ADMINISTRATIVE LAW SECTION
Newsletter
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The Use of the Florida Evidence Code in Administrative Hearings in Light of *Florida Industrial Power Users Group v. Graham*

by Bruce Culpepper, Administrative Law Judge, Division of Administrative Hearings

In January 2017, the Florida Supreme Court issued its decision in *Florida Industrial Power Users Group v. Graham*, 209 So. 3d 1142 (Fla. 2017) ("*Florida Industrial*"). In this case, the Supreme Court considered the Florida Public Service Commission's ("Commission") decision not to apply the rule of witness sequestration ("Rule") in an administrative hearing. The Rule is found in section 90.616, Florida Statutes. The Commission asserted that it had the discretion not to enforce the Rule, regardless of the fact that it is an established rule of evidence in Florida civil and criminal courts.

The Supreme Court agreed with the Commission and specifically found that "the Florida Evidence Code is not applicable to administrative proceedings." Accordingly, the Supreme Court ruled that the Commission had the "discretion" to refuse to apply a rule of evidence in its administrative proceeding.

So, what is this "discretion" business the Supreme Court imparts? *Florida Industrial* confirms that the Florida Evidence Code does not apply to administrative proceedings. We knew that. (Ironically, for a process

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From the Chair

by Robert Hosay

I would like to shine a spotlight on the Administrative Law Section's establishment of two awards to recognize and memorialize preeminent professionals that work tirelessly in our field of administrative law. Establishing these awards is long overdue and of great importance to substantiate the significance of the professionals working in administrative law. You will not be surprised by who provided the muscle and the work in the trenches to get this project completed. Thank you, Jowanna N. Oates! I look forward to nominating qualified professionals for these two inaugural awards now and in the future. The two awards are the S. Curtis Kiser Administrative Lawyer of the Year Award and the Administrative Law Section Outstanding Service Award.

The S. Curtis Kiser Administrative Lawyer of the Year Award is named after Senator S. Curtis Kiser, a 1967 graduate of the University of Iowa and a 1970 graduate of the Florida State University College of Law. Senator Kiser has a long and distinguished career in public service

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to the State of Florida. His public service includes: State Representative (1972-1982); Senator (1984-1994); Public Service Commission Nominating Council (1978-1994); General Counsel for the Public Service Commission; and Commissioner, Public Employees Relations Commission. During Senator Kiser's legislative service, he was the prime sponsor of legislation that established the Florida Evidence Code and the Administrative Procedure Act. The S. Curtis Kiser Administrative Lawyer of the Year Award will be presented to a member of The Florida Bar who has made significant contributions to the field of administrative law in Florida.

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

It's live! With great excitement I invite you to visit the new and improved Administrative Law Section (ALS) website at http://flaadminlaw.org/. The technology committee, headed by Paul Drake, worked diligently over the past year to develop a format and a plan for content that supports the purpose and mission of the Administrative Law Section. In addition to Paul, I'd like to specifically highlight the hard work of James Ross, Tabitha Harnage, Judge Gar Chisenhall, and Judge Suzanne Van Wyk for their dedicated and persistent work to publish a website that will serve our profession, our members, and the public very well. The updated website provides pertinent information in an efficient and effective manner. Browse the website to access our respected ALS newsletter, learn about our section and membership, and access resources helpful to anyone working in our profession.

A huge thank you to hard working ALS executive council member Tabitha G. Harnage for organizing and supporting our most recent ALS social events. Tabitha was able to organize a fun and passionate group to participate in the Tallahassee Bar Association's 22nd Annual Chili Cook-Off. Thank you team ALS for representing us well at this event!

I hope by reading this column you have gained a more significant appreciation for some of the hard work performed by so many of our section members. Please do not hesitate to contact me if you would like to get involved. The professional value and meaningful relationships will last your entire career.

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

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APPELLATE CASE NOTES

by April A. Caminez-Bentley, Tara Price, Gigi Rollini, and Larry Sellers

Formal Administrative Hearing—Waiver of Right
233 So. 3d 488 (Fla. 1st DCA 2017).

Denise Campbell worked at an assisted living facility and found one of the facility's patients in the dining hall unresponsive. Ms. Campbell ordered the staff to place the patient in his bed so that he could receive CPR, but CPR was not performed after it was discovered that the patient had a "Do Not Resuscitate" order on file. The patient died. Ms. Campbell inaccurately reported that the patient was found unresponsive in his bed, not in the dining hall.

The Department of Health (DOH) filed an administrative complaint against Ms. Campbell, alleging that she (1) inaccurately recorded the event; and (2) falsified or altered the patient's records. The complaint included an election-of-rights form, notifying Ms. Campbell that she had 21 days to request a formal administrative hearing. DOH believed that Ms. Campbell did not respond.

Ms. Campbell's attorney submitted an affidavit stating that he personally hand-delivered a request for a formal hearing within 21 days. DOH also filed an affidavit stating that the Board of Nursing (Board) never received a request for a formal hearing. At DOH's request, the Board concluded that Ms. Campbell waived her right to a formal administrative hearing. The Board then held an informal hearing. It issued a Final Order concluding that Ms. Campbell acted improperly, but increased the recommended penalty from probation and a fine to the revocation of her license. Ms. Campbell appealed the Board's Final Order based on the determination that she waived her right to a formal administrative hearing and the increased penalty.

The court held that the Board was required to give Ms. Campbell an evidentiary hearing on whether she timely requested a formal hearing. If the Board determines on remand that Ms. Campbell did not waive her right to a formal hearing, the court directed that the case proceed to the Division of Administrative Hearings. If the Board determines that she did waive her right, the court concluded that the Board could penalize Ms. Campbell via an informal hearing.

Next, the court addressed the issue of the Board's revocation of Ms. Campbell's license. Ms. Campbell argued that the Board lacked competent substantial evidence to find aggravating factors sufficient to impose the penalty of revocation. However, the court found that the permissible penalty range for falsifying patient records—with or without aggravating factors—included license revocation. The court was thus unable to reverse the Board's penalty based on the argument presented in Ms. Campbell's appeal, but reversed and remanded the case for the Board to conduct an evidentiary hearing on whether she waived her right to a formal administrative hearing.

Injunctions—Preservation of Entitlement to Injunctive Relief
Dep't of Health v. Bayfront HMA Med. Ctr., 43 Fla. L. Weekly D96 (Fla. 1st DCA Jan. 2, 2018).

The Department of Health (DOH) and Galencare, Inc. d/b/a Northside Hospital (Northside) appealed a nonfinal order enjoining Northside from operating a provisional trauma center and enjoining DOH from allowing Northside to operate one prior to the conclusion of any timely-filed administrative proceeding challenging any preliminary approval of Northside's application and any subsequent judicial review. The injunction order was issued by the trial court after a temporary injunction was sought by Bayfront HMA Medical Center, LLC d/b/a Bayfront Health (Bayfront).

Bayfront sought the injunction on the basis that DOH lacks authority to accept a letter of intent (LOI) to apply for approval to operate a new trauma center in a Trauma Service Area (TSA) that has no trauma center position available (and therefore no need), or to allow a provisional trauma center to operate during the pendency of an administrative challenge to the provisional approval of the application.

The court reversed on the basis that Bayfront failed to prove its entitlement to temporary injunction relief.

Regarding the required substantial likelihood of success element, the court concluded that there is no need criterion at or before the provisional review stage. As a result, the statute does not require or permit DOH to consider need until the onsite review stage of the application process. Bayfront therefore failed to prove substantial likelihood of success on its claim that DOH lacks authority to accept a LOI to apply for approval to operate a new trauma center in a TSA when the TSA has no need.

The court also rejected Bayfront's interpretation that Northside cannot begin operations as a provisional trauma center until the conclusion of all administrative proceedings. Section 395.4035, Florida Statutes, allows any hospital that submitted an application found acceptable by DOH based on a provisional review to be eligible to operate as a provisional trauma center. While the statute also provides that a hospital that wishes to protest a decision made by DOH based on its review of applications or on the recommendations of the site visit review team may do so under chapter 120, such provisions do not state what effect an administrative challenge has on a provisional trauma center beginning operation. A stay on a provisional trauma center's operations, on the other hand, would affect the statutory timeline

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and could endanger the viability of the provisional trauma center, which would be forced to sit idly while any administrative proceeding concludes. The court concluded that the statute did not support the assertion that a challenge requires the provisional trauma center's operations to be stayed pending that challenge.

Insurance—Disapproval of Proposed Endorsements
Sec. First Ins. Co. v. Fla. Office of Ins. Regulation, 232 So. 3d 1157 (Fla. 5th DCA 2017).

Security First Insurance Company (Security First) submitted to the Office of Insurance Regulation (OIR) policy endorsements to the conditions section for its homeowners, tenant homeowners, condominium unit owners, and dwelling fire insurance policies, for OIR's approval. The new language would have restricted policyholders' ability to assign post-loss benefits without having the consent of all insureds, additional insureds, and mortgagees named in the policies.

OIR disapproved Security First's proposed endorsements because it concluded they violated the intent and meaning of section 627.411(a), (b), and (e), Florida Statutes, and unlawfully restricted the assignment of post-loss benefits. Security First requested administrative review, and the hearing officer issued a report and recommendations, upholding OIR's decision. OIR issued a Final Order adopting the report and recommendations. Security First appealed.

On appeal, Security First argued that although a policy endorsement could not require consent from an insurer to authorize the assignment of post-loss benefits, the case law prohibited only endorsements requiring the insurer's consent. The court, however, disagreed, stating that a provision against the assignment of an insurance policy did not bar the assignment of post-loss benefits. The court concluded that "the right to recover under an insurance policy is freely assignable after loss."

Security First also argued that OIR's Final Order should be reversed due to numerous public policy concerns, particularly the vested rights of other parties who Security First asserted should have "an equal voice in such assignments to prevent impairing their interests." Security First also expressed concern that the assignment of less than all rights would allow an assignor and an assignee to enter split causes of action suing the obligor. But the court concluded that these public policy concerns were for the Legislature, and not the judiciary, to resolve. Thus, the court affirmed OIR's Final Order.

Licensing—Agency Discretion to Deny Exemptions for Disqualifying Criminal Offenses
A.P. v. Dep't of Children & Families, 230 So. 3d 3 (Fla. 4th DCA 2017).

This appeal was brought by a licensed mental health counselor in Florida, practicing since 1991, who was disqualified in 1998 from being able to work with children and vulnerable adults under Florida's Level 2 employment screening standards after exposing himself to an undercover officer in a public park and pleading no contest to a misdemeanor. Appellant sought an exemption from this disqualification because he wanted to open an intensive outpatient substance abuse program.

After the Department of Children and Families (DCF) denied Appellant's request, he sought review through an administrative hearing pursuant to section 435.07(3)(c), Florida Statutes. The ALJ issued a recommended order, which included a finding of fact that Appellant was rehabilitated and that he no longer presents a danger if employed in a position of special trust caring for children or vulnerable adults. The ALJ concluded that DCF abused its discretion and recommended the exemption be granted.

The DCF Secretary adopted all of the ALJ's findings of fact in the Final Order (including the finding of rehabilitation and not presenting a danger), but rejected the legal conclusion that it would be an abuse of discretion to deny the exemption, concluding that DCF had discretion to deny the exemption anyway. Without articulating a clear rationale for the decision, DCF denied the exemption.

The Fourth District Court of Appeal recognized that to reject an ALJ's conclusion of law, "the agency . . . must make a finding that its substituted conclusion of law . . . is as or more reasonable than that which was rejected or modified" under section 120.57(1)(*l*), Florida Statutes. The court found that DCF's adoption of the ALJ's factual findings of rehabilitation and not presenting a danger conflicted with, and could not be supported by, the legal conclusion that the exemption could nonetheless be denied.

The court stated that section 435.07(3)(a), Florida Statutes, authorizes the Secretary, in articulating the decision to reject the ALJ's recommendation, to consider several enumerated factors as to whether an applicant presents a danger if his employment were allowed. Because the Secretary did not consider these factors or state that he relied on any rationale other than the "nature" of Appellant's underlying offense, the court reversed and remanded the matter to DCF for a decision consistent with the court's opinion and with the ALJ's findings already adopted by DCF.

Mandamus Relief—Sufficiency of Allegations Within Complaint
S.J. v. Thomas, 233 So. 3d 490 (Fla. 1st DCA 2017).

S.J. alleged that the Superintendent removed him from his traditional high school through a process called "disciplinary reassignment," and required him to finish the school year at either an alternative school or a virtual school. S.J. requested a hearing, which was held pursuant to sections 120.569 and 120.57, Florida Statutes. A recommended order was issued, recommending that S.J. be "disciplinarily reassigned" for the remainder of the school year. The School Board then adopted the recommended order

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through a "Notice of Adoption of Recommended Order," but did not render a final order. Nothing in the notice indicated the School Board intended it to operate as a final order, or that it had any intention to grant S.J. all of the rights afforded by the Administrative Procedure Act (APA).

S.J. filed a petition for a writ of mandamus, asserting that the School Board had a legal duty to issue a written final order pursuant to the APA because his "disciplinary reassignment" affected his substantial interests. In granting the School Board's motion to dismiss, the trial court determined the APA did not apply to a "disciplinary reassignment" because the Legislature did not explicitly provide that a "disciplinary reassignment" falls under the purview of the APA, unlike expulsion.

The First District Court of Appeal disagreed, reversing the trial court's dismissal. The court determined that S.J.'s complaint for mandamus relief sufficiently alleged facts that entitled him to mandamus relief, including by showing that his "disciplinary reassignment" was virtually indistinguishable from expulsion and, therefore, fell under the APA.

The court also determined S.J. sufficiently alleged that the "disciplinary reassignment" affected his substantial interests, finding his alleged inability to attend a traditional school satisfied the injury-in-fact standard, and that this is the type of interest the Education Code was designed to protect. The court reversed and remanded the case to the trial court to issue an alternative writ of mandamus directing the School Board to show cause why the requested relief should not be granted.

Public Records—Exemptions for Local Government Risk Management Claims Files
City of Homestead v. McDonough, 232 So. 3d 1069 (Fla. 3d DCA 2017).

Dr. James E. McDonough was involved in an incident with an off-duty police officer. After the incident, McDonough filed a Notice of Intent to file a claim against the City of Homestead (City). While the Notice of Intent was pending, McDonough filed a complaint against the police officer for defamation. The City was not named in the complaint.

McDonough filed a public records request seeking five e-mails relating to the City's decision to defend the police officer in the defamation action, the last of which was acknowledged in open court by McDonough to be confidential, privileged, and exempt. The trial court determined that the City properly claimed the first two records as exempt based on the claims file exception in section 768.28(16)(b), Florida Statutes, but that the third and fourth records, even though kept in the risk management file, were not confidential and exempt. The trial court ordered the City to produce the non-exempt records.

The Third District Court of Appeal disagreed with the trial court, finding that all of the documents requested were privileged and not subject to production pursuant to chapter 119, Florida Statutes, or section 768.28(16)(b). The court concluded that no statutory exception to section 768.28(16)(b) existed to allow for production of records in the risk management file, even where there would be no harm if produced.

Accordingly, the court reversed the part of the order finding some of the claims file records non-exempt, concluding that that all of the records in the City's risk management file were confidential and exempt from disclosure until such time as the claims related to McDonough's Notice of Intent have been resolved.

Public Records—Number of Private Car Service Pickups and Fees Paid to Broward County is Public
Rasier-DC, LLC v. B & L Serv., Inc., 43 Fla. L. Weekly D145 (Fla. 4th DCA Jan. 10, 2018).

Rasier-DC, LLC, a subsidiary of Uber Technologies, Inc. (Uber), and Broward County entered into a license agreement that permitted Uber to provide its services at the airport and Port Everglades. The license agreement mandated that Uber report to the county the number and time of pickups and drop-offs at the airport and Port Everglades, the identity of the driver, and the fee in each of those zones. In exchange, the county was required to maintain as confidential Uber's trade secret information and assert a trade secret exemption to any public records requests under the Florida Public Records Act.

Yellow Cab made a public request to the county for all reports or documents containing pickup information by Uber, as well as the amount owed to the county for those trips for a several year period. The county refused to release unredacted information without authorization from Uber, claiming much of the information was subject to a trade secret exemption. Yellow Cab filed a complaint against the county alleging a violation of the Public Records Act and sought the unredacted information. Uber intervened. The court held an evidentiary hearing and ordered that the information was subject to the trade secret exemption. Yellow Cab moved for rehearing and the court ruled that the number of pickups, in the aggregate, as well as the amount of money paid to the county as a usage fee at the airport was not trade secret information and not exempt from disclosure. Other more specific information, such as the specific locations and dates of the pickups, as well as the identity of the drivers, was trade secret information.

Uber appealed, arguing the trial court abused its discretion in ordering the production of the number of pickups and amount of money paid to the county. The court rejected Uber's argument, reasoning that a corporation's sales volume, income statements, and gross sales were not trade secrets and cited to a federal district court order in California that concluded Uber competitor Lyft's commissions and revenues on certain products were not trade secrets. In addition, the court reasoned that Uber did not derive independent economic value from the fees given the county or the total number of Uber

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pickups, and that disclosing such information would not provide Yellow Cab with an advantage. Finally, the court noted that public records cannot be made private based on a promise of the government, citing *National Collegiate Athletic Association v. Associated Press*, 18 So. 3d 1201, 1208 (Fla. 1st DCA 2009). Thus, the court ordered the county to produce the redacted records providing the fees given the county and the total number of Uber pickups.

Reimbursement for Medicaid Funds for Hospitals—Mootness of Petitions for Administrative Hearing

Sarasota Cnty. Pub. Hosp. Dist. v. Agency for Health Care Admin., 230 So. 3d 973 (Fla. 1st DCA 2017).

In a consolidated appeal, in which Sarasota County Hospital District served as the lead appellant, sixty-seven Petitioners (collectively, Hospitals) sought administrative hearings pursuant to section 120.57(1), Florida Statutes, after the Agency for Health Care Administration (AHCA) announced its rates of reimbursement of Medicaid funds for services provided by hospitals for outpatient services for the 2016-17 fiscal year. AHCA dismissed the Hospitals' petitions with prejudice. The First District Court of Appeal reversed the orders of dismissal, and remanded for the grant of formal hearings pursuant to section 120.57(1).

Sarasota County Hospital District (as representative of the Hospitals) alleged that for fiscal year 2016-17, the Florida Legislature passed zero Medicaid outpatient rate reductions and appropriated sufficient funds to reimburse the Hospitals at a rate substantially higher than AHCA's posted reimbursement rates; yet, AHCA, on its own initiative, elected to implement drastic rate reductions for the year, resulting in a significant reduction of funding for the Hospitals. The applicable rates were not posted by AHCA until after the start of the fiscal year on July 11, 2016, and then were revised and republished on August 10, 2016. The rates, which were alleged to be greatly reduced from previous years, took effect for all Medicaid outpatient hospital providers on July 1, 2016.

AHCA dismissed the Hospitals' petitions, finding the rates of reimbursement were not "final agency action" until after AHCA audited the Hospitals' requested reimbursements, which would occur in the future. AHCA relied on section 409.908(1)(f)1., Florida Statutes, which provides a point of entry for the Hospitals "to correct or adjust the calculation of the *audited* hospital" rate, and on section 409.908(1), which does not allow Hospitals to challenge *unaudited* rates on the basis that they are preliminary in nature. AHCA went on to find that, even if the Hospitals were entitled to challenge unaudited rates, AHCA lacked jurisdiction to adjust the Hospitals' rates, due to section 409.905(6)(b)1., which prohibits AHCA from making any further adjustments after October 31 of the fiscal year. AHCA concluded that this therefore rendered the Hospitals' claims moot.

Given the posture, the court accepted the allegations of the petition as true and reviewed AHCA's statutory interpretations de novo. The court determined that section 409.908(1)(f)1. only spoke to audited reimbursement requests, was silent as to the pre-audit period, and thus, did not preclude formal administrative challenge to the Medicaid reimbursement rates set by AHCA prior to agency auditing.

The court further disagreed that the matter was moot after October 31, 2016, even though the Hospitals' petitions were filed several months before, finding that section 409.905(6)(b)1. applied to challenges of unaudited rates as well because, as a practical matter, audits were not completed by such an early date in the fiscal year.

The court found AHCA's interpretation to be a misreading of the statutes, concluding that the substantial interests of a party entitled to Medicaid reimbursement are affected at the time an unsatisfactory rate is

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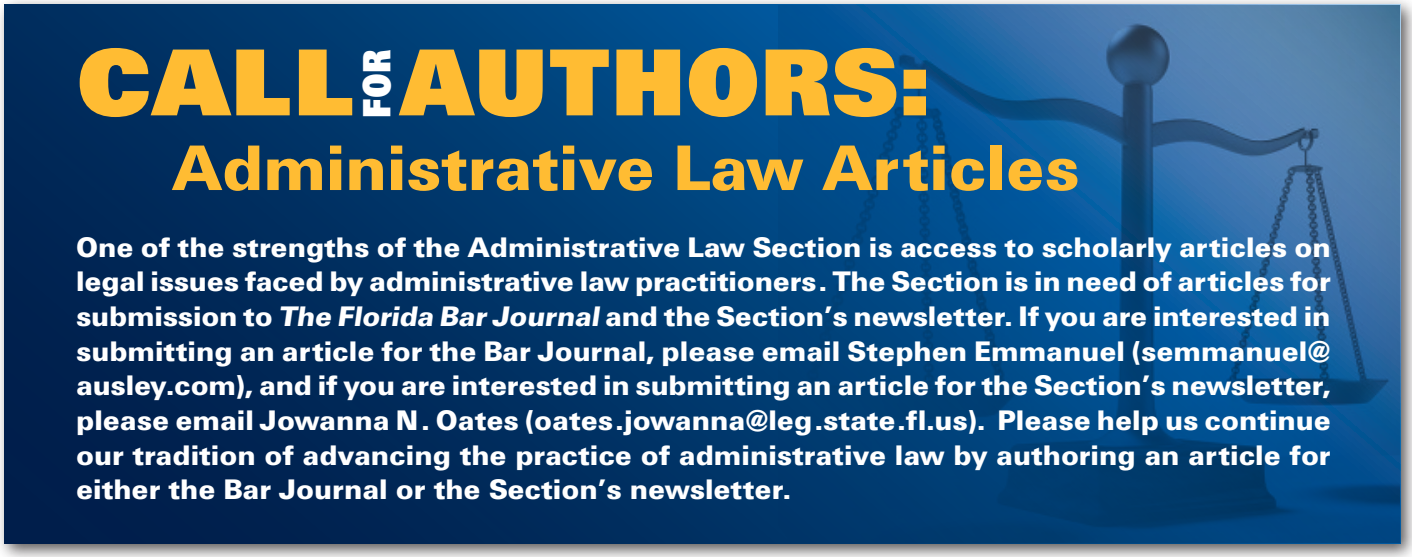

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announced, as that rate takes effect immediately and reimbursements which are made prior to auditing are based on that rate. Accepting as true the Hospitals' allegation that the methodologies used to set the rates are not subject to change during the auditing process, the court held that the rate becomes final at the time it is announced, and therefore is subject to challenge.

Rule Challenge—Agencies Must Follow Rulemaking Procedure When Repealing Existing Rules
Dep't of Bus. & Prof'l Reg. v. Dania Entmt. Ctr., LLC, 229 So. 3d 1259 (Fla. 1st DCA 2017).

The Department of Business and Professional Regulation, Division of Pari-Mutel Wagering (DBPR) published a notice of proposed rulemaking to repeal rules 61D-11.001(17) and 61D-11.002(5) and to adopt a new rule that would prohibit player banked games established by the house. DBPR initially concluded that no statement of estimated regulatory costs (SERC) was necessary because the proposed rules would not create a financial impact greater than $200,000. Several cardrooms submitted a good-faith based lower cost regulatory alternative (LCRA) proposal, estimating that the prohibition on designated player games would cost them more than $87 million over five years. The LCRA stated this increased cost could be avoided if DBPR did not repeal the rules. DBPR published a notice of change that withdrew the proposed rule, but still proposed repealing rules 61D-11.001(17) and 61D-11.002(5).

A number of cardrooms filed petitions challenging the validity of the proposed rule changes. After a formal hearing, the ALJ issued a Final Order concluding that the repeal of rules 61D-11.001(17) and 61D-11.002(5) was an invalid exercise of delegated legislative authority. The ALJ reasoned that the repeal of the rules met the definition of a "rule" because the repeal would have implemented new DBPR policy with regard to designated player games. The ALJ found that DBPR failed to materially follow rulemaking procedures when it did not file a SERC in response to the cardrooms' LCRA, as section 120.541, Florida Statutes, requires. Finally, the ALJ concluded that the repeal of the rules exceeded DBPR's rulemaking authority and enlarged, modified, or contravened the law implemented, because DBPR did not have the ability to define an "authorized game" beyond the definition found in section 849.086, Florida Statutes. DBPR appealed.

On appeal, the court held that DBPR's proposed repeal of rules 61D-11.001(17) and 61D-11.002(5) was a "rule." The court cited section 120.52(16), Florida Statutes, and noted that a rule repeal constitutes a rule where it has the effect of creating or implementing a new rule or policy, or where it, in and of itself, creates rights and adversely affects others. Here, DBPR's proposed rule would have adversely affected the cardrooms' rights by giving DBPR discretion to approve or deny internal controls for designated player games and the "net effect" of the repeal would have implemented DBPR's new policy of prohibiting all designated player games.

In addition, the court held that DBPR failed to prepare a SERC as required by section 120.541. Thus, the repeal of the rule was an invalid exercise of delegated legislative authority.

However, the court did not affirm the ALJ's conclusion that DBPR did not have the authority to repeal the rules. Because DBPR is authorized to regulate cardroom behavior including the rules for designated player games, it had the authority to further define the term "designated player game" and provide additional guidance and clarity to the cardrooms.

Accordingly, the court affirmed the ALJ's Final Order concluding that the proposed repeal of the rules was a rule and that the proposed rule repeal was invalid because DBPR failed to follow the statutorily required rulemaking procedures. The court, however, rejected the portion of the Final Order that concluded DBPR lacked the authority to repeal the rules.

Standing—Jurisdictional Requirements to Challenge Repeal of Agency Rule
K.M. v. Dep't of Health, 43 Fla. L. Weekly D37 (Fla. 3d DCA Dec. 27, 2017).

In 2015, the Department of Health (DOH) filed a notice of proposed rulemaking to repeal rule 64C-4.003, which required pediatric cardiac facilities approved by Children's Medical Services (CMS) to comply with certain standards. DOH asserted that it was repealing the rule because it exceeded its statutory authority to regulate pediatric care facilities.

K.M. is a beneficiary of CMS who requires pediatric cardiac services to treat a serious heart condition. She filed a petition for determination of invalidity of proposed rule, alleging that DOH's proposed repeal of the rule would reduce the quality of care available in the CMS program and was an invalid exercise of delegated legislative authority. The ALJ held a final hearing, during which two pediatric cardiologists called by K.M. testified about the risk of decreased quality of care provided by CMS clinics following a repeal of rule 64C-4.003's standards. The ALJ issued a Final Order dismissing K.M.'s petition, concluding that K.M. lacked standing because she failed to prove the proposed rule repeal would have a real or immediate effect on the quality of care available in the CMS network. K.M. appealed.

The court observed that section 120.56(1), Florida Statutes, requires K.M. to prove she will be "substantially affected" by the repeal of rule 64C-4.003. To demonstrate that she is substantially affected, K.M. was required to show that the repeal would result in a real and immediate injury in fact and that K.M's interest is within the zone of interest to be protected or regulated.

The court held that K.M. failed to meet the real and immediate

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injury prong, because her prospective injury was based on speculation and conjecture. The repeal of the rule did not have the direct effect of reducing the quality of care provided by CMS-approved providers, and the court reasoned that it was not "readily apparent" that those providers would stop providing quality care simply because the rule was repealed. In addition, the court noted that K.M.'s witnesses' failed to offer unqualified testimony that the repeal of the rule would lead to decreased quality of care. Instead, the testimony showed that although a risk of decreased quality of care existed, there was no evidence that the facilities would lower their standards of care due to the rule's repeal. The court affirmed.

In dissent, Judge Emas wrote that the court should have reversed the ALJ's Final Order dismissing the petition. Judge Emas concluded that the record and expert testimony showed that K.M. had demonstrated sufficient evidence that the quality of her future care from CMS-approved providers would be reasonably diminished due to the repeal of the rule. He also reasoned that standing to challenge an agency rule was broader than the traditional notion of standing and that this broad standing was essential to permit citizens, such as K.M., to initiate challenges to rulemaking that exceeded delegated legislative authority.

Trauma Center Application and Selection Process—Mootness of Petition for Administrative Hearing
Pub. Health Tr. of Miami-Dade Cnty., Fla. v. Dep't of Health, 230 So. 3d 992 (Fla. 1st DCA 2017).

The Public Health Trust of Miami-Dade County, Florida d/b/a Jackson South Community Hospital (Jackson South) and Aventura Hospital & Medical Center (Aventura) both applied to the Department of Health (DOH) to operate a Level II trauma center in the same region during the 2014-2016 application cycle. DOH accepted Aventura's application and granted it provisional approval to operate a Level II trauma center in the region. Jackson South's application was denied and it challenged DOH's denial of its application. The ALJ entered a Recommended Order concluding that Jackson South submitted an acceptable application, was in substantial compliance with the statutes, and should be approved to operate as a provisional Level II trauma center until the conclusion of the 2014-2016 application cycle. DOH and one of the existing trauma centers (who had intervened in the administrative proceedings) filed exceptions to the Recommended Order.

During the 2015-2017 application cycle, Jackson South filed an application to operate a Level II trauma center in the same area. DOH granted Jackson South provisional approval to operate a Level II trauma center. The intervenor then moved to dismiss Jackson South's administrative challenge to the denial of its first application as moot because DOH had granted Jackson South provisional approval based on the second application. DOH entered a Final Order dismissing Jackson South's petition as moot, and Jackson South appealed.

Jackson South argued on appeal that DOH was obligated to render a substantive determination on the merits of its petition challenging the denial of its first Level II trauma application. The intervenor argued that Jackson South had abandoned its first application and that it could not maintain multiple active applications at the same time. The court disagreed, holding that the statutes and rules did not prevent Jackson South from filing a second application while challenging DOH's denial of its first application.

The court also reasoned that Jackson South's provisional licensure during the 2015-2017 application cycle did not moot its challenge to DOH's denial of its first application filed during the 2014-2016 application cycle. The denial of Jackson South's first application would prevent it from competing with Aventura for the sole available seven-year trauma center license in the region. If DOH reversed its denial, either Jackson South or Aventura would be eligible to receive the seven-year license. But if DOH did not reverse its denial of Jackson South's first application and granted Aventura the seven-year license, Jackson South's second application would likely be denied because the region needed only one trauma center. Because DOH would not permit Jackson South to compete against Aventura for the final trauma center spot using Jackson South's second application, Jackson South's petition challenging DOH's denial of Jackson South's first application was not moot. Thus, the court reversed DOH's Final Order dismissing Jackson South's petition for administrative hearing as moot and remanded for further proceedings.

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Gigi Rollini and April Caminez-Bentley *practice with Messer Caparello, P.A., in Tallahassee.*

DOAH CASE NOTES

Substantial Interest Hearings

Javier A. Muniz-Pagan v. Universal City Development Partners, d/b/a Universal Studios Orlando, Case No. 17-2653 (Recommended Order Oct. 6, 2017).

FACTS: Javier A. Muniz-Pagan is a 33-year-old disabled male who uses an electric wheelchair. Universal City Development Partners, d/b/a Universal Studios Orlando ("Universal Studios") owns, operates, and manages entertainment parks in Orlando. On July 9 and 11, 2016, Universal Studios did not permit Mr. Muniz-Pagan to join the queues for the following attractions: Skull Island: Reign of Kong; E.T. Adventure; Jurassic Park River Adventure; and Dudley Do-Right's Ripsaw Falls. According to Mr. Muniz-Pagan, Universal Studios employees told him that power wheelchairs could not be allowed in the queues because they would be a safety hazard if they lost power. Universal Studios publishes a Riders Guide for its patrons and has an internal operating document setting forth general operating procedures pertaining to guests with disabilities. Both documents demonstrate that Universal Studios provides unrestricted access to its attractions for patrons operating manual wheelchairs. However, those same documents also demonstrate that Universal Studios provides no access to its attractions for patrons operating electric wheelchairs. If a patron using an electric wheelchair refuses or is unable to transfer to a manual wheelchair provided by Universal Studios, then Universal Studios offers for that patron to use the exit ramp to access an attraction. Mr. Muniz-Pagan filed a complaint with the Florida Commission on Human Relations, for unlawful discrimination based on disability. After FCHR's investigation, Mr. Muniz-Pagan filed a petition for an administrative hearing, and FCHR transmitted the case to the Division of Administrative Hearings.

OUTCOME: The ALJ noted that the Americans with Disabilities Act ("the ADA") makes no distinction between power-driven and manually operated wheelchairs. An entity subject to the ADA can avoid making a reasonable modification to its policies or procedures to accommodate such devices only when the entity can demonstrate that the necessary modification would fundamentally alter the nature of the good or service at issue. The ALJ concluded that Universal Studios "offered no evidence that would support a finding that allowing power-driven wheelchairs in its attraction queues would fundamentally alter the services, facilities, privileges, advantages, or accommodations that it provides to its patrons." The ALJ further concluded that "[i]n the absence of evidence that it would fundamentally alter the nature of its services to allow attraction queue access to patrons who operate power-driven wheelchairs, [Universal Studio]'s practice of directing such patrons to the exit ramp seems to be the practical equivalent of telling these patrons 'to go around to the back.'" Accordingly, the ALJ recommended that FCHR enter a final order finding that Universal Studios subjected Mr. Muniz-Pagan to unlawful discrimination by not allowing him to use his power-driven wheelchair in attraction queues at its theme park.

Pam Stewart, as Comm'r of Educ. v. Silva of South Fla., Inc., d/b/a New Horizons (7502), and Yudit Silva, Case No. 17-3898SP (Recommended Order Dec. 11, 2017).

FACTS: Silva of South Florida, Inc. ("SSF"), is a nonprofit corporation that operated a private school known as New Horizons ("the School"). Yudit Silva served as the School's principal or administrator. The Department of Education (DOE) administers the Gardiner Scholarship Program and the John M. McKay Scholarships for Students with Disabilities Program. In addition, DOE has some administrative responsibilities for the Florida Tax Credit Scholarship Program. The School participated in the three programs and received scholarship funds paid on behalf of its students. On March 30, 2017, Pam Stewart, as Commissioner of Education, issued an Administrative Complaint against SSF and Ms. Silva, giving notice that Ms. Stewart intended to end the School's participation in the aforementioned scholarship programs based on allegations of fraudulent activity.

OUTCOME: The Administrative Law Judge ("ALJ") recommended that the Commissioner enter a final order revoking the School's participation in the scholarship programs. In the course of doing so, the ALJ addressed the argument by SSF and Silva that the standard of proof should be clear and convincing evidence because the case amounted to a penal proceeding. The ALJ concluded as follows: "This argument is not without merit, for a proceeding to *revoke* a private school's participation in a scholarship program has punitive overtones, to say the least. But a school which is prohibited from receiving (through its students – the school's benefit is indirect) these scholarship funds is not precluded from operating as a private school; unlike a licensee whose license is revoked, the school may keep its doors open. Further, a decision to revoke a private school's participation in a scholarship program does not take scholarship benefits away from any of its students (to whom the scholarships are awarded); they are free to continue receiving their scholarships, so long as they transfer

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to another school. The undersigned concludes that participation by a private school in the Gardiner, McKay, and FTC scholarship programs is not a vested right or even an entitlement, but a kind of privilege, namely that of selling a product (education) to customers being subsidized by the state to make the purchase. Deprivation of participation, therefore, is not a sanction, but rather amounts to a loss of eligibility to continue enjoying an exceptional commercial advantage. Such deprivation determines the school's substantial interests, but is not punitive in character."

Dep't of Bus. & Prof'l Reg., Div. of Pari-mutuel Wagering v. Summer Jai-Alai P'ship, Case No. 17-3727 (Recommended Order Dec. 12, 2017)

FACTS: Summer Jai-Alai Partnership ("Summer Jai-Alai") has held a summer jai-alai permit in Miami-Dade County for more than 35 years, the result of converting an earlier greyhound racing permit into a summer jai-alai permit. In December 2016, Summer Jai-Alai applied for a 2017-18 operating license based on the permit, expressly identifying the proposed location of the summer jai-alai performances as a location in Dania, Florida—which is outside of Miami-Dade County, but is located less than 35 miles from the location it had previously used in Miami-Dade.

On March 10, 2017, the Department of Business and Professional Regulation Division of Pari-mutuel Wagering ("the Division") issued the license. Following a complaint from the landlord of Summer Jai-Alai's Miami-Dade County location, however, the Division determined that it had issued the license in error. In a notice of intent to withdraw the license, the Division did not allege that Summer Jai-Alai had violated any statute or rule, but instead stated simply that the license was issued "in error as [Summer Jai-Alai] is not authorized to operate summer jai-alai performances via the Permit outside of Miami-Dade County."

Summer Jai-Alai timely requested a formal administrative hearing under sections 120.569, 120.57(1), and 120.57(1)(e), Florida Statutes, and the matter was referred to the Division of Administrative Hearings.

OUTCOME: An Administrative Law Judge ("ALJ") recommended that the Division enter a final order dismissing the notice of intent to withdraw Summer Jai-Alai's license.

The ALJ observed that a purported "withdrawal" of an already-issued license is a legal nullity, unless the invalidation is authorized by statute or rule. The Division claimed it was permitted to withdraw or revoke the license under section 550.0745, Florida Statutes, which generally authorizes the conversion to a summer jai-alai permit and provides that the permittee may operate within its original county. However, the ALJ said this statute must be read together with section 550.475, Florida Statutes, which authorizes a pari-mutuel permitholder to lease its facility to any other holder of the same class permit when located within a 35-mile radius of each other—not limited to the original county. Indeed, the ALJ observed that the Division had previously interpreted section 550.475 in that exact way, but at some point in time changed its position. Thus, the ALJ rejected the Division's argument that as applied to converted permits like Summer Jai-Alai's, the statutes only authorized relocation up to 35 miles within the original county.

In addition, in what was described as a close question, the ALJ found that Division's notice of intent to withdraw the license amounted to an unadopted agency statement that qualified as a rule that deprived holders of converted permits of the benefit of section 550.475. The ALJ also rejected any contention by the Division that rulemaking was not feasible or practicable.

Disciplinary/Enforcement Actions

Dep't of Bus. & Prof'l Reg., Div. of Pari-Mutuel Wagering v. Areci Robledo, Case Nos. 17-4870PL, 17-4871PL, 17-4872PL, & 17-4873PL (Recommended Order Dec. 27, 2017).

FACTS: Areci Robledo ("Ms. Robledo" or "Respondent") holds a license authorizing her to train greyhounds in Florida. The Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("the Division") served Ms. Robledo with four administrative complaints alleging that she impermissibly medicated or administered prohibited substances to racing greyhounds for which she was the trainer of record for races held at Palm Beach Kennel Club between September 27, 2016 and January 28, 2017. During the course of the final hearing, Ms. Robledo presented an exhibit purportedly consisting of photographs taken at the Palm Beach Kennel Club. The Division opposed admission of those photographs, arguing that they had not been provided to the Division prior to the hearing, they had not been authenticated, and they were irrelevant. After the final hearing, the ALJ became aware of another ALJ's ruling in McClellan & Nemeth v. Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, that the Division's urine sampling procedures were based on an unadopted rule.

OUTCOME: The ALJ accepted the photographs into evidence. In doing so, she explained as follows: "As the Supreme Court of Florida recently observed in Florida Industrial Power Users Group v. Graham, 209 So. 3d 1142, 1146 (Fla. 2017), the Florida Evidence Code is not applicable to administrative proceedings, and administrative agencies therefore possess the discretion whether to require the parties to strictly adhere to the evidentiary rules established in chapter 90, Florida Statutes. Here, because Respondent appeared pro se and is not familiar with evidentiary principles regarding authentication; because the photographs, if authentic, are tangentially relevant to show general conditions present at the PBKC, albeit not necessarily on the dates on which the greyhounds that

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are the subject of these proceedings raced; and because [the Division] was able to conduct cross-examination at the final hearing regarding the photographs, the undersigned determines that they should be, and therefore are, admitted into evidence. However, for the reasons discussed herein, they have been given minimal weight." As for the McClellan ruling and its impact on this case, the ALJ explained that the "[k]ey to the ALJ's determination in McClellan that urine sampling procedures used in that case constituted an unadopted rule was [the Division]'s stipulation that: '[t]he Division and its representatives are still following the protocols and procedures outlined in Section 3 of the 2010 Manual as its protocol for sampling racing greyhounds' urine.' By contrast, in the instant proceeding, the parties did not stipulate or otherwise assert that the sampling procedures used to collect and store the urine constitute an unadopted rule that violates section 120.54(1)(a), and the evidence presented in these proceedings was not sufficiently detailed to enable the undersigned to determine whether these procedures were, in fact, substantially similar or identical to those in Section 3 of the 2010 Manual. Accordingly, under the existing record in these proceedings, the undersigned is not able to make a finding that the urine sampling procedures used in these cases constitute an unadopted rule on which [the Division] would not be entitled to rely as a basis for agency action. However, the undersigned is keenly aware that section 120.57(1)(e) prohibits both the ALJ and the agency from taking agency action based on an unadopted rule. Accordingly, if [the Division] believes that additional evidence needs to be presented in these proceedings to enable salient findings of fact to be made on this issue in these cases, it may, before entering the final orders, remand these proceedings to the undersigned with a request that the evidentiary hearing be re-opened to take additional evidence on this issue, that additional findings of fact on this issue be made, and that a recommended order after remand be entered." Ultimately, the ALJ recommended that the Division enter final orders imposing fines and suspensions based on Ms. Robledo's violations of section 550.2451, Florida Statutes.

Rule Challenges

Fla. Society of Ambulatory Surgical Ctrs., Inc., et al. v. Dep't of Fin. Servs., Div. of Workers' Comp., et al., Case Nos. 17-3025RP, 17-3026RP, & 17-3027RP (Final Order Nov. 30, 2017).

FACTS: The Department of Financial Services, Division of Workers' Compensation ("DWC"), resolves disputes between health care providers and insurance carriers over reimbursement for health care services provided to injured workers, pursuant to section 440.13(7), Florida Statutes. On December 7, 2016, DWC proposed amendments to existing rules regarding the reimbursement dispute resolution process, and also proposed to adopt new rule 69L-31.016, entitled "Reimbursement Disputes Involving a Contract or Workers' Compensation Managed Care Arrangement or Involving Compensability or Medical Necessity." Subsection (1) of the proposed rule provided that DWC would no longer resolve reimbursement disputes between health care providers and carriers when: (1) a contract established the amount of reimbursement to the health care provider; or (2) health care services were provided to the injured worker via a workers' compensation managed care arrangement. Under subsection (2) of the proposed rule, the Division would also not resolve reimbursement disputes arising from assertions by a carrier that particular treatment was not compensable or medically necessary. Since August 2015, the Division has been utilizing a non-rule policy consistent with subsection (1) of the proposed rule. Since November 2015, DWC has been utilizing a non-rule policy similar to subsection (2) of the proposed rule. Prior to the utilization of the non-rule policies, DWC would determine whether a carrier had improperly adjusted or disallowed a provider claim, determine the proper reimbursement amount pursuant to a contract or managed care arrangement, and order the carrier to promptly pay that amount. Similarly, if a carrier adjusted or disallowed a provider charge based on a lack of compensability or medical necessity, DWC would also make the necessary determinations and resolve the dispute.

Three petitions were filed to challenge the proposed rule provisions in subsection (1) and subsection (2), as well as a related proposed amendment to an existing rule. Petitioners represented the interests of health care providers regularly participating in DWC's provider-carrier reimbursement dispute process. The three cases were consolidated. A group of Intervenors representing the interests of insurance carriers regularly participating in DWC's provider-carrier reimbursement dispute process intervened in support of DWC's proposed rules.

OUTCOME: The ALJ issued a Final Order invalidating the challenged proposed rule provisions. As a threshold matter, the ALJ rejected DWC's claim that Petitioners lacked standing because they failed to prove they would be directly impacted by the proposed rules. The ALJ pointed out the inconsistency of DWC's stipulation that the carrier-Intervenors would be directly impacted by the proposed rules, finding that stipulation to be an admission equally applicable to the other side of the provider-carrier reimbursement disputes addressed by the proposed rules. Separately, the ALJ rejected DWC's argument that to prove standing, Petitioners were "required to quantify with precision the amount of lost income by reason of application of the unadopted policies in order to prove they will be injured in fact by the adoption of the [p]roposed rules." The ALJ deemed DWC's argument to be a "plain misreading" of Office of Insurance Regulation v. Secure Enterprises, LLC, 124 So. 3d 332 (Fla. 1st DCA 2013). Among other distinctions, the

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ALJ noted that "unlike in Secure Enterprises, Petitioners are directly regulated by the statute, the existing rules, and the proposed rules. Moreover, here, the proposed rules seek to take away (and the unadopted policies have already taken away) from Petitioners the rights they previously exercised to use the reimbursement dispute process to resolve their reimbursement disputes involving reimbursement contracts or managed care arrangements, and to resolve disputes when carriers adjusted or disallowed payment for any . . . reason."

The ALJ concluded that the challenged proposed rules exceeded DWC's grant of rulemaking authority and enlarged, modified, or contravened the specific provisions of laws to be implemented. With regard to whether DWC had authority for the proposed rules, the ALJ concluded that "[t]he grant of rulemaking authority in section 440.13(7)(e) authorizes rules only for 'carrying out' section 440.13(7), not 'carving out' exceptions from the all-inclusive scope of the statutory reimbursement dispute process." In addition to calling into question DWC's argument that only Article V courts have the authority to interpret and apply contracts such as one between a health care provider and a carrier, the ALJ concluded that even if that argument were well-founded, that would not create rulemaking authority "to insinuate an exception into the statute, where none exists, to exclude reimbursement disputes involving contract-based reimbursement. That is an unlawful insinuation of authority by bureaucratic osmosis."

Charles F. McClellan and Natasha Nemeth v. Dep't of Bus. & Prof'l Reg., Div. of Pari-Mutuel Wagering, Case No. 17-5238RU (Partial Summary Final Order Dec. 22, 2017).

FACTS: Charles F. McClellan and Natasha Nemeth are licensed racing greyhound trainers. The Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("the Division"), served five Administrative Complaints on Mr. McClellan and four Administrative Complaints on Ms. Nemeth, alleging that they violated section 550.2415(1)(a), Florida Statutes (2017), because their racing greyhounds tested positive for cocaine metabolites. On September 21, 2017, Mr. McClellan and Ms. Nemeth filed a two-count rule challenge petition. Count I was an unpromulgated rule challenge, alleging that the Division's urine sample collection practices are based on Section 3 from the Greyhound Veterinary Assistant Procedures Manual ("the Manual") even though Section 3 had been

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determined to be an unpromulgated rule in Dawson v. Department of Business and Professional Regulation, Case No. 14-5276RU (Fla. DOAH Jan. 29, 2015). Count II of the petition was a challenge directed to existing rules. With regard to Count I, the Division acknowledged in a Pre-Hearing Stipulation that "[t]he Division and its representatives are still following the protocols and procedures outlined in Section 3 of [the Manual] as its protocol for sampling racing greyhounds' urine." Petitioners moved for Partial Summary Final Order, with respect to Count I only.

OUTCOME: The Administrative Law Judge ("ALJ") issued a Partial Summary Final Order, concluding that as to Count I of the petition, the Division has been violating section 120.54(4)(e), Florida Statutes, by continuing to rely on Section 3 even after being ordered by Dawson to cease all such reliance. The ALJ retained jurisdiction to conduct further proceedings on attorneys' fees and costs.

One week after the ALJ's ruling, the Division published an emergency rule governing drug testing of racing greyhounds. As justification for finding that there is an immediate danger to the public health, safety, or welfare, the Division stated in its "Notice of Emergency Rule" that "an emergency rule is necessary because the Division would be unable to test for many prohibited substances in greyhounds and be unable to take subsequent administrative action in cases where a prohibited substance is found in such an animal. Such substances would include performance enhancing substances, pain numbing substances, and others that could lead to potential injuries or death to the racing animals. Further, the Division must be able to test for such substances in order to ensure legitimate and fair races and to protect the betting public. Although the Division rejects the legal finding in the Partial Summary Final Order, the Emergency Rule is necessary so that the Division can ensure the greyhound races that occur during the pendency of any legal challenges occur under safe conditions."

Bid Protests

Boston Culinary Group, Inc., d/b/a Centerplate v. Univ. of Central Fla., Case No. 17-4509BID (Recommended Order Nov. 21, 2017).

FACTS: Since 2007, Boston Culinary Group, Inc., d/b/a Centerplate ("Centerplate"), has held a ten-year contract to provide concessions and alcoholic beverages at multiple athletic and performance facilities on the campuses of the University of Central Florida ("UCF"). In January 2016, UCF began preparing for the end of Centerplate's contract and the award of a new concessions contract. Ovation Food Services, L.P., d/b/a Spectra Food Services and Hospitality ("Spectra"), provides concessions, venue management, and related hosting and entertainment services. Brian Hixenbaugh is a Spectra general manager and has worked for Spectra since 2006. Mr. Hixenbaugh appears on the UCF organization chart under Curt Sawyer, UCF's Associate Vice President for University Services. Mr. Sawyer met with Mr. Hixenbaugh and five other men to discuss the concessions contract on February 19, 2016. Follow-up meetings with the same people were scheduled on approximately April 15, 2016 and June 10, 2016. During at least two of the aforementioned meetings, the participants discussed important aspects of the invitation to negotiate ("ITN") that would be utilized to procure a new concessions contract. Because Spectra was interested in bidding for the new concessions contract, some UCF officials were concerned about Mr. Hixenbaugh's involvement in the meetings about the concessions contract. Nevertheless, Mr. Hixenbaugh attended another significant meeting on August 29, 2016, concerning the concessions contract. UCF issued an Invitation to Negotiate ("ITN") for the concessions contract on February 28, 2017. Centerplate, Spectra, and two other entities responded with proposals. On June 16, 2017, UCF invited Spectra to attend an in-person meeting to discuss aspects of a potential agreement between the two entities. During the course of the meeting held between UCF and Spectra on June 21, 2017, Spectra representatives requested and received a tour of UCF facilities relevant to the concessions contract. On July 20, 2017, UCF announced that it intended to award the concessions contract to Spectra. Centerplate protested that decision, and Centerplate's request for a formal administrative hearing was referred to DOAH.

OUTCOME: The ALJ found that "[p]articipating in the ITN development would provide a vendor the competitive advantage of having a hand in shaping the ITN, a head start on preparing a proposal, and a fuller understanding of the University's desires and priorities. Mr. Hixenbaugh participated in the meetings and gained a competitive advantage for Spectra." Accordingly, the ALJ concluded that "Mr. Hixenbaugh's participation and the walk-through did not just violate University rules. They were contrary to competition. Competitive bidding is designed to secure fair competition on equal terms for all bidders. Harris v. Sch. Bd., 921 So. 2d 725 (Fla. 1st DCA 2006). Axiomatically, providing one bidder a voice in shaping the ITN, providing one bidder advance notice of the ITN terms, and allowing that bidder to develop a relationship with the individuals who evaluate the bid and participate in the negotiation denies fair competition and places the bidders on unequal footing. Allowing the Spectra negotiating team to tour the University facilities before the negotiation session in violation of the ITN requirements, with University negotiation team member Mr. Hansen facilitating the tour, exacerbated the University's anti-competitive behavior." As a result, the ALJ recommended that UCF enter a final order declaring the ITN invalid and rejecting all proposals.

Constitutional Revision Commission Administrative Law Update

by Jowanna Nicole Oates

In 1968, the Florida Constitution was amended to create a commission to be convened after ten years and subsequently every twenty years, to examine the Constitution and suggest changes for consideration by the voters.[1] The first Constitutional Revision Commission (CRC) was convened in 1978; the second in 1998; and the third in 2017. The CRC began its work on March 20, 2017, and has held public meetings throughout the state and considered over 2,000 public proposals.[2]

Although none of the administrative law proposals submitted by the public advanced, an administrative law proposal submitted by Commissioner Roberto Martinez is currently moving through the process. Proposal 6 seeks to amend Article V of the Florida Constitution[3] by creating a new section 21:

> Section 21. Judicial interpretation of statutes and rules – In interpreting a state statute or rule, a state court or an administrative law judge may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo.[4]

The proposal echoes recent efforts by the United States Congress to legislatively overturn the United States Supreme Court's decision in *Chevron, USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).[5] In *Chevron*, the Court created a judicial framework for reviewing an agency's interpretation of a statute that it is authorized to administer:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-43.[6] The Court's decision in *Chevron* has been heavily criticized by academics, industry groups, and Supreme Court Justices Antonin Scalia, Clarence Thomas and Neil Gorsuch.[7]

Florida's Current Treatment of the Agency Deference Doctrine

Although Florida's appellate courts have not expressly adopted *Chevron*, the state's courts have extended similar deference to an agency's interpretation of a statute.[8] The First District Court of Appeal has explained the agency deference doctrine as follows:

> An administrative agency's interpretation of a statute that it applies is usually accorded substantial deference unless the interpretation is clearly erroneous. Under that doctrine, if the agency's interpretation is one of several permissible interpretations, it must be upheld despite the existence of reasonable alternatives.
>
> This court recognizes exceptions to the general rule. First, a court need not defer to an agency's construction or application of a statute if special agency expertise is not required. Similarly, a court need not defer to an agency's construction if the language of the statute is clear and therefore not subject to construction.

Doyle v. Dep't of Bus. Reg., 794 So. 2d 686, 690 (Fla. 1st DCA 2001). *See also Verizon v. Jacobs*, 810 So. 2d 906, 907 (Fla. 2002). Additionally, Florida's appellate courts defer to an agency's interpretation of its own adopted rule. *See, e.g., Baptist Hospital, Inc. v. Dep't of Health & Rehab. Servs.*, 500 So. 2d 620 (Fla. 5th DCA 1986).

However, administrative law judges (ALJs) are not required to give deference to an agency's interpretation of a statute or a rule. Unlike appellate courts, ALJs do "not merely find the facts and supply the law, as would a court. The hearing officer 'independently serves the public interest by providing a forum to expose, inform, and challenge agency policy and discretion.'" *McDonald v. Dep't of Banking & Finance*, 346 So. 2d 569, 583 (Fla. 1st DCA 1977). The decision in *The Public Health Trust of Miami-Dade County v. Department of Health* further illustrates why ALJs are not required to adhere to the agency deference doctrine:

> Unlike the judiciary, ALJs are participants in the decision-making processes that lead to administrative interpretations of statutes and rules—the very administrative interpretations to which courts defer. The ALJ's duty is to provide the parties an independent and impartial analysis of the law with a view towards helping the agency make the correct decision. In fulfilling this duty, the ALJ should not defer to the agency's interpretation of a statute or rule, as a court would; rather, the ALJ should make independent legal conclusions based upon his or her best interpretation of the controlling law, with the agency's legal interpretations being considered as the positions of a party litigant, entitled to no more or less weight than those of the private party. Otherwise, whenever a private litigant is up against a state agency and the outcome depends upon the meaning of an ambiguous statute or rule administered by that agency, the agency's thumb would always be on the scale, even during the putatively de novo administrative hearing, and the non-agency party's interpretive

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> arguments would never be heard by a judge who could be completely neutral in deciding such questions of construction.

Case No. 15-3171 (DOAH Feb. 29, 2016) at ¶ 119. Similarly, the ALJ in *Associated Industries of Florida, Inc. v. Department of Environmental Protection*, Case No. 16-6889 (DOAH Dec. 30, 2016) at ¶ 37, explained that deference to an agency's statutory interpretation was a "judicial principle" and chapter 120, Florida Statutes, does not require ALJs to provide such deference.

Questions Raised by Proposal 6

1) Would use of the de novo standard of review eliminate constitutional concerns associated with the agency deference doctrine?

Critics of the agency deference doctrine often contend that judicial deference to an agency's interpretation of a statute or rule violates a litigant's right to due process.[9] The Florida Supreme Court has explained that due process requires that litigants be afforded adequate notice and the opportunity to be heard. *See Scull v. State*, 569 So. 2d 1251, 1252 (Fla. 1990). Arguably, due process is implicated by the agency deference doctrine because it results in an agency's interpretation of a statute or rule being clothed with the presumption of correctness in a proceeding in which the agency is a party.[10] This is arguably unfair to the non-agency litigant. *See, e.g., Pedraza v. Reemployment Assistance Appeals Comm'n*, 208 So. 3d 1253, 1257 (Fla. 3d DCA 2017) (Shepherd, J., concurring) (opining that courts "should not be so quick to embrace a course of conduct that results in systemic bias towards one of the parties."). In other types of proceedings, a court is not permitted to "favor" one party over another.

Then-Judge Neil Gorsuch, writing in a concurring opinion, opined that replacing judicial deference to an agency's statutory interpretation with de novo review would remedy the due process issues raised by the deference doctrine:

> [D]e novo judicial review of the law's meaning would limit the ability of an agency to alter and amend existing law. It would avoid the due process and equal protection problems of the kind documented in our decisions. It would promote reliance interests by allowing citizens to organize their affairs with some assurance that the rug will not be pulled from under them tomorrow, the next day, or after the next election. And an agency's recourse for a judicial declaration of the law's meaning that it dislikes would be precisely the recourse the Constitution prescribes—an appeal to higher judicial authority or a new law enacted consistent with bicameralism and presentment.

Gutierrez-Brizuela v. Lynch, 834 F. 3d 1142, 1158 (10th Cir. 2017) (Gorsuch, J., concurring).

Another argument against judicial deference to an agency's interpretation of a statute or rule is that such deference violates the separation of powers doctrine.[11] The separation of powers doctrine has been strictly applied by the Florida Supreme Court, to prevent one branch of government from encroaching on the power of another and to prevent one branch of government from delegating its power to another branch. *See Whiley v. Scott*, 79 So. 3d 702, 708-09 (Fla. 2011). There is concern that judicial deference to an agency's interpretation of a statute or rule, results in judges delegating their authority to interpret the law to the executive branch. *See, e.g,. Talk America, Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 68 (2011) ("It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well.") (Scalia, J., concurring). *See also Pedraza*, 208 So. 3d at 1257 (Shepherd, J., concurring).

However, proponents for the status quo also express separation of powers concerns stemming from judges deciding policy. For example, in *Chevron*, the Court opined that in cases where there is statutory ambiguity, "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones…." 467 U.S. at 866. *See also* John C. Cruden, Assistant Attorney General, Remarks on the Enduring Nature of the Chevron Doctrine at the D.C. Bar's Administrative Law and Agency Practice Committee's Harold Leventhal Lecture (Nov. 10, 2015) (explaining that the delegation of authority to agencies makes sense due to the agencies' "political accountability and responsiveness."). Similarly, the Florida Supreme Court has stated that under Article II, section 3 of the Florida Constitution, policy decisions are to be made by the Legislature. *See, e.g., Askew v. Cross Key Waterways*, 372 So. 2d 913, 925 (Fla. 1978).

2) Would the proposal increase the complexity of the rule adoption process?

Advocates of the agency deference doctrine maintain that the judicial deference is necessary due to the complex nature of rulemaking. Although

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the Florida Legislature is prohibited from delegating its authority to another of branch of government,[12] some degree of delegation is often necessary:

> Subordinate functions may be transferred by the legislature to permit administration of legislative policy by an agency with the expertise and flexibility needed to deal with complex and fluid conditions. Otherwise, the legislature would be forced to remain in perpetual session and devote a large portion of its time to regulation. "Obviously, the very conditions which may operate to make direct legislative control impractical or ineffective may also, for the same reason, make the drafting of detailed or specific legislation impractical or undesirable."

Microtel, Inc. v. Fla. Public Serv. Comm'n, 464 So. 2d 1189, 1191 (Fla. 1985) (citations omitted). An example of the complexity of regulation is the number of rules adopted per year by Florida's agencies versus the number of bills passed by the Legislature. Last year, Florida's agencies adopted 1760 rules; in comparison, the Legislature passed 249 bills.[13]

Conversely, in reviewing concerns with a similar federal proposal to replace the agency deference doctrine with de novo review, the dissenting view of the United States House of Representatives Judiciary Committee observed:

> Leading administrative law experts generally agree that abolishing judicial deference to agencies' interpretations of their statutory authority would make the rulemaking process more costly and time-consuming. Heightened review would force agencies to adopt more detailed factual records and explanations, effectively imposing more procedural requirements on agency rulemaking, which is already burdened by procedural delays.

H.R. Rep. No. 114-622, at 27 (June 14, 2016). However, Florida currently requires agencies to compile a rulemaking record "in all rulemaking proceedings." *See* § 120.54(8)(a)-(h), Fla. Stat. (2017). Since section 120.54(8), Florida Statutes, requires an agency to compile a fairly extensive rulemaking record, it is unclear how the de novo standard would add time to the rulemaking process.

3) Is the proposal necessary?

A final argument that the CRC will have to consider is whether Proposal 6 is necessary. In Florida, courts are not required to defer to an agency's interpretation of a statute, because in reviewing ambiguities, courts generally use canons of statutory construction. *See, e.g., Bautista v. State*, 863 So. 2d 1180, 1185 (Fla. 2003) ("Legislative intent is the polestar that guides a court's statutory construction analysis."). Additionally, the Legislature is always free to revisit a statute or to pass a new statute, where agency rulemaking reveals a gap in statutory authority. For example, in *Associated Industries of Florida, Inc. v. Department of Environmental Protection*, the ALJ invalidated a rule that required companies to notify the public of a pollution release within 24 hours after release, because the agency did not have authority to adopt the rule and the rule enlarged the statutes cited as law implemented. *See* DOAH Case No. 16-6889 (Dec. 30, 2016) at ¶¶ 33 and 39. In response, the Legislature passed the Public Notice of Pollution Act the next session, which gave the Department the authority needed to adopt rules related to public notification of pollution events. *See* Ch. 2017-95, Laws of Fla.

Conclusion

There are compelling arguments for preserving the agency deference doctrine and for replacing the doctrine with de novo review. Proposal 6 has passed its committees of reference and is ready for consideration by the full commission. In order for a proposal to be placed on the November 6, 2018, general election ballot, it must receive approval from 22 members of the full commission.[14] The CRC must submit its final report to the Department of State no later than May 10, 2018.[15] A proposal placed on the ballot must be approved by at least 60% of the electors voting on the proposal.[16] The issues identified by this article and others will be considered by the CRC as the process continues. If you wish to follow the proposal, the CRC has announced that it will hold additional hearings across the state in March 2018 in order to allow for citizen input and CRC meetings are always livestreamed on the Florida Channel.

Jowanna Nicole Oates *is a Chief Attorney with the Joint Administrative Procedures Committee. She is the immediate past chair of the Administrative Law Section, serves as a co-editor of the Administrative Law Section Newsletter, and is a member of The Florida Bar Continuing Legal Education Committee. She earned her J.D. from the University of Florida Frederic G. Levin College of Law.*

The views expressed herein are those of the author and not intended to reflect the views of the Joint Administrative Procedures Committee or the Florida Legislature.

Endnotes

1 *See* Article 11, section 2, of the Florida Constitution for provisions related to the current operation of the CRC.

2 Out of the 2,000 proposals, only six public proposals were advanced. *See CRC Takes Up Six Citizen Proposals*, Florida Bar News, Nov. 15, 2017. Several administrative law proposals were submitted by the public for consideration by the CRC. *See, e.g.,* Public Proposals N. 700077—Nullification of Administrative Rules (legislative nullification of agency rules by joint resolution); Public Proposal N. 700686—Jurisdiction of District Court of Appeal (prohibition on the Legislature passing a law to require administrative appeals to be heard by a district court of appeal outside the jurisdiction of the order being appealed).

3 Commissioner Martinez at the CRC Executive Committee meeting held on February 2, 2018, noted that the proposal, if approved, should be placed in Article II, section 3, of the Florida Constitution.

4 The de novo standard of review has been described as "free review" because the appellate court is not required to give deference to the lower court's decisions of law. *See* Harvey J. Sepler, *Appellate Standards of Review*, 73 Fla. B. J. 11, 49 (Dec. 1999).

5 *See, e.g.,* Separation of Powers Restoration Act (SOPRA), H.R. 4768, 114 Cong. § 3 (2016); Regulatory Accountability Act of 2017, H.R. 5, 115 Cong. § 202 (2017).

continued...

CONSTITUTIONAL REVISION

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[6] The United States Supreme Court has afforded similar deference to an agency's interpretation of a regulation. *See Auer v. Robbins*, 519 U.S. 452 (1997),

[7] *See* Jowanna Nicole Oates, *Saying Goodbye to Chevron and Auer? New Developments in the Agency Deference Doctrine*, 91 Fla. B. J. 6 (June 2017), for an examination of recent decisions criticizing the agency deference doctrine and congressional efforts to overturn the decisions.

[8] Section 120.68(7)(e), Florida Statutes, prohibits a court from "substitut[ing] its judgment for that of the agency on an issue of discretion." *See, e.g., Dreyer v. Fla. Real Estate Comm'n*, 370 So. 2d 95 (Fla. 4th DCA 1979).

[9] Article I, section 9 of the Florida Constitution, provides: "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself."

[10] *See Bd. of Optometry v. Florida Soc. of Ophthalmology*, 538 So. 2d 878, 889 (Fla. 1st DCA 1988) (stating that once a rule "has been issued and acted or relied upon by the agency or members of the public in conducting the business of the agency, the rule will be treated as presumptively valid, or merely voidable, and must be given legal effect until invalidated in a section 120.56 rule challenge proceeding."). However, it should be noted that section 120.56(2)(c) provides: "When any substantially affected person seeks determination of the invalidity of a **proposed rule** pursuant to this section, the proposed rule is not presumed to be valid or invalid." (emphasis added). *See* § 16, Ch. 96-159, Laws of Fla.

[11] The separation of powers doctrine is found in Article II, section 3, of the Florida Constitution: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

[12] *See Bush v. Schiavo*, 885 So. 2d 321, 332 (Fla. 2004) (observing that the non-delegation doctrine requires statutes to contain "adequate guidelines and criteria.").

[13] *See* Fla. J. Admin. Procs. Comm., *2017 Annual Report*, available at japc.state.fl.us; Fla. Leg. Div. of Law Rev. & Info., *Florida Legislature – Regular Session 2017 Statistics Report*, available at http://www.leg.state.fl.us/data/session/2017/citator/Daily/stats.pdf.

[14] *See* Const. Revision Comm'n R. 5.4 (4) (2017-2018).

[15] *See* FLA. CONST. art. XI, §2(c).

[16] *See* FLA. CONST. art. XI, §5(e).

Agency Snapshot: Agency for State Technology

by Rachelle Munson

Background:

The Agency for State Technology (AST), established in 2014, is Florida's newest state agency. AST was established to develop and publish information technology policy for the management of the state's information technology resources, oversee the state's essential technology projects, manage the State Data Center (SDC), and to house Florida's Chief Information Officer. Through collaborative partnerships with both public and private sector, AST is able to maximize IT resources and save taxpayer dollars by delivering more efficient and effective enterprise customer services to the Sunshine State. AST holds as its mission to achieve success through technology and its vision is to be the national leader in government technology. Since rulemaking is not a matter of agency discretion, the agency initiates rulemaking as prescribed by applicable law. Based on the agency's 2017-2018 regulatory plan, AST expects to implement rulemaking in substantive areas.

In addition to various full-time positions, including a general counsel and senior attorney who oversee the legal issues for the agency, a Technology Advisory Council was also established within the agency to consider and make recommendations to the Executive Director on such matters as enterprise information technology policies, standards, services, and architecture.

Executive Director / Chief Information Officer:

Eric Larson was appointed as the Executive Director/Chief Information Officer for AST on March 7, 2017. As the Chief Information Officer (CIO), Mr. Larson sets information technology policy and direction for the State of Florida. The CIO is an advisor to the Governor on technology issues. Before joining the agency, Mr. Larson was the Chief of Distributed Infrastructure at the Department of Financial Services and led numerous internal initiatives, in addition to architecting and implementing a permanent multi-site Disaster Recovery for mainframe applications. Together with the Governor's Office of Policy and Budget, Mr. Larson focuses on bringing a "big picture" view of agency investments and strategies, assuring that agency investments fit into an enterprise view of IT.

Chief Information Security Officer:
Thomas Vaughn

Chief Data Officer:
Burt Walsh

Geographic Information Officer:
Ekaterina Fitos

Inspector General:
Tabitha McNulty

Legislative Affairs and Communications:
Erin Choy

General Counsel:
Anthony Miller

Governing Statutes and Rule:
Chapter 282, Florida Statutes
Section 20.61, Florida Statutes
Rule Division 74, Florida Administrative Code

Headquarters Address and Contact Information:
Agency for State Technology
4050 Esplanade Way
Suite 115
Tallahassee, FL 32311
Phone: 850-412-6050
info@ast.myflorida.com

State Data Center Location:
2585 Shumard Oak Boulevard
Tallahassee, FL 32399
Main Number: 850-413-9306

Public Records Custodian:
Erin Choy
4050 Esplanade Way
Suite 115
Tallahassee, FL 32311
Email: Erin.Choy@ast.myflorida.com
Phone: (850) 412-6050

Law School Liaison

Spring 2018 Update from the Florida State University College of Law

by David Markell, Steven M. Goldstein Professor

This column highlights recent accomplishments of our College of Law students. It also lists the rich set of programs the College of Law has hosted and will be hosting during the spring 2018 semester. We hope section members will join us for one of more of our upcoming programs.

Recent Student Achievements

- Christina Behan, Stephen Cunningham, William Hamilton, Stuart Nincehelser, and Guerline Rosemond have had the special opportunity this year to engage in externships with the Florida Constitution Revision Commission, a body appointed every 20 years to solicit, research, and process proposals for amending the state constitution. Students have assisted with legal research, analysis, and redrafting of the proposals, and drafting of ballot measures for consideration by the Florida Supreme Court before being voted on by the public.
- Several students participated in administrative, environmental, or land use law externships in the Fall 2017 semester:
  - Abrianne Brookins, Department of Business and Professional Regulation
  - Isabelle Campbell, Tallahassee City Attorney
  - Jessica Farrell, Earthjustice
  - Janaye Garrett, NextEra/Florida Power & Light
  - Julianne Haun, Attorney General—State Programs
  - Kaitlynne Wilson, Attorney General—State Programs
  - Cecilia Orozco, Executive Office of the Governor—Office of the General Counsel
  - Jessica Rodriguez, Division of Administrative Hearings
  - Michelle Snoberger, Florida Housing Finance Corporation
  - Mykhaylo Vzevolodskyy, Attorney General—Consumer Protection
- The following students will be working as administrative, environmental, or land use law externs this spring:
  - John Barr, Department of Economic Opportunity
  - Taylor Birster, Tallahassee City Attorney
  - Marlie Blaise, Public Employees Relations Commission
  - Shannon Brophy, Department of Health
  - Rachel Eilers, Department of Health
  - Andrew Faris, Department of Health
  - Kody Glazer, Leon County Attorney
  - Mark Johnson, Department of Financial Services
  - Giselle Justo, Department of Transportation
  - Nico Kairies, Division of Administrative Hearings
  - Annalise Kapusta, Division of Administrative Hearings
  - Sarah Korkuc, Department of Financial Services
  - Ashlee Polfer, Blueprint Intergovernmental Agency
  - Carly Simpson, Division of Administrative Hearings
  - Tian Wu, Florida Housing Finance Corporation
- The College of Law has created a new externship opportunity this spring for a student to work with the lawyers at the Florida Association of Counties in Tallahassee on issues of importance to county attorneys throughout the state.
- Several students have earned prestigious scholarships relating to administrative, environmental, or land use law. Congratulations to this year's Goldstein Scholarship recipients: Keeley McKenna, Valerie Chartier-Hogancamp, and Joshua Funderburke, and also to this year's McLear Scholarship recipients: Jill Bowen, Kacey Heekin, Jennifer Mosquera, and Hannah Rogers.
- We are delighted that several students have had their scholarship accepted for publication: James Brent Marshall, "Geoengineering: A Promising Weapon or an Unregulated Disaster in the Fight Against Climate Change?," Michael Melli, "Policy Mechanisms, Precedent, and Authority For State Implementation of Climate Change Agendas," and Jessica Farrell, "The Centennial Shakeup: Is the National Park Service losing its ability to manage and create Aquatic Preserves?," will be published in 33:2 *Journal of Land Use and Environmental Law* (forthcoming 2018).

Valerie Chartier-Hogancamp's note, "Analysis of Indirect and Cumulative Impacts: Do the Sierra Club v. FERC Opinions Signal a Limitation of NEPA's Reach?," was published in 32 *Journal of Land Use and Environmental Law* (2017).

- The *Journal of Land Use and Environmental Law* is pleased to announce that Volume 32:2 Spring 2017 Issue has been published and distributed. The volume features articles from recent FSU College of Law Distinguished Environmental Lecturers Professor Carol Rose and Professor Robert V. Percival. It also includes articles from the College of Law's *Environmental Law Without Courts Symposium* by Professor Eric Biber, Professor Robin Kundis Craig and

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LAW SCHOOL LIAISON
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Catherine Danley, Professor Erin Ryan, Professor Sarah E. Light, Professors Robert L. Glicksman and Emily Hammond, Professor David L. Markell, Professor Hannah J. Wiseman, Professor Christopher J. Walker, Professor Arden Rowell, and Professor Mark Seidenfeld. The volume also features comments by Professor Shi-Ling Hsu and Professor Donna Christie.

Spring 2018 Events

The College of Law has a full slate of administrative law events and activities on tap for the spring semester.

Spring 2018 Environmental Distinguished Lecture

Thomas Merrill, Charles Evans Hughes Professor of Law, Columbia Law School presented our Spring 2018 Distinguished Lecture, entitled "The Supreme Court's Regulatory Takings Doctrine: Common-Law Constitutionalism Runs Aground." Professor Merrill's lecture on February 7, 2018.

Environmental Certificate and Environmental LL.M. Enrichment Lectures

Justin Pidot, Associate Professor with Tenure, University of Denver Sturm College of Law, presented on January 24, 2018.

Daniel Raimi, Senior Research Associate, Resources for the Future, and Lecturer, University of Michigan Gerald R. Ford School of Public Policy, presented on February 21, 2018.

Mariana Fuentes, Assistant Professor, Florida State University, Earth, Ocean and Atmospheric Science Department, will be speaking on Wednesday, March 28, 2018, from 12:30 – 1:30 p.m. in room 310.

Spring 2018 Environmental Student Colloquium

The FSU College of Law Environmental, Energy and Land Use Law program will hold its annual Spring Colloquium for student papers on Wednesday, April 4, 2018, in room A221 of the Advocacy Center. This is an opportunity for students to be recognized for their research and writing achievements, for them to give a short presentation of their work, and to get feedback on their hard work. More information, including the names of the student presenters, will be announced.

Environmental Law Society Recent Events

On September 26, 2017, the Environmental Law Society (ELS) organized a career panel that featured professionals with diverse backgrounds and impressive careers in Environmental law. Participants included Jason Wiles, President and CEO at 7G Environmental Compliance Management, LLC, Ronni Moore, staff attorney with the House of Representatives, Anne Harvey-Holbrook, staff attorney at Save the Manatee, Bud Vielhauer, general counsel with the Florida Fish and Wildlife Conservation Commission, and Ralph DeMeo, shareholder at Hopping, Green, and Sams.

The ELS and the Student Animal Legal Defense Fund (SALDF) hosted Standing for Endangered Species on November 2, 2017. Anne Harvey-Holbrook, staff attorney from Save the Manatee, spoke regarding animal standing in other countries versus their standing in the United States, with a focus on manatees.

The ELS and the SALDF partnered with Pets Ad Litem (PAL) for the Twelfth Annual Puppies in the Pool event. All donations from the dog wash went to the City of Tallahassee animal shelter.

The ELS and the SALDF also worked with Pets Ad Litem as part of the City of Tallahassee's beautification project. Pets Ad Litem has adopted Easterwood Drive. This effort saves taxpayer dollars by reducing the need for the city to pick up litter. The ELS and the SALDF were glad to be a part of helping beautify Tallahassee while changing people's attitudes about litter.

Student Animal Legal Defense Fund (SALDF) Recent Events

Members of the SALDF attended the 25th National Animal Law Conference in Portland, Oregon. This three-day event included the inaugural Animal Legal Defense Fund Student Convention. Topics included animals as victims of criminal offenses, animal sanctuaries, and the worldwide growth of animal law.

The SALDF hosted a screening of "Unlocking the Cage" on September 27, 2017. This documentary follows animal rights lawyer Steven Wise and The Nonhuman Rights Project legal team in their unprecedented court challenge to break down the legal wall that separates animals from humans. This event was open to the public and featured a Q & A with Kevin Schneider, an attorney with the Non-Human Rights Project and a College of Law alumnus. The following day, the SALDF hosted an animal law panel for law students featuring Kevin Schneider, Ralph DeMeo (with Pets Ad Litem and the Animal Law Section of The Florida Bar), and Professor Sam Weisman.

The SALDF hosted a meeting regarding Pet Trusts on October 19, 2017. FSU College of Law alumnus Max Solomon, from Hueler-Wakeman Law Group, discussed how lawyers can help their clients financially plan for their four-legged and winged loved ones.

Every year, the Leon County Humane Society hosts Walk and Wag: Humane Heroes. Humane Heroes brings our community together to speak for those who have no voice of their own. The SALDF created a team of over 16 members, both students and alumni, and raised $900.00. The SALDF was awarded the United Fur Justice Award for its contribution.

Information on upcoming events is available at http://law.fsu.edu/academics/jd-program/environmental-energy-land-use-law/environmental-program-events. We hope Section members will join us for one or more of these events.

Administrative Law Section

ADMINISTRATIVE LAW SECTION
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(Item # 8011001)

This is a special invitation for you to become a member of the Administrative Law Section of The Florida Bar. Membership in this Section will provide you with interesting and informative ideas. It will help keep you informed on new developments in the field of administrative law. As a Section member you will meet with lawyers sharing similar interests and problems and work with them in forwarding the public and professional needs of the Bar.

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Note: The Florida Bar dues structure does not provide for prorated dues. Your Section dues cover the period from July 1 to June 30.

For additional information about the Administrative Law Section, please visit our website:
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FLORIDA EVIDENCE CODE
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in which the Florida Evidence Code does not apply; there sure are a lot of rules about evidence!) But, if rules of evidence are now to be used at the presiding officer's "discretion," what becomes our evidentiary standard? Did *Florida Industrial* revise our ground rules for administrative hearings? Has the Supreme Court laid out a new evidentiary barometer? Should Administrative Law Judges ("ALJs") and agency hearing officers now consider referencing the Florida Evidence Code prior to excluding any evidence?

Actually, the precept presented in *Florida Industrial* is rather straightforward. The Supreme Court did not tell us WHAT the rules of evidence are for administrative proceedings. It advised us HOW we may use them.

Administrative proceedings are governed by the Administrative Procedure Act found in chapter 120, Florida Statutes. The admissibility of evidence in administrative hearings is articulated in section 120.569(2)(g), which states:

> *Irrelevant*, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly *relied* upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida.

Fla. Stat. (2017) (emphasis added). So, there it is. Simply stated, to be admissible in chapter 120 evidentiary hearings, evidence must meet two requirements. It must be (1) *relevant*, and it must be (2) *reliable*.

ALJs are tasked to make express findings of fact. In order to do so, ALJs must ensure that their findings are based solely on the competent substantial evidence they allow into the record. Whether a document or testimony is "relevant" to the ultimate disputed issue is generally straightforward. (Although, often the relevancy/irrelevancy question is not made clear until after all the evidence is admitted.) As far as admitting evidence that is "commonly relied upon by reasonably prudent persons," I customarily adhere to the sapient advice from one of my esteemed colleagues, who proclaimed: "I consider myself the most 'reasonable prudent person' in the room. Therefore, I must be sufficiently satisfied that I can rely upon the evidence in order to make my findings of fact."

So, how does *Florida Industrial* fit into our chapter 120 evidentiary framework? The *Florida Industrial* ruling focuses on the second prong, reliability. In other words, administrative practitioners may use the Florida rules of evidence to attack or support whether documents or testimony are sufficiently *reliable* to support a finding of fact.

To explore how this concept works in practice, let's consider the following scenario. Say that during an administrative hearing, a party, who is charged with misconduct, seeks to introduce a photograph of dubious origin, which he represents exonerates him of any wrongdoing. The opposing attorney might (appropriately) object and argue that the Florida Evidence Code requires the necessary foundation to be laid before evidence is admitted in Florida courts. (In other words, a witness with knowledge must testify that the photograph is a fair and accurate representation of the scene that it depicts.) Therefore, the photograph is simply not *reliable* enough for the ALJ (the most "reasonable prudent person" in the room) to use as a basis for a factual finding. Thereafter, the ALJ, using his or her discretion, might declare, "Objection well made! In light of Florida rules of evidence, the photograph is not reliable enough for me to admit under section 120.569(2)(g). Therefore, I will not make any findings of fact based on the information it might portray."

Conversely (and just as significantly), a party might counter any objections to entering a photograph by announcing that a witness who is familiar with the photograph will authenticate the scene depicted in the picture. Therefore, the photograph is reliable enough for the ALJ to admit into the evidentiary record. (This same concept can be seen in section 120.57(1)(c), Florida Statutes, which allows hearsay to be used to support a finding of fact if the evidence would be admissible over objection in civil actions. Evidence that meets a hearsay exception in sections 90.803 or 90.804, Florida Statutes, is quite likely reliable enough for the presiding officer to use as a basis for a factual finding.)

In sum, the Supreme Court in *Florida Industrial* did not revise or modify the rules of evidence for administrative proceedings. Instead, the Supreme Court provided guidance to administrative practitioners and presiding officers on how to apply the Florida Evidence Code in the context of chapter 120 evidentiary hearings. To be admissible, section 120.569(2)(g) directs that evidence must meet two criteria; it must be: 1) relevant, and 2) reliable. The provisions of the Florida Evidence Code may be used to help determine the reliability of documents or testimony that is introduced into the record.

Bruce Culpepper *has served as an Administrative Law Judge since 2015. Judge Culpepper attended the University of Florida for both his undergraduate degree (history) and his law degree. After graduating law school, Judge Culpepper began his law practice in the United States Air Force as a Judge Advocate General. In 1997, he returned to his home town of Tallahassee and entered private practice where he concentrated on commercial, administrative, and appellate litigation. In 2010, Judge Culpepper went back into public service and joined the Florida Department of Financial Services. The following year, he moved to the Florida Office of Insurance Regulation where he handled a broad array of administrative litigation and regulatory matters. Judge Culpepper is currently serving as a Judge Advocate in the Florida Army National Guard. Among Judge Culpepper's community activities, he has been involved in the William H. Stafford Inns of Court, Leadership Tallahassee, Boy Scouts, Florida Blue Key Leadership Honorary Society, and the Tallahassee Camellia Society.*

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