Perkins Professor of Law, Environmental Policy and Public Policy at Duke University, gives his lecture, Artificial General Intelligence and Existential Risk: Lessons from Climate & Enviroronmental Law.

Presenters take a walking tour of Tallahassee.



David Bookbinder on Climate Claims Brought by State and Local Governments

On January 24, the Center welcomed David Bookbinder, former Chief Climate Counsel for the Sierra Club and former Chief Counsel for the Niskanen Center. Bookbinder has been practicing public interest environmental law for more than 30 years, and has spent the last 20 litigating climate cases, drafting climate legislation, and wrestling with climate regulation.

Bookbinder delivered a talk titled, *State and Local Governments as climate Plaintiffs and Climate Climate Defendants: Hard Questions About the Role of the Judiciary*, in which he discussed the tort claims that state and local governments are bringing against the fossil fuel industry, and citizens' constitutional claims against States and the Federal government.

Student Spotlight

We are so proud to share that a trio of students in the Center's Environmental Certificate Program have recently had their work accepted for publication, have been presented with awards, and/or have given public presentations.

First, 3L Ashley Landwerlen has been busy recently. Her article, *Deposing a Tiger King: How the Big Cat Public Safety Act is Changing the Legal Framework of Private Pet Ownership & Commercial Exhibition of Exotic Species*, has been accepted for publication in the Florida State University College of Law Journal of Land Use and Environmental Law. Her article takes a deep look at the animal welfare and public safety issues arising from an exponentially increasing and inadequately regulated captive exotic animal population, and it advances the proposition that the enactment of the Big Cat Public Safety Act—which prohibits exhibitors from allowing the public to make direct contact with a big cat and ends their private ownership and breeding—provides lawmakers, policymakers, regulators, and other stakeholders with a uniform three-pillar framework to advance legal protections for other exotic animals common

to private pet ownership and commercial roadside exhibition, such as the gray wolf and American alligator.

Landwerlen also co-authored, with FSU Law Adjunct Professor and shareholder at Guilday Law Ralph DeMeo, an article titled *The City of Tampa, the First U.S. City to Implement Innovative Technology to Remove "Forever Chemicals" from Drinking Water*. This article, which explores Tampa's working with environmental engineers to implement Suspended Ion Exchange technology to eliminate harmful and pervasive per- and polyfluoroalkyl chemicals from its drinking water, will be published in The Florida Specifier.

Additionally, Landwerlen recently co-presented, alongside Demeo, a presentation titled *Protecting Florida Manatees & Their Habitat*, at a CLE event held by the Animal Law Section of the Florida Bar. Finally, as part of her externship with Pets Ad Litem, Landwerlen testified at a Florida Senate committee meeting in opposition to SB 632 (Taking of Bears).

3L Kevin Griffen is wrapping up his FSU Law experience with two articles headed to publication. The first, *Living Pollutants: Importing Pollution Law Logic to Put Aquaculture Facilities on the Hook for Escapes*, 29 Drake J. Agric. L. __ (forthcoming), argues for the creation of a regulatory scheme for marine aquaculture based on the regulatory scheme for pollutants. The second, *Seas the Day: Finding the Treasures of Ratifying the Law of the Sea Convention*, 39 J. Land Use & Env't L. ____ (forthcoming), centers on the necessity for the United States to ratify the Law of the Seas Convention, for both environmental and strategic reasons.

Finally, Griffen was awarded the Subciter of the Year Award by the Journal of Land Use and Environmental Law, and was awarded the Candidate's Award by the FSU Law Review.

3L Melissa Gallo's article, *A Drastic Change to the Endangered Species Act Could Diminish Species Populations If Not Developed*, will be published in an upcoming edition of the ELULS Reporter, the official publication of the Environmental and Land Use Law Section of the Florida Bar. The article focuses on a new regulation that allows the U.S. Fish and Wildlife Service to translocate a species outside its historical range before overdevelopment or climate change destroy its habitat. In her article, Gallo argues that the regulation lacks the emphasis on flexible species management and clarity that would propel it to protect endangered species, and then offers solutions and best practices the Service should consider going forward with this new regulation.

Alumni Spotlight

Ahjond Garmestani, JD (Class of '01), PhD, a Research Scientist at the U.S. Environmental Protection Agency, Office of Research and Development, continues his work on important, transdisciplinary studies and articles on climate change, sustainable development, and adaptive governance. In addition to his role at the EPA, Garmestani is also a Fellow at the Utrecht Centre for Water, Oceans and Sustainability Law, Utrecht University School of Law, The Netherlands; Associated Faculty in the Department of Environmental

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>CONT. DOAH CASE NOTES

mail-in ballot; and (4) that illegally cast ballot being counted. Moreover, it would also have to be assumed that Boydstun had not already voted early, in person, or by mail. As for the "zone of interest" aspect of standing, Boydstun argued that the zone of interest was "election integrity." The ALJ concluded that an interest in election integrity was too undifferentiated and generalized to confer standing.

Licensing—Waiver of Right to Request Hearing

Dep't of Health v. Blot, Case No. 23-4193PL (Recommended Order Mar. 7, 2024) (Finkbeiner, ALJ).

FACTS: Blot was a Florida-licensed midwife. An incident that occurred while Blot was performing midwifery services led the Department of Health ("the Department") to investigate her. In response, Blot's attorney sent an August 4, 2020 letter to the Department setting forth her version of events and attaching an expert witness affidavit opining that Blot provided the appropriate standard of care. More than two years later, on February 17, 2022, the Department filed a six-count administrative complaint against Blot's midwifery license. On February 22, 2022, the Department transmitted the administrative complaint and an election of rights form to Blot and her attorney via certified U.S. mail, and Blot received those documents on March 6, 2022. Florida Administrative Code Rule 28-106.111 provides that a party waives its right to request an administrative hearing if a hearing request is not filed with the agency in question within 21 days of receiving written notice of the agency's decision. Because the Department did not receive. Blot's completed election of rights form until June 2, 2023, the Department concluded that she waived her right to request a hearing.

OUTCOME: The ALJ found that the August 2020 letter from Blot's attorney "cannot possibly be construed as a petition for hearing as contemplated by rule 28-106.111 because it predates the Administrative Complaint, which is the 'written notice of an agency decision' triggering [Ms. Blot]'s right to request a hearing." As a result, the ALJ determined that Blot's failure to file a hearing request within 21 days of receiving the administrative complaint resulted in her waiving her right to request an administrative hearing.

ESxPO Retail, LLC v. Dep't of Agric. & Consumer Servs., Case No. 23-4508RU & 24-0033RX (Final Order Mar. 4, 2024) (Dickson, ALJ).

Rule Challenge—Agency Interpretation of Statute Was Permissible

FACTS: Delta-9 tetrahydrocannabinol concentration ("delta-9 THC") is the primary psychoactive component of cannabis. Under federal law, cannabis with a delta-9 THC concentration of 0.3% or less is legal hemp, and cannabis with a delta-9 THC concentration above 0.3% is a schedule I controlled substance. THCA refers to tetrahydrocannabinol acid, a precursor to delta-9 THC. When THCA loses its carboxyl group through exposure to heat or UV light, THCA converts into delta-9 THC. Manufacturers of hemp-based products often decarboxylate their products in order to achieve a higher delta-9 THC concentration and thus maximize the psychoactive effect. A post-decarboxylation testing method will account for all potential delta-9 THC in a sample. This is also referred to as the "total THC" in a hemp sample.

While section 581.217, Florida Statutes, does not define "total delta-9 THC concentration," the statute mandates that hemp extract may only be sold if the total delta-9 THC does not exceed 0.3 percent. Section 581.217 authorizes the Florida Department of Agriculture and Consumer Services ("the Department") to adopt a rule providing for a "procedure that uses *post*-decarboxylation . . . for testing the [delta-9 THC] concentration of cultivated-hemp." The Department adopted Florida Administrative Code Rule 5K-4.034(2)(m) ("the Rule") that defines "total delta-9 THC as [delta-9 THC] + (0.877 X [THCA]).

ESxPO Retail, LLC d/b/a Chronic Guru ("the Petitioner") is a Florida-licensed retailer of hemp-based products and operates retail hemp establishments in Florida. During inspections of the Petitioner's stores on September 27, 2023, and October 2, 2023, the Department cited the Petitioner for selling hemp containing a *total* delta-9 THC concentration of more than 0.3% on a dry weight basis. The Petitioner argued, in part, that the Rule's definition of total delta-9 THC contravenes Florida law by in-

cluding THCA in the calculation of total delta-9 THC.

OUTCOME: The ALJ rejected the Petitioner's argument because "the definition at issue is authorized by the Legislature's use of the word 'total' in 'total delta-9 tetrahydrocannabinol' found at section 581.217(3)(e) *coupled with* the requirement of using a post-decarboxylation test for hemp." The ALJ concluded that the Rule's utilization of a post-decarboxylation test "is both logical and permissible."

Unadopted Rule Challenge—Attorneys' Fees and Costs

Falkenberg Real Estate, LLC v. Dep't of Transp., Case No. 23-4703F (Final Order Jan. 31, 2024) (Stevenson, ALJ).

FACTS: DOAH Case No. 23-3202RU involved Falkenberg Real Estate, LLC's ("Falkenberg") effort to use a driveway connection permit ("the permit") that its predecessor in interest had obtained from the Department of Transportation ("the Department") in 2008. The predecessor in interest had intended to use the permit to construct a mixed-use project that was to have a convenience store, a gas station, a bank/office, and retail space. While the predecessor in interest finished the driveway, no other aspect of the project was completed. During a meeting with Falkenberg representatives on June 28, 2023, Department officials took the position that the permit had expired and that Falkenberg would have to go through a new permit review process because the project had not been completed within one year of the permit's issuance. While Falkenberg's representatives strenuously disagreed with the Department's position that the permit had expired, they did not assert during the June 28, 2023 meeting that the Department's position amounted to an unadopted rule. That argument was initially raised when a Falkenberg attorney issued a letter, dated July 24, 2023, to a Department official. On August 21, 2023, Falkenberg file a unadopted rule challenge petition with DOAH. On November 6, 2023, the ALJ issued a final order in DOAH Case No. 23-3202RU concluding that the Department relied on unadopted rules to support its position that the permit had automatically expired. Falkenberg then filed a motion on December 5, 2023, requesting that the ALJ determine Falkbenberg's entitlement to attorneys' fees and costs pursuant to section 120.595, Florida Statutes, as a result of the final order issued in Case No. 3202RU.

OUTCOME: The Department argued that DOAH had no jurisdiction to award fees and costs pursuant to section 120.595 because no motion for attorneys' fees and costs was pending when the final order in DOAH Case No. 23-3202RU was issued. The ALJ rejected this argument because Falkenberg's rule challenge petition requested attorneys' fees and costs pursuant to section 120.595. The ALJ also noted the portion of section 120.595(4) mandating that fees and costs "shall be rendered against the agency." Another issue concerned whether Falkenberg complied with section 120.595(4)(b) by providing the Department with 30 days advance notice before filing the rule challenge petition. The ALJ rejected an argument that notice was given during the June 28, 2023 meeting because there was no evidence that Falkenberg raised the unadopted rule issue. Instead, the required written notice was not provided until Falkenberg's attorney issued the July 24, 2023 letter to the Department. However, the letter was issued less than 30 days prior to the petition filing. As a result, the ALJ concluded that Falkenberg did not satisfy the statutory condition precedent for seeking fees and costs pursuant to section 120.595(4).

Permitting—Public Notice

S.R. Perrott, Inc. v. Belvedere Terminals Co., LLC & Dep't of Envtl. Prot., Case No. 23-4286 (Recommended Order of Dismissal Mar. 5, 2024; Final Order Apr. 19, 2024).

FACTS: Belvedere Terminals Company, LLC ("Belevedere") filed an application with the Department of Environmental Protection ("the Department") for a permit to construct a greenfield refined products terminal in Ormond Beach, Florida. On June 20, 2023, the Department issued a notice of intent to authorize the proposed facility. The public notice accompanying the notice of intent stated that those whose substantial interests were affected by the proposed action had 14 days following publication of the public notice to file a petition. On July 7, 2023, Belvedere published the public notice in the Hometown News - Ormond Beach edition on July 7, 2023, and provided proof of that publication to the Department. After receiving no petitions objecting to the notice of intent, the Department issued the permit to Belvedere on August 1, 2023.

S.R. Perrott, Inc. ("Perrott") is a food and beverage distributorship in Ormond Beach that owns a warehouse located northeast of the proposed facility. Perrott filed a petition for an adminis-

trative hearing with the Department on August 15, 2023. The Department ultimately referred an amended petition to DOAH on November 1, 2023. The parties agreed that the administrative hearing would be bifurcated with DOAH initially considering the adequacy of the published notice and whether Perrott's petition was timely-filed. However, the parties disagreed over whether the Department should have published a notice of application. Florida Administrative Code Rule 62-110.106(6) requires that the Department publish a notice of application for projects that are "reasonably expected by the Department" to result in heightened public concern or a request for an administrative hearing.

OUTCOME: The ALJ determined that the public notice published in the Hometown News "was not deficient in any manner that would cause it to be ineffective to establish a deadline for filing the Petition." He also determined that the Hometown News satisfied the circulation threshold of section 50.011(1)(a)1., Florida Statutes. As for whether the Department should have published a notice of application, the ALJ found there were no aspects of the project that "should have triggered a determination of heightened public concern." Accordingly, with the public notice having been published on July 7, 2023, the ALJ concluded that the deadline for filing a petition was July 21, 2023. Because the petition was not filed until August 15, 2023, the ALJ recommended that the petition be dismissed due to untimeliness. Furthermore, the ALJ noted that Perrott raised issues in its proposed recommended order that were not mentioned in the joint pre-hearing stipulation. Because the ALJ's order of pre-hearing instructions required the parties to identify all issues remaining to be litigated, the ALJ ruled that the new issues described in Perrott's proposed recommended order "have not been properly pled or preserved, have been waived, and are not subject to disposition in this proceeding."

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Sciences at Emory University in Atlanta, Georgia; and an Adjunct Professor and Fellow at the University of Nebraska in Lincoln, Nebraska.

Garmestani's recent publications include:

To Burn or Not To Burn: Governance of Wildfires in Australia, Ecology & Soc'y 29(1):8 (2024) (with S. Clement, J. Beckwith, & P. Cannon)

Identifying Untapped Legal Capacity To Promote Multi-level and Cross-sectoral Coordination of Natural Resource Governance, Sustainability Sci. 19:325-346 (2024) (with Harvey, N.A., C.R. Allen, A.W.G.J. Buijze, and H.F.M.W. van Rijswick)

Multiscale Adaptive Management of Social-ecological Systems, BioScience 73, 800-807 (2023) (with C.R. Allen, D.G. Angeler, L. Gunderson, & J.B. Ruhl)
Moving Beyond the Panarchy Heuristic, Advances in Ecological Res. 69:69-81 (2023) (with Angeler, D.G., C.R. Allen, & L. Gunderson)

Practicing Before DOAH: What You Missed

BY CHARLES GREENBERG

"Practicing before DOAH," an eight-hour CLE event free to Administrative Law Section members, was held on June 28, 2024, at the Florida State University College of Law. Sponsored by Meenan P.A, Foley & Lardner LLP, Pennington, Cynthia A. Henderson, P.A., and Ausley McMullen, the event featured two separate segments: a mock administrative hearing and a series of panel discussions focused on administrative law.

The morning kicked off with an opportunity to socialize over coffee, sponsored by Foley & Lardner, LLP. Following the coffee social was the mock hearing, which involved a proposed disciplinary action. The mock hearing was put on by a slew of experienced administrative law judges and experienced administrative lawyers, acting as judge, attorneys, and witnesses in the case. The hearing covered various aspects of administrative litigation, and included examples of motions in limine, witness sequestration, opening statements, objections, and examination of witnesses. Throughout the hearing, a panel of administrative law judges provided feedback as to what had been most effective, providing the audience with the opportu lunch was provided through sponsorship by Meenan, P.A., participants were addressed by the chair of the Administrative Law Section, Louise St. Laurent, and the Chief Judge of DOAH, Darren A. Schwartz. The networking lunch also gave participants the opportunity to connect with numerous board certified attorneys, judges, and other practitioners in the administrative law community.

After lunch, the CLE continued with three presentations put on by experienced administrative practitioners. The first presentation focused on pre-hearing practice, and covered topics including preparing a request for hearing, pre-hearing motions and stipulations, and e-filing. The second presentation focused on administrative hearing practice, and included discussions of all aspects of the administrative hearing. The final presentation focused on post-hearing practice, and discussed how to write a winning proposed recommended order, the filing of exceptions, and considerations for appellate practice, among others. The CLE was capped off by an ALJ panel discussion, in which the participants were once more presented with an opportunity to hear from administrative law judges about effective practices before DOAH.

The Administrative Law Section is grateful to all those participants, sponsors, and attendees who made "Practicing Before DOAH" successful. Those who missed out on the event will be glad to hear that the Administrative Law Section plans to present the CLE again in the fall of 2025. In the interim, the Administrative Law Section will continue to provide its members with free opportunities to gain continuing legal education credit, presented by experienced members of the administrative law community. To find out about future CLE opportunities available to Administrative Law Section members, visit https://flaadminlaw.org/ or follow the Florida Bar Administrative Law Section page on Facebook.

>CONT. *APPELLATE CASE NOTES*

tor fuel to the motoring public below nonrefiner cost, injuring Sun Gas, which competes with BJ's for motor fuel sales.

BJ's is a member club and a retail business. Nonmembers cannot buy motor fuel at a BJ's gas station. As such, BJ's argued that it is not a "retail outlet" because it sells and advertises sales of motor fuel only to its members and not to the "motoring public." Sun Gas responded that BJ's is a "retail outlet" because by selling motor fuel to its members, BJ's is selling motor fuel to members of the "motoring public."

Following a hearing, the trial court entered an order granting BJ's motion for summary judgment. The trial court found that BJ's only sells motor fuel to its members, who are a subset of the "motoring public," not the general motoring public. Accordingly, the trial court held that BJ's is not a "retail outlet" under the MFMPA, and thus BJ's is not governed by the MFMPA. Sun Gas appealed.

Among other things, Sun Gas argued that the Florida Supreme Court's decision in *PW Ventures, Inc. v. Nichols*, 533 So. 2d 281 (Fla. 1988), should control the case. In that case, the Court considered whether the sale of electricity to a single customer rendered a corporation a "public utility," which was defined as "every . . . corporation . . . or other legal entit[y] supplying electricity or gas . . . to or for the public within this state." The Florida Public Service Commission defined the phrase "to the public" as meaning "to any member of the public," and the Court affirmed the Commission's ruling.

Sun Gas argued that *PW Ventures* compels the conclusion that by selling motor fuel to members of the public, BJ's sells motor fuel to the public and thus BJ's falls within the MFMPA's purview. However, the court found that *PW Ventures* was distinguishable, because in that case, the Court was reviewing an agency's interpretation of its own regulatory statute. The Court acknowledged a deferential standard, noting that "the contemporaneous construction of a statute by the agency charged with its enforcement and interpretation is entitled to great weight," and "courts will not depart from such a construction unless it is clearly unauthorized or erroneous." Therefore, in *PW Ventures*, the Court could only depart from the Commission's definition of "the public" including any members of the public if the definition were completely untenable.

However, the Fourth District concluded *PW Ventures* was not comparable to the case before it because the deferential standard accorded agencies no longer exists and article V, section 21, of the Florida Constitution, now provides that a court may not defer to an agency interpretation of a statute but must interpret the statute *de novo*. Thus, the court concluded that *PW Ventures* does not require the conclusion on *de novo* review that the "motoring public" should be defined as any single motorist. Instead, the court determined that based upon a plain ordinary meaning analysis, the term "motoring public" refers to the population of drivers as a whole, rather than any individual driver. Under the MFMPA, a "retail outlet" sells motor fuel to the "motoring public." BJ's only sells fuel to its members, who are members of the "motoring public" but are not *the* "motoring public." Thus, the court reasoned, BJ's is not a "retail outlet" as defined in MFMPA, which currently and unambiguously provides that "[i]t is unlawful for any nonrefiner engaged in commerce in this state to sell any grade or quality of motor fuel *at a retail outlet* below nonrefiner cost." Therefore, the court held that the MFMPA's clear and unambiguous language does not apply to BJ's sale of motor fuel.

The court also considered the legislative history, canons of construction, and the legislative intent to conclude that the plain and ordinary meaning of "the public" is people as a whole, and that the meaning of "the motoring public" must be understood as motorists as a whole. The MFMPA defines a "retail outlet" as a facility that sells motor fuels to the "motoring public." Since BJ's only sells motor fuel to its members and not all motorists, BJ's is not a "retail outlet" within the statutory definition. Accordingly, the Fourth District affirmed the final judgment, concluding that BJ's was not selling to the "motoring public" when it sold fuel only to its members and not the general motoring public.

Agency Final Order Authority—Standards Governing Rejection and Modification of an ALJ's Recommended Order

Wellsprings Residence, LLC v. Agency for Health Care Admin., 388 So. 3d 250 (Fla. 6th DCA 2024).

Wellsprings Residence, LLC ("Wellsprings") appealed an AHCA final order that disciplined Wellsprings' assisted living facility license more severely than the discipline recommended by the ALJ. Concluding that AHCA improperly modified and rejected some of the ALJ's factual findings made in the recommended order, the Sixth District Court of Appeal reversed in part and affirmed in part the final order.

After a multi-day evidentiary hearing and submission of proposed recommended orders by both parties, the ALJ issued a recommended order that found in favor of AHCA on several counts and recommended that AHCA impose a $3,000 fine and a $500 fee against Wellsprings. Both parties filed exceptions to the recommended order.

In the final order, however, AHCA instead imposed a $16,500 fine and a $1,000 fee by modifying certain findings to be in favor of AHCA and by rejecting other findings made by the ALJ that had been in favor of Wellsprings.

The appellate court explained that administrative findings of fact are reviewed for competent, substantial evidence, though review of administrative conclusions of law is *de novo*. An agency may issue a final order adopting the recommended order of an ALJ. § 120.57(1)(l), Fla. Stat. It may not, however, reject or modify an ALJ's findings of fact unless it "determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law." *Id.*

The appellate court held that because the ALJ's factual findings that AHCA modified and rejected were supported by competent, substantial evidence, they could not be rejected or modified. The court also concluded that AHCA improperly reweighed the evidence, evaluated the credibility of witnesses, determined that the evidence was clear and convincing, decided that actual or constructive knowledge was proved, and "then modified and rejected the ALJ's factual findings to reach its intended result."

The court therefore reversed those portions of the final order that were improperly modified and remanded for entry of a final order adopting the ALJ's recommended order, noting one permissible correction to a scrivener's error in the recommended order.

Constitutional Challenge - Dismissal of Licensee's Constitutional Challenges to Non-Renewal Statute under Judicial Policies from *Key Haven Associated Enterprises*

Paylan v. Fla. Dep't of Health, 385 So. 3d 160 (Fla. 1st DCA 2024).

Paylan is a medical doctor who was convicted of fraudulently obtaining a controlled substance—a third-degree felony under section 893.13, Florida Statutes. The Board of Medicine suspended Paylan's medical license for two years. Thereafter, the Department of Health ("the Department") issued an order subjecting her medical license to a ten-year non-renewal period pursuant to section 456.0635(3)(a)(2), Florida Statutes ("the Statute"). The Statute provides that the Department shall refuse to renew a license if the applicant has been convicted of a felony under Chapter 893. The Statute further provides that any such conviction excludes the applicant from licensure renewal "unless the sentence and any subsequent period of probation for such conviction or plea ended: for felonies of the third degree, more than ten years before the date of application."

Paylan appealed the Department's denial of her renewal application to the Second District Court of Appeal. The Second District affirmed, rejecting Paylan's argument that the non-renewal was a prohibited second administrative punishment for the same conduct and that the application of the statute was unjust. Paylan then sued the Department in circuit court, raising both as applied and facial constitutional challenges to the Statute. The circuit court granted the Department's motion for summary judgment, finding that Paylan's arguments were barred by collateral estoppel.

On appeal, the First District Court of Appeal found that the circuit court's application of the collateral estoppel doctrine was incorrect. The First District noted that the doctrine's application is limited to adjudicated facts that had been in dispute between the parties. Because the Second District in Paylan's appeal of her renewal application did not adjudicate any factual disputes between Paylan and the Department, the court found that no estoppel could arise from the appellate court's determination in that matter.

Nevertheless, the First District affirmed the dismissal of Paylan's constitutional challenges, relying on two judicial policies from *Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Improvement Trust Fund*, 427 So. 2d 153 (Fla. 1982).

First, the appellate court found that Paylan's as-applied constitutional challenge was properly dismissed for failing to exhaust administrative remedies.

Second, the court found that Paylan's facial challenge was properly dismissed because Paylan attempted to make a facial constitutional challenge in the trial court after she asserted her challenge in the Second District. Specifically, the court explained that under *Key Haven,* an aggrieved party may either make a facial constitutional challenge on direct review in the district court under section 120.68, Florida Statutes, at the completion of the administrative process *or* that party may assert the facial challenge in a separate suit in the trial court—but they may not do both.

Lastly, the First District held that affirmance was appropriate because Paylan failed to identify any conflict between any constitutional text and the Statute that required judicial resolution with respect to her facial challenge.

Exhaustion of Administrative Remedies—Whistleblower's Act

Sch. Bd. of Palm Beach Cnty. v. Groover, 337 So. 3d 799 (Fla. 4th DCA 2024).

Groover filed a grievance with the School Board of Palm Beach County ("the Board"). Subsequently, Groover filed a complaint in civil court against the Board, alleging a violation of the Florida Whistleblower's Act. *See* § 112.3187(8)(b), Fla. Stat. The Board moved for summary judgment, arguing that Groover failed to exhaust her administrative remedies prior to filing civil suit. The trial court denied the Board's motion.

The Board then petitioned the Fourth District Court of Appeal for certiorari review of the trial court's denial of its summary judgment motion. The appellate court examined section 112.3187(8)(b), which requires a

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complainant to file a complaint with the local governmental entity (here, the Board) if the entity has established an administrative procedure or contracted with DOAH to handle complaints. The appellate court noted that the statute creates a mandatory, presuit requirement for complainants to first exhaust administrative remedies.

Here, the Board had a contract with DOAH, but Groover did not pursue or inquire as to the availability of an administrative remedy. The Fourth District also rejected the trial court's conclusion that Groover exhausted her administrative remedies through her filing of a grievance. Notably, Groover's filed grievance was generalized and not brought pursuant to the Board's whistleblower policy and did not reference Florida's Whistleblower Act. The appellate concluded that "the filing of [a] generalized grievance cannot satisfy the exhaustion requirement of the statute."

Thus, the Board's petition was granted with instructions that the trial court enter summary judgment in favor of the Board.

Licensing—Jurisdiction to Revoke, Due Process Fulfilled by Attempt to Provide Actual Notice

Goldstein v. Dep't of Bus. & Prof'l Reg., 389 So. 3d 678 (Fla. 3d DCA 2024).

This case arises from an appeal from the Department of Business and Professional Regulation's ("the Department") final order revoking Goldstein's real estate broker license. Goldstein was charged with second-degree theft and pled nolo contendere. He filed a criminal self-reporting document with the Department in which he listed his mailing address, e-mail address, and phone number. Thereafter, the Department filed an administrative complaint seeking to revoke Goldstein's license. A notice of rights was attached to the complaint. Additionally, the complaint and notice of rights were sent to Goldstein via certified mail, regular mail, and email to the same addresses Goldstein listed in his criminal self-reporting document. However, Goldstein failed to respond.

Accordingly, the Department filed a motion asserting it made all reasonable efforts to provide reasonable notice to Goldstein and requesting that the Real Estate Commission ("the Commission") find that Goldstein waived his right to a hearing, which the Commission granted. The Department also sent a copy of the motion to Goldstein. The Commission then issued its final order, revoking Goldstein's real estate license and assessing fines and costs.

Goldstein appealed the final order arguing: (1) the Commission was without jurisdiction to revoke his license because it expired before the administrative complaint was filed, and (2) he was denied due process because he did not receive a copy of the pleadings.

The Third District Court of Appeal rejected both arguments and affirmed the final order. The appellate court first noted that there is no statute or rule to support Goldstein's jurisdictional argument. Instead, section 455.271(11), Florida Statutes, provides that the status or change in a licensee shall not alter the right to impose discipline upon the licensee, whether the license is active, inactive, or delinquent. Goldstein's license was active when he was arrested and became involuntarily inactive when the Department filed its complaint.

Second, the court found that Goldstein's due process rights were not violated because the Department properly attempted to notify Goldstein, relying on the addresses and phone number he provided to the Department. The court explained that due process does not require actual notice, but an attempt to provide actual notice, which is what the Department did.

Tax Refunds—Department of Revenue Motor Fuel Tax

SEI Fuel Servs., Inc. v. Fla. Dep't of Revenue, 379 So. 3d 607 (Fla. 1st DCA 2024).

SEI Fuel Services, Inc. ("SEI"), appealed the Department of Revenue's ("DOR") final order denying SEI's request for partial refund of double-paid motor fuel taxes. DOR deemed improper the first payment remitted by SEI, and determined SEI was not entitled to a refund of the second proper payment, despite SEI paying twice the amount of owed taxes. The First District Court of Appeal reversed DOR's decision, finding that Florida's tax laws contain ample room for amending taxpayer errors and

explaining it is not the province of DOR to create additional penalties for inadvertently paying double taxes.

As background, SEI purchases fuel to supply to various stores. Florida law requires payment of a fuel tax on the purchase or sale of such motor fuel. Instead of remitting the taxes directly to DOR, SEI improperly paid the tax amount directly to its supplier, which then remitted the payment to DOR. SEI subsequently paid the same amount directly to DOR. DOR audited SEI's fuel tax payments wherein the parties discovered the double payment. SEI filed a refund request for its direct payment to DOR as an overpayment made in error pursuant to section 245.26, Florida Statutes. DOR denied the initial refund request.

SEI filed a petition for formal administrative hearing. The parties did not dispute that SEI was required to pay the motor fuel taxes directly to the Department; the parties also did not dispute that a double payment occurred. Upon referral to DOAH, the ALJ found no disputed issues of material fact and relinquished jurisdiction to DOR for an informal hearing.

DOR argued to the hearing officer that SEI was not entitled to a refund due to the improper first payment. The hearing officer agreed and upheld DOR's denial of SEI's refund request based on the determination that SEI failed to make the first payment via a lawful channel as required by the statute. Based on this determination, the hearing officer determined SEI was therefore not entitled to a refund, as section 206.41(1)(d), (e), and (f), Florida Statutes, state that taxes paid to an upstream supplier are not eligible for refund, even though the second payment otherwise would have been eligible for a refund.

SEI appealed the final order to the First District Court of Appeal, which agreed with DOR's position that SEI failed to make the first payment through lawful channel and that SEI was not entitled to a refund of that improper payment. However, the First District rejected DOR's argument that receipt and acceptance of the first non-refundable payment prohibited SEI from obtaining a refund of the subsequent direct payment of the same tax that resulted in double payment. The appellate court held that DOR owed a refund of SEI's direct payment on the basis that no tax was owed where the first payment equated to full payment under the law. Holding otherwise would allow DOR to take in "double what it was owed."

Witness Assessments—Weighing Witness Demeanor in Assessing Competent, Substantial Evidence

AGI Traffic Sch., Inc. v. Dep't of Hwy. Safety & Motor Vehicles, No. 3D23-1279, 49 Fla. L. Weekly D526 (Fla. 3d DCA Mar. 6, 2024).

AGI Traffic School, Inc. ("AGI") was a third-party contractor with the Department of Highway Safety and Motor Vehicles ("DHSMV") to facilitate driver's license examination services to the public. AGI's contract with

DHSMV required AGI to ensure that adult applicants completed a registration form and were physically present for their exams. DHSMV reserved the right to terminate the three-year contract with AGI upon the company's failure to adhere to these requirements. The contract also permitted the parties to resolve disputes pursuant to section 120.60, Florida Statutes.

DHSMV conducted a surprise site inspection a few months into its contract with AGI. While on the premises, the DHSMV officer found that none of the test takers were physically present at the testing facility during times at which the online portal reported tests were being administered. During the inspection, the president of the company could not provide applicant registration forms or explain the absence of test takers from the premises, as required per the contract.

DHSMV issued an emergency suspension of AGI's ability to conduct further driver's license exams based on the violations observed by the officer. AGI timely petitioned for and was granted an administrative hearing. The ALJ found the violations had occurred and recommended termination of the contract. DHSMV adopted the recommendation.

AGI appealed the final order, arguing the ALJ's factual findings lacked competent, substantial evidence on the basis that the ALJ improperly relied on the company president's demeanor during his hearing testimony instead of evidence admitted at the hearing.

The Third District Court of Appeal affirmed DHSMV's order. The court held that the ALJ based its decision on competent, substantial evidence, which requires only that "the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *Vill. of Palmetto Bay v. Palmer Trinity Priv. Sch., Inc.*, 128 So. 3d 19, 25 (Fla. 3d DCA 2012); *O.H. v. Agency for Pers. with Disabilities*, 332 So. 3d 27, 33 (Fla. 3d DCA 2021) ("It does not matter that there may be competent substantial evidence to support alternative findings of fact, only whether the hearing officer's findings of fact are supported by competent substantial evidence.").

The appellate court further explained that the ALJ was in the best position to make findings on the credibility and persuasiveness of the president's testimony, holding that an "appellate court is required to defer to a lower court's findings regarding witness credibility." *Wise v. Dep't of Mgmt. Servs.*, 930 So. 2d 867, 870 (Fla. 2d DCA 2006).

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> CONT. CITIZENS PROPERTY INSURANCE CORPORATION ARBITRATION BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS

disputes have been referred to DOAH, several of which have already been resolved. The advantages of this process are beginning to be realized.

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