ADMINISTRATIVE LAW SECTION
Newsletter
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Titans of Administrative Law

by Virginia Ponder

Titan
n
2. one that is gigantic in size or power: one that stands out for greatness of achievement

Merriam-Webster.com.

Retrieved March 26, 2017, from https://www.merriam-webster.com/dictionary/titan

This article spotlights three seasoned attorneys who focus their practice on administrative law. All three are among the finest examples of administrative advocacy. The goal of this article is to share not only little anecdotes of practice, but also, something of their person and character. Emerging during each discussion was an unmistakable enthusiasm for their profession and the diversity of issues afforded by the practice of administrative law. Additionally, all possess qualities every lawyer would do well to master to ensure a long sustainable career--poise, integrity, compassion, and discipline. I am grateful to each for their time, the conversation, and conviviality.

Donna E. Blanton
The Radey Law Firm

Blanton moved to the Sunshine State from Kings Mountain, North Carolina when she was in the tenth grade, finishing high school in Ormond Beach. Blanton earned a degree in journalism from the University of Florida and worked as a journalist with the Orlando Sentinel, covering politics and government for about eleven years. For Blanton, leaving the field of journalism to pursue a legal career felt like an organic

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From the Chair

by Jowanna N. Oates

With a feeling of pride and a tinge of sadness, I submit my last chair's column. In keeping with the tradition of past chairs, I would like to take this opportunity to recognize and thank those individuals who have been responsible for the Section's success this year.

At the start of this Bar year, I announced that the Section's primary goals were recruitment, reclamation, and retention. I am pleased to report that the Section's membership has slightly increased. Although we have seen growth, there is still much work left to do. I truly believe that the Section is capable of reaching a membership of at least 1,500 lawyers, as there are a number of Bar members whose practices touch on some aspect of federal or state administrative law, but who are not yet Section members.

This year, the Section sponsored several excellent continuing legal education (CLE) courses: the Pat Dore Administrative Law Conference; a program on solar energy and renewables in Gainesville, Florida; a webinar on basic administrative law in conjunction with the Young Lawyers Division; and an advanced-level program produced in conjunction with the Environmental and Land Use and Government Lawyers Sections. Bruce Lamb, the Section's long-serving CLE committee chair, has done a tremendous job organizing this year's programs. It appears that the Section will see a profit from this year's courses, thanks to the fantastic work of program chairs Judge Cathy Sellers, Patty Nelson, Cindy Miller, Michael Cooke, and Stephen Emmanuel.

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FROM THE CHAIR
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Judge Elizabeth McArthur continues to do an outstanding job as co-editor of the newsletter. Additionally, Judge McArthur, along with Judge Scott Boyd and Judge Li Nelson, are responsible for working with the Bar to update the *Florida Administrative Practice Manual*. Even with her busy schedule, Judge McArthur's amazing attention to detail ensures that each issue of the newsletter is top-notch. It has been a joy working as her co-editor for the past few years and I am thankful for her knowledge, wit, and insight. I would also like to thank all of the authors who submitted articles to the newsletter this year: Judge John Van Laningham, Paul Drake, Francine Folkes, Judge Suzanne Van Wyk, Richard Shoop, Gregg Morton, Tiffany Roddenberry, and Virginia Ponder. I cannot let this opportunity go by without saluting the newsletter's regular contributors: Tara Price, Gigi Rollini, and Larry Sellers (Appellate Case Notes); Judge Gar Chisenhall, Paul Rendleman, Christina Shideler, Virginia Ponder, Brittany Griffith, Dustin Metz, and Katie Sabo (DOAH Case Notes); and Professor Dave Markell (Florida State University College of Law Update).

This year, Stephen Emmanuel has gone above and beyond as co-chair of the Section's publications committee and the editor of Section articles for *The Florida Bar Journal*. I truly believe that publishing articles in *The Florida Bar Journal* should be a top priority of any section, because it raises the section's visibility to the rest of the Bar's membership. Under Stephen's leadership, the Section published informative articles in nearly every issue of *The Florida Bar Journal*. I would like to recognize the members who had articles published in *The Florida Bar Journal* this year: Larry Sellers, H. French Brown IV, Brittany Adams Long, E. Dylan Rivers, Diane S. Perera, Erik G. Ross, and Gregory Pitt.

For the past several years, the Section has made a determined effort to increase interest in administrative law and the Section by engaging with the state's 12 law schools. The law school outreach committee, chaired by Judge Lynne Quimby-Pennock and co-chaired by Vilma Martinez and Sharlee Hobbs, put together informative panel discussions at the University of Florida Levin College of Law, Thomas M. Cooley School of Law, Barry University School of Law, University of Miami School of Law, St. Thomas University School of Law, Florida Coastal College of Law, Florida A&M University College of Law, and Florida State University College of Law. I truly appreciate each Section member who took time out of their busy schedule to talk to the students. It should be noted that Judge Quimby-Pennock attended the majority of the networking noshes. The Section owes Judge Quimby-Pennock a debt of great gratitude for introducing administrative law and the Section to the next generation of lawyers.

I would like to extend my eternal gratitude to all of the executive council members, committee chairs, and liaisons for all of their assistance this year: Francine Folkes, Gigi Rollini, Colin Roonarine, Fred Springer, Judge Lynne Quimby-Pennock, Judge Suzanne Van Wyk, Amy Schrader, Fred Dudley, Stephen Emmanuel, Clark Jennings, Bruce Lamb, Patty Nelson, Dan Nordby, Christina Shideler, Michael Cooke, Cindy Miller, Judge John Van Laningham, Paul Drake, Judge Robert Kilbride, Ralph DeMeo, Gregg Morton, and Timisha Brooks. Also, a very special thank you to former Section chair (and current legislative committee chair) Linda Rigot for all of her hard work.

There are four individuals who ensure that all of the Section's essential functions are carried out. I am beyond thankful for this group--the Section's officers--for everything that they have done this year. It has been a pleasure working with Judge Gar Chisenhall, the incoming chair-elect, who does not possess the ability to say "no" when it comes to Section work. The Section is lucky to have such a committed member. As treasurer, Brian Newman kept a keen eye on the Section's finances, and I know that he will be just as conscientious as the Section's newly elected secretary. I am grateful for Robert Hosay's willingness to serve as a sounding board; the Section will benefit greatly from the wealth of experience that he brings to the position of chair. Last, but definitely not least, I must recognize our immediate past chair, Richard Shoop. Richard continues to be one of the Section's leading members. Instead of resting on his laurels, Richard stepped up to chair the nominating and ad hoc bylaws committees, served as a panelist and steering committee member for the Pat Dore Administrative Law Conference, all while writing periodic columns for the newsletter. I always say that Richard sets the standard for the rest of us.

The Section's Florida Bar Board of Governors liaison, Larry Sellers, has done a superb job of keeping us informed about the Bar's activities. Larry does more than serve as our Board of Governors liaison--he attends executive council meetings, presents at CLE programs, and writes for the newsletter and *The Florida Bar Journal*. We are beyond fortunate to have an involved and dedicated Board of Governors liaison and Section member.

In closing, I would like to recognize my supervisor, Ken Plante, who has lent me a great deal of support during my term as chair. Similarly, Calbrail Banner, the Section's administrator, has been a source of knowledge and support from day one. Calbrail truly does the Section's "heavy lifting" and without her we could not function. Calbrail has worked hard to keep the Section's expenses down at events without sacrificing comfort or quality. Finally, I would be remiss if I did not extend a sincere and heartfelt "thank you" to Judge Scott Boyd. Without Judge Boyd's invitation to an executive council meeting in 2010, I don't know if I would have become an active member of the Section.

As my term as chair ends, I encourage you to get involved with the Section by: (1) attending an executive council meeting; (2) serving on a committee; (3) attending a live CLE program; and (4) writing an article for the newsletter and *The Florida Bar Journal*. I plan on doing all of these things next year; I hope to see everyone else do the same! I will always be grateful to you for allowing me to serve as your chair. It has been an honor and privilege to lead one of the Bar's finest sections!

Appellate Case Notes

by Tara Price, Gigi Rollini, and Larry Sellers

Administrative Proceedings—No Sixth Amendment Right to Counsel

Weaver v. Dep't of Health, Bd. of Nursing, 42 Fla. L. Weekly D859 (Fla. 5th DCA Apr. 13, 2017).

Lisa Bonny Weaver sought review of a final order from the Department of Health, Board of Nursing (Board), permanently revoking her nursing license for violations of sections 456.072(1)(c) and 464.018(1)(d)2., Florida Statutes. Ms. Weaver argued that she received ineffective assistance of counsel during her administrative proceeding. The court held that Ms. Weaver's claim was "not a basis for reversal," as her ineffective assistance of counsel claim required a violation of the Sixth Amendment right to counsel. However, there is no Sixth Amendment right to counsel in administrative proceedings that involve the revocation of state-issued licenses.

Agency Statutory Obligations—Annual Reconciliation of Juvenile Detention Facility Assessments

Marion Cnty. v. Dep't of Juvenile Justice, 42 Fla. L. Weekly D765 (Fla. 1st DCA Apr. 4, 2017).

Section 985.686, Florida Statutes, establishes a cost-sharing system between Florida's counties and the Department of Juvenile Justice (Department). The Department adopted rule chapter 63G-1, Florida Administrative Code, to implement the provisions of section 985.686, and subsequently engaged in its annual reconciliation process. Several counties challenged the reconciliations for fiscal years 2009-2012 and the Department's rules. An ALJ ultimately found that the Department's rules were invalid and had resulted in the Department having overcharged the counties and the matter was appealed. For discussion and background, *see Okaloosa County v. Department of Juvenile Justice*, 131 So. 3d 818 (Fla. 1st DCA 2014), and page 1 of the June 2014 Administrative Law Section Newsletter.

After the rule challenge, the Department and counties entered into joint stipulations, wherein the Department acknowledged that its annual reconciliations were based on invalid rules and revised reconciliation amounts were published. The parties stipulated to relinquishing jurisdiction of the administrative challenges to the Department so that it could enter final orders incorporating the stipulations and revised reconciliations. However, the Department entered final orders that did not adopt the facts in the stipulations and unilaterally "corrected" its reconciliation calculations. Numerous counties appealed the Department's final orders. For a discussion of issues related to these actions affecting certain counties *see Pinellas County v. Department of Juvenile Justice*, 188 So. 3d 894 (Fla. 1st DCA 2016); *Broward County v. Department of Juvenile Justice*, 192 So. 3d 70 (Fla. 1st DCA 2016); and page 3 of the June 2016 Administrative Law Section Newsletter.

During this appeal, the Legislature in 2016 enacted section 985.6865, Florida Statutes. The system in section 985.6865 would allow the counties to recoup their prior overpayments in future years through a more favorable cost-sharing split, in exchange for dismissing all pending litigation. Seventeen of the counties voluntarily dismissed their cases. Appellants refused to dismiss their cases, since they did not benefit from the statute.

The Department argued that although Appellants could not be forced to dismiss their appeals, the court should dismiss the cases because no justiciable issues remained. The court disagreed and analyzed the issues raised by Appellants.

First, the court held that the Department was bound by its joint stipulation and was not authorized to unilaterally disregard those stipulations without seeking relief or withdrawal from the stipulations from DOAH. Although the Department argued that it could not be bound by stipulated facts that were based on a misinterpretation of law, the court concluded it would be "unfair and impermissible" to allow the Department to unilaterally reject the stipulations because the Department subsequently changed its interpretation of the law.

Second, the court held that under section 985.686, the Department had a clear duty to reconcile the counties' estimated and actual costs, and that the counties were only responsible for actual costs. The court then concluded that if the Department did not recognize Appellants' overpayments and take steps to resolve those overpayments, "the Department is not performing its duties under the statute," which "renders the reconciliation process in the statute meaningless." The court reasoned that although the statute and the rules did not address reimbursements, the Department still had a duty to provide a reconciliation process that was more than just a reconciliation on paper. The court noted that "[a]ny arguments as to where the money to repay the appellants must come from is beyond the scope of this opinion." Thus, the court reversed the Department's final orders, and held that the Department had "a statutory duty to actually reconcile the appellants' overpayment amounts" that were reflected in the stipulations.

Attorney's Fees—No Jurisdiction Following Dismissal

Agency for Healthcare Admin. v. Planned Parenthood of Sw. & Cent. Fla., Inc., 207 So. 3d 1032 (Fla. 1st DCA 2017).

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The Agency for Healthcare Administration (AHCA) filed three administrative complaints against Planned Parenthood. Planned Parenthood filed motions to dismiss the complaints but did not raise the issue of sanctions or attorney's fees. After the ALJ denied Planned Parenthood's motions to dismiss the complaints, AHCA voluntarily dismissed the complaints. Planned Parenthood then filed a motion requesting attorney's fees as a prevailing party under section 120.595(1), Florida Statutes. As AHCA did not qualify as a non-prevailing party under that statute, Planned Parenthood amended its motion and sought attorney's fees as a sanction under section 120.569(2)(e), Florida Statutes, and alleged that AHCA had filed the complaints for an improper or frivolous purpose. The ALJ entered an order setting an evidentiary hearing on Planned Parenthood's amended motion. AHCA sought review of that order.

As this was review of non-final agency action, the court analyzed whether the ALJ's order "departed from the essential requirements of the law, thereby causing irreparable injury which cannot be adequately remedied on appeal following final judgment." The court held that the ALJ was divested of jurisdiction the moment AHCA voluntarily dismissed its administrative complaints. Thus, the case was closed prior to Planned Parenthood's filing of its motion seeking attorney's fees, and it would cause AHCA irreparable injury to disclose irrelevant information and prepare for a hearing in a case where the ALJ lacked jurisdiction to enter an order. Moreover, as the ALJ lacked jurisdiction to reopen the case, it was a departure from the essential requirements of law for the ALJ to set Planned Parenthood's amended motion for evidentiary hearing. Thus, the court quashed the ALJ's order.

Charter Schools—Constitutionality of Administrative Appeal Process

Sch. Bd. of Palm Beach Cnty. v. Fla. Charter Educ. Found., Inc., 213 So. 3d 356 (Fla. 4th DCA 2017).

The Florida Charter Educational Foundation, Inc. and South Palm Beach Charter School (Applicants) submitted an application to the School Board of Palm Beach County (School Board) to open a new charter school. After a hearing, the School Board voted to deny the application.

Applicants appealed the denial of their application. The Charter School Appeal Commission (Commission) held a cursory hearing and determined that the School Board did not have competent substantial evidence to deny the application. The Commission did not make any factual determinations, but recommended that the State Board of Education (State Board) reverse the School Board's denial. The State Board then held a hearing on the matter. Without discussion, the State Board voted to reverse the School Board's denial of the application.

The School Board appealed, challenging the constitutionality of section 1002.33, Florida Statutes. The School Board argued that the statute violated the Florida Constitution's requirement that school boards "operate, control, and supervise all free public schools within the school district." The court disagreed, noting that the Florida Constitution also states that the "state board of education shall be a body corporate and have such supervision of the system of free public education as is provided by law." The court concluded that the Florida Constitution not only contemplates but encourages the State Board to, at times, infringe on the School Board's local powers.

The School Board also argued that the statute violated its due process rights because the statute did not provide the State Board with standards to use when it reviewed the School Board's denial of the application. The court rejected this argument, holding that the statute requires the State Board to review whether the School Board's rejection was supported by competent, substantial evidence that meets a "good cause" or "legally sufficient reason" standard.

However, the court agreed with the School Board that section 1002.33(6)(e)5. requires the Commission to include a "fact-based justification" along with its recommendation to the State Board. Here, the Commission erred by failing to include a "fact-based justification" for its recommendation to the State Board. The Commission issued only a single conclusory statement that the denial of the application was not supported by competent, substantial evidence. The court held that this did not meet the requirements of the statute and prevented the court from sufficiently reviewing the record on appeal. Thus, the court affirmed the constitutionality of the administrative appeal process of the charter school statute, but reversed and remanded the State Board's order so that the Commission could make factual determinations justifying its recommendation, which then could be reviewed and adopted or rejected by the State Board.

Elections—Curing Illegible Documentation for Matching Campaign Contributions

Thurston v. Fla. Elections Comm'n, 210 So. 3d 684 (Fla. 4th DCA 2017).

Perry Thurston challenged the Division of Elections' decision not to review corrected documentation to determine whether he had met the qualifying threshold for state matching funds from the Election Campaign Financing Trust Fund. Mr. Thurston argued on appeal that Florida's Election Campaign Financing Act (Act) does not prevent a candidate from obtaining matching funds due to the failure to correct deficiencies in paperwork submitted for matching contributions until after the candidate's elimination in a primary election.

After reviewing the applicable statute and administrative rule, the court concluded that neither imposed a deadline on curing defective paperwork because neither explicitly address the situation that arose in this case. The court also observed that the Division's decision was contrary to the legislative intent of the Act,

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which was to "encourage qualified persons to seek statewide elective office who would not, or could not otherwise do so and to protect the effective competition by a candidate who uses public funding." The court therefore determined that the agency erroneously interpreted the law by imposing a deadline that does not otherwise exist in statute or rule. Accordingly, the court reversed and remanded the case to the Division with directions to determine whether Mr. Thurston met the threshold for receiving matching funds and if so, to provide the funds.

Fair Housing Act—Subsequent Building Owner Not Liable for Disability Access Issues in Design or Construction of Building
Harbour Pointe of Perdido Key Condo. Ass'n, Inc. v. Henkel, 42 Fla. L. Weekly D873 (Fla. 1st DCA Apr. 13, 2017).

The Harbour Pointe of Perdido Key Condominium Association (Association) appealed a final order of the Florida Commission on Human Relations (Commission), which concluded that James Henkel had an actionable Fair Housing Act (FHA) claim against the Association for its failure to maintain certain accessibility standards in the pre-existing features of his condominium building.

Following an administrative hearing, the ALJ issued a recommended order stating that the building's entry doors were out of compliance with Florida and federal push-weight standards for handicap access. Nonetheless, the ALJ concluded that no actionable claim existed based upon the decision in *Harding v. Orlando Apartments, LLC*, 748 F. 3d 1128 (11th Cir. 2014), which held the design and construction standards did not apply to subsequent owners who did not design or construct the building at issue.

The Commission rejected the ALJ's conclusions of law and determined that a subsequent owner was still responsible for the maintenance of the standards for pre-existing features, such as the push-weight standards on the entry doors. Because the Association had failed to maintain the proper push-weigh requirements on the entry doors, the Commission found that Mr. Henkel had an actionable FHA claim.

The Association appealed, arguing that it did not design or construct the building and that Mr. Henkel had failed to show sufficient evidence that the Association had modified the push-weight requirements on the entry doors. Citing the *Harding* case, the court reversed the part of the Commission's final order that concluded that Mr. Henkel had an actionable claim for his accessibility issues involving the entry doors.

Medicaid—Subrogation & Assignment of Third Party Benefits
Giraldo v. Agency for Health Care Admin., 208 So. 3d 244 (Fla. 1st DCA 2016).

This appeal was taken by the Personal Representatives of the Estate of Juan Villa (Villa) from a final administrative order denying a petition to reduce the amount owed to the Agency for Health Care Administration (AHCA), to satisfy a Medicaid lien that attached to settlement proceeds recovered in a products liability and negligence suit for a catastrophic injury. AHCA, through Florida's Medicaid program, paid for portions of Villa's medical care and subsequently asserted a lien against any future settlements or awards. Villa petitioned DOAH for a determination of the correct amount of the lien. After a hearing, the ALJ rejected Villa's arguments and the case was appealed.

The court found no error in the ALJ's factual determinations or legal determination that AHCA was entitled "to secure reimbursement for payments already made for medical costs from not only that portion of the settlement allocated for past medical

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expenses but also from that portion intended as compensation for future medical expenses." The court concluded that the ALJ properly interpreted section 409.910(17)(b), Florida Statutes, as requiring any Medicaid recipient seeking to challenge the amount payable to AHCA when a settlement is obtained to prove, by clear and convincing evidence, that a lesser portion of the total settlement recovery should be allocated as reimbursement for past and future medical expenses. The court then concluded that Villa failed to meet this evidentiary burden. While recognizing that testimony was submitted by Villa through witnesses to meet this burden, the court found that the ALJ was not bound to credit that testimony, even where, as here, the testimony was unrebutted. Accordingly, the court affirmed the final administrative order to satisfy the full amount of AHCA's lien against the settlement proceeds.

Willoughby v. Agency for Health Care Admin., 212 So. 3d 516 (Fla. 2d DCA 2017), *certifying conflict with Giraldo v. Agency for Health Care Admin.*, 208 So. 3d 244 (Fla. 1st DCA 2016).

Mr. Willoughby was injured in an accident and received approximately $148,000 from Medicaid for medical expenses. Subsequently, Mr. Willoughby sued his insurer for bad-faith and received a $4 million settlement. AHCA sought reimbursement for expenses incurred by Medicaid and Mr. Willoughby filed a petition with DOAH seeking to reduce the amount of the Medicaid lien. The parties stipulated that Mr. Willoughby recovered less than $147,019.61 as payment for his past medical expenses. Mr. Willoughby argued that AHCA could satisfy its lien only on this portion of the settlement representing past medical expenses. Like in *Giraldo*, AHCA argued that its Medicaid lien could be satisfied from settlement funds allocable to past and future medical expenses. The ALJ agreed with AHCA and ruled that the entire $4 million settlement was available to satisfy the Medicaid lien, and denied the petition to reduce AHCA's lien.

Mr. Willoughby argued on appeal that (1) the ALJ erred in determining the bad-faith portion of the $4 million settlement was available to satisfy the lien; and (2) "the ALJ erred in reducing the amount of the lien to correspond with that portion of the settlement allocable to past medical expenses." Addressing the first claim, the court concluded that damages in first-party bad faith actions do include the total amount of a claimant's damages, including any amount in excess of the claimant's policy limits; the settlement as to bad faith damages acknowledged that "all sums . . . constitute[d] damages on account of personal injuries or sickness"; and Medicaid-paid medical bills related to those injuries. Thus, AHCA properly sought reimbursement from such damages.

However, the court held the ALJ's order as to whether AHCA could satisfy its lien from both past and future medical expenses was not supported by competent, substantial evidence. The court began by explaining that AHCA cannot impose its "lien upon settlement proceeds which are not 'designated as payments for medical care,' as those [nonmedical] proceeds qualify as a recipient's property." The court found that the ALJ erroneously conflated what constituted damages for "personal injuries or sickness," and what damages were specifically for "medical expenses," stating that not all personal injury damages are for medical expenses. The court disagreed with the First DCA that AHCA could satisfy its lien from funds allocated to *future* medical expenses, particularly in light of other DCA case law suggesting that liens may only be satisfied from funds allocable to past medical. Since Mr. Willoughby is no longer eligible for Medicaid benefits, AHCA would expend no funds for his future care. Therefore, the ALJ's conclusion that the settlement included all of Willoughby's medical expenses was not supported by competent, substantial evidence.

As a result of the court's disagreement with the First DCA on the issue of whether AHCA's lien may be satisfied by future medical expenses, the court certified conflict with *Giraldo*.

Public Records Exemption—Definition of Trade Secrets
Office of Ins. Regulation v. State Farm Fla. Ins. Co., 213 So. 3d 1104 (Fla. 1st DCA 2017).

State Farm Florida Insurance Company (State Farm), like other insurers, is required to file quarterly reports (QUASR reports) with the Office of Insurance Regulation (OIR) that provide county-level data about its policies. State Farm filed its QUASR reports with OIR and marked them as confidential trade secret information. After State Farm discovered that OIR planned to publicly release its QUASR data, it sought a declaratory judgment in circuit court, alleging that the QUASR data was a trade secret exempt from disclosure, and requested an injunction to prohibit OIR from releasing the data. The trial court granted State Farm's requested relief and OIR appealed.

On appeal, OIR argued that State Farm did not sufficiently show that its QUASR data was information that had independent economic value. The court confined its review to analyzing whether the trial court's ruling that State Farm's QUASR data was a trade secret was supported by competent substantial evidence. The court found that the testimony of multiple witnesses qualified as competent substantial evidence supporting the trial court's ruling, and affirmed the trial court's order.

Public Records—Reasonableness of Deposit and Special Service Charge
Trout v. Bucher, 205 So. 3d 876 (Fla. 4th DCA 2016).

W. Michael Trout sought through a public records request to inspect the official ballots associated with the 2014 election for Florida's 21st Congressional District. The Supervisor of Elections informed him that a $189.21 deposit was required to

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inspect the ballots, and an hourly fee of the same amount would be required. Mr. Trout refused to pay the fees and filed suit under the Public Records Act. Specifically, Mr. Trout argued that any special charges imposed by an agency must be based on the cost of the lowest paid individual able to perform the work. Both sides moved for summary judgement and the trial court granted the Supervisor of Elections' motion.

On appeal, the court affirmed the trial court's decision. The court observed that section 119.07(4)(d), Florida Statutes, permits an agency to use the "labor cost of the personnel providing the service that is *actually incurred by the agency or attributable to the agency* for the clerical and supervisory assistance required." (emphasis added.) Rejecting Mr. Trout's argument, the court observed that his argument would require the court to rewrite the statute by ignoring the words "actually incurred" or "attributable" in favor of adding language "limiting a service charge to the lowest hourly rate of the employee capable of performing the work."

Rule Challenge—Section 120.541(3) Does Not Require Ratification During First Legislative Session Following Adoption
Fernandez v. Dep't of Health, 42 Fla. L. Weekly D806 (Fla. 1st DCA Apr. 11, 2017).

Daniel R. Fernandez and Dax J. Lonetto, SR., PLLC (Appellants), sought judicial review of the ALJ's final order concluding that an adopted but not yet ratified amendment to rule 64B8-10.003, Florida Administrative Code, was not an invalid exercise of delegated legislative authority by the Department of Health, Board of Medicine (Board).

Rule 64B8-10.003 permits licensed physicians to charge patients and government entities "the reasonable costs of reproducing copies of written or typed documents or reports" up to $1.00 per page for the first 25 pages, and up to $0.25 per page for all pages thereafter. Licensed physicians can charge all other entities up to $1.00 per page, regardless of the number of pages. The Board initiated rulemaking proceedings to amend the rule to remove the price break for patients and government entities after 25 pages. The Board determined that a statement of estimated regulatory costs (SERC) was necessary and pursuant to section 120.541(3), Florida Statutes, legislative ratification was necessary. Appellants sought an administrative hearing, and the ALJ entered a final order on December 8, 2015, finding that the proposed rule was not an invalid exercise of delegated legislative authority. Appellants timely sought judicial review of the ALJ's order. During the pendency of the appeal, the Board submitted the rule to the Legislature requesting ratification during the 2016 legislative session. The Legislature did not ratify the rule during the 2016 legislative session.

The court began by analyzing whether the appeal was moot due to the failure of the Legislature to ratify the rule during the 2016 legislative session. Appellants argued that the Legislature's failure to ratify the rule rendered it "dead" due to the statutory constraints on the adoption and effective dates of amended rules. The court held that the rule was not "dead," despite the Legislature's failure to ratify it, because it could ratify the rule in a future legislative session. The court noted other instances in which ratification of a rule was repeatedly requested over the course of several legislative sessions.

The court also held that the Board was not required to withdraw the rule simply because the Legislature had not yet ratified it. Examining section 120.54, Florida Statutes, the court noted that although the Board could elect to withdraw the rule, it was not required to do so. Additionally, the court stated that section 120.541 included a deadline for the submission of a rule to the Legislature, but did not include a deadline by which the Legislature or Board must act if the rule was not ratified.

As the appeal was not moot, the court evaluated the merits of Appellants' appeal of the ALJ's final order and found no violation of the rulemaking procedures, no evidence that the rule was vague or gave the Board unbridled discretion, and no showing that the Board exceeded its rulemaking authority. In addition, the court held that the ALJ's conclusion that the evidence failed to show that the rule was an invalid exercise of delegated legislative authority or arbitrary or capricious was supported by the substantial record evidence. Thus, the court affirmed the ALJ's final order.

Statutory Interpretation—Summer Jai Alai Permits
W. Flagler Assocs., Ltd. v. Dep't of Bus. & Prof'l Regulation, 42 Fla. L. Weekly D764 (Fla. 1st DCA Apr. 4, 2017).

An owner or operator of a parimutual permit (Permittee) who was eligible to convert its existing permit after having the smallest play or total pool within its county for the 2011-2012 and 2012-2013 fiscal years declined to convert its existing permit to conduct summer jai alai, pursuant to section 550.0745, Florida Statutes. In September of 2015, West Flagler Associates, Ltd. (West Flagler), applied for a permit to conduct summer jai alai, citing the Permittee's failure to convert its existing permit after the 2011-2012 and 2012-2013 fiscal years, and seeking the "new permit" available under section 550.0745. The Department of Business and Professional Regulation (DBPR) issued a letter denying West Flagler's application, claiming that section 550.0745 did not permit the application because it was filed more than two consecutive years after the Permittee's qualifying 2011-2012 and 2012-2013 fiscal years.

West Flagler sought an informal administrative hearing, arguing that DBPR erroneously engrafted a time requirement on its application. The hearing officer rejected West Flagler's interpretation of the statute and issued a recommended order concluding that the application should

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be denied based on DBPR's initial interpretation. DBPR entered a final order concurring with the hearing officer and West Flagler sought judicial review.

The court began by noting that DBPR's interpretation of section 550.0745 was not entitled to great weight because it was contrary to the plain meaning of the statute. The court noted that section 550.0745 "creates two separate ways for permittees to obtain a summer jai alai permit and . . . [DBPR's] conflation of these two distinct permit opportunities improperly imposed unrelated timing requirements on the 'new permit' language." Citing the statute, the court, found that an existing permittee could apply to convert an existing permit when its "mutuel play from the operation of such pari-mutuel pools for the 2 consecutive years next prior to filing an application under this section has had the smallest play or total pool within the county." Only that permittee was permitted to apply to convert its existing permit under those conditions.

The court then held that a second opportunity occurs after an existing permittee declines to convert its permit, and noted the statute states: "If a permittee who is eligible under this section to convert a permit declines to convert, a *new* permit is hereby made available in that permittee's county to conduct summer jai alai games as provided by this section . . . ." The court concluded that "the two separate instances are mutually exclusive," and the "2 consecutive years prior" time limitation on applications for summer jai alai permits applied only to the first opportunity, the conversion by a permittee of its existing permit. Thus, the court reversed DBPR's final order denying West Flagler's permit application.

Witness Sequestration—Applicability in Administrative Proceedings
Fla. Indus. Power Users Grp. v. Graham, 209 So. 3d 1142 (Fla. 2017).

The sole issue appealed in the case was whether the Florida Public Service Commission (PSC) erred in declining to sequester witnesses after the Florida Industrial Power Users Group's (FIPUG) request pursuant to section 90.616, Florida Statutes. The PSC determined that sequestration pursuant to section 90.616 was not mandatory in an administrative proceeding.

The Court looked to the scope and applicability of chapter 90, Florida Statutes, to ascertain legislative intent. The Court concluded that under 90.103, the Florida Evidence Code does not strictly apply to administrative proceedings. The Court therefore found that the PSC "did not err in finding that it has discretion regarding whether to apply the Florida Evidence Code--including the rule of sequestration found in section 90.616, Florida Statutes--in its administrative proceedings." Instead, the Court concluded that administrative proceedings are governed by chapter 120, Florida Statutes, including its provisions on the exclusion and admissibility of evidence.

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DOAH CASE NOTES

Substantial Interest Hearings

Shands Jacksonville Medical Center, Inc., d/b/a UF Health Jacksonville v. Dep't of Health and Orange Park Medical Center, Inc., Case No. 16-3369 (Recommended Order Jan. 27, 2017).

FACTS: Chapter 395, Part II, Florida Statutes, provides for the establishment of a statewide trauma system "designed to meet the needs of all injured trauma center victims who require care in an acute-care setting . . ." §395.40(2), Fla. Stat. The Department of Health ("DOH") is the state agency primarily responsible for administering Florida's trauma system and is required by statute to adopt a rule allocating the number of trauma centers throughout the state. Rule 64J-2.010, entitled "Allocation of Trauma Centers Among Trauma Service Areas," allocates trauma centers among the state's 19 trauma service areas (TSAs) based on a calculation of each TSA's need for trauma centers. Shands Jacksonville Medical Center, Inc., d/b/a UF Health Jacksonville ("Shands"), operates a Level I trauma center in TSA 5, which consists of Baker, Clay, Duval, Nassau, and St. Johns Counties. On April 1, 2016, Orange Park Medical Center ("Orange Park") filed an application to operate as a Level II trauma center in TSA 5. Even though data from 2014 indicated that TSA 5 needs just one trauma center, DOH provisionally approved Orange Park's application on April 28, 2016, and Orange Park has operated as a provisional Level II trauma center since May 2016. Prior to 2015, DOH rejected trauma center applications if rule 64J-2.010 indicated there was no need in the relevant TSA. Shands challenged the approval of Orange Park's application by asserting that it violated DOH's own rules and governing statutes. In addition, Shands argued that the approval was based on an unadopted rule that would allow the approval of provisional trauma centers regardless of any need indicated by rule 64J-2.010.

OUTCOME: The ALJ recommended that DOH issue a final order denying Orange Park's application to operate a provisional trauma center in TSA 5. In doing so, he concluded that "[n]ot only is the Department's new policy of accepting letters of intent and ensuing applications in the absence of an available slot contrary to statute and its existing rule, it is also unreasonable and nonsensical. All parties, including the Department, acknowledged that the establishment of a provisional trauma center involves millions of dollars of investment in equipment, staff, and expertise. It is highly unlikely that a hospital would make the investment necessary to establish a provisional trauma center, and undergo the lengthy and time-consuming review process, knowing in advance that final denial of the program is a foregone conclusion, due to lack of allocated need." The ALJ also concluded that DOH relied on an unadopted rule in order to approve Orange Park's application because that practice "represents a significant shift from the Department's existing rule requirements." Finally, the ALJ concluded that DOH acted "illegally" by allowing Orange Park to operate a provisional trauma center. DOH's decision to issue a provisional license to Orange Park was merely proposed agency action that Shands had a right to challenge, but DOH erroneously treated it as final agency action.

Miami-Dade County v. Dep't of Mgmt. Servs., Div. of Ret., Case No. 16-4657 (Recommended Order Feb. 8, 2017).

FACTS: Garfield Perry worked for Miami-Dade County ("the County") from April 1974 through October 2009. Two months before his retirement, Mr. Perry entered into an agreement for the County to provide him with life, medical, and dental insurance policies. In order to pay for the aforementioned policies, Mr. Perry (via a payroll deduction agreement between the County and DMS) authorized the Department of Management Services, Division of Retirement ("DMS"), to remit to the County a portion of his Florida Retirement System pension benefits. While the policies were in effect, DMS remitted $18,271.75 to the County. On May 7, 2014, Mr. Perry pleaded guilty to one count of bribery and extortion. Pursuant to article II, section 8(d) of the Florida Constitution, DMS notified Mr. Perry on August 6, 2014, that his pension benefits had been forfeited. On March 31, 2016, DMS withheld $18,271.75 from a consolidated remittal to the County on behalf of other retirees in order to recover the remittals that DMS had made to the County for Mr. Perry's insurance premiums. The County responded by requesting a formal hearing, and DMS referred the matter to DOAH.

OUTCOME: After hearing witness testimony and accepting exhibits from both parties, the ALJ issued a Recommended Order recommending that DMS enter a final order dismissing the County's hearing request because DMS's actions did not implicate the agency's "core regulatory duties." The ALJ concluded that DMS's relevant core regulatory duties include the calculation and payment of pension benefits. When DMS takes action that impacts the calculation and payment of one's pension benefits, then "administrative jurisdiction attaches under sections 120.569 and 120.57(1)." In contrast, a premium deduction agreement with a third party such as the County does not implicate a core regulatory duty of DMS. Accordingly, a court (rather than DOAH) has jurisdiction over a dispute regarding that agreement.

Dominic Chambers v. Ag. for Persons with Disabilities, Case No.

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16-6521EXE (Recommended Order Feb. 10, 2017).

FACTS: In 2007, at age 18, Dominic Chambers stole a cell phone from a package while employed at UPS and was convicted of third degree grand theft. Since being convicted, Mr. Chambers has been attending college and working toward a degree in behavioral analysis. In 2011, Mr. Chambers completed a training program to become a nursing assistant, but he has not applied for licensure as a CNA. Last year, Mr. Chambers became certified in professional crisis management after successfully completing a course in reactive strategies for controlling the behavior of persons with developmental disabilities. In addition, Mr. Chambers has been working with special needs children for several years and has spent the last eight years working as a patient care assistant for the adult grandson of Don Shula, the former coach of the Miami Dolphins. Mr. Chambers recently sought to work or volunteer for The Schott Communities, a nonprofit corporation that provides services for disabled adults. Because grand theft is a "disqualifying offense" within the meaning of chapter 435, Florida Statutes, Mr. Chambers is ineligible to work for The Schott Communities without an exemption from the Agency for Persons with Disabilities ("APD"). In July 2016, Mr. Chambers requested such an exemption. However, APD notified Mr. Chambers via a letter dated October 13, 2016, that his request had been denied due to a lack of clear and convincing evidence of his rehabilitation. Mr. Chambers requested a formal administrative hearing, and APD referred this matter to DOAH.

OUTCOME: The ALJ observed that APD "determined as a matter of ultimate fact that Chambers was not rehabilitated, which meant (as a matter of law) that the head of [APD] had *no discretion* to grant an exemption." See § 435.07(3)(a), Fla. Stat. (2016) (providing that "[i]n order for the head of an agency to grant an exemption to any employee, the employee must demonstrate by clear and convincing evidence that the employee should not be disqualified from employment."). As a result, the ALJ concluded that there was no discretionary decision for him to review. Moreover, the ALJ stated that any recommendation from him would be "futile" given that an agency head retains the discretion to deny an exemption so long as the final order complies with section 120.57(1)(*l*), Florida Statutes, by stating with particularity the reasons for rejecting or modifying an ALJ's conclusions of law and finding that its substituted conclusions are as or more reasonable than the ALJ's. See J.D. v. Dep't of Child. & Fams., 114 So. 3d 1127 (Fla. 1st DCA 2013)(noting that "even if the ALJ determines (as a matter of fact) that the applicant met his or her burden to demonstrate rehabilitation and thus concludes (as a matter of law) that it would be an abuse of discretion for the agency to deny the exemption, the agency head retains the discretion to deny the exemption so long as the final order" complies with section 120.57(1)(*l*)). Accordingly, the ALJ recommended that APD enter a final order "granting or denying Dominic Chambers the exemption from disqualification for which he is, in fact, eligible."

Rebecca Coleman Curtis v. Dep't of Health, Bd. of Psychology, Case No. 16-6167 (Amended Recommended Order March 13, 2017).

FACTS: On September 30, 2014, Rebecca Coleman Curtis applied to the Board of Psychology ("the Board") for licensure as a psychologist. Her application relied on a provision in section 490.006(1)(c), Florida Statutes, which authorizes licensure for applicants who possess a doctoral degree in psychology from a program accredited by the American Psychological Association, and who have at least 20 years of experience as a licensed psychologist in any jurisdiction or territory of the United States within the 25 years preceding the application date. On October 17, 2014, the Department of Health sent Ms. Curtis a letter notifying her that she had been approved for licensure upon passage of the Florida laws and rules examination. The Board ratified the approval of Ms. Curtis's application on November 21, 2014. After Ms. Curtis passed the laws and rules examination in August 2016, the Board sent her an e-mail notifying her that a question had arisen over whether she had received her doctoral degree at a program accredited by the American Psychological Association. On August 24, 2016, Ms. Curtis notified the Board that she would be relying on the portion of section 120.60(1), Florida Statutes, which provides for default licensure if a licensure application is not approved or denied within 90 days of it being deemed complete. After receiving a notice of intent to deny her licensure application on approximately October 11, 2016, Ms. Curtis requested a formal administrative hearing, and the Board referred the matter to DOAH.

OUTCOME: The ALJ issued an Order recommending that the Board approve Ms. Curtis's application and issue her a license. In doing so, the ALJ rejected the Board's argument that it could not issue the license once staff discovered a perceived deficiency in Ms. Curtis's application. The ALJ concluded that the "staff's discovery occurred long after the statutorily-established time frame for reviewing the application, but more to the point, the Board had already voted to approve the license. Moreover, section 456.013(2) provides that the 'department shall issue a license to any person certified by the appropriate board' as having met the licensure requirements." In support of its decision to deny Ms. Curtis's application, the Board cited Bronson v. Schulten, 104 U.S. 410 (1881), for the proposition that all orders of a court may be set aside, modified, or annulled by that court. However, the ALJ concluded that Bronson was inapplicable because the Board is not a court, and its authority is "expressly circumscribed by the process outlined in" section 120.60(1). In addition, the ALJ concluded that the Board's practice of conducting a

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final review or reconsideration of an applicant's qualifications amounted to an unadopted rule. Finally, with regard to the Board's argument that it would not be in the best interest of the public to issue a default license when the Department of Health can prosecute and discipline a licensee for obtaining a license through an error, the ALJ concluded that "[t]o allow the agency to later revoke a license pursuant to section 456.072(1)(h) based solely upon a purported deficiency in the licensee's application when the agency has failed to comply with section 120.60(1), not only would erode the protection that section 120.60 affords license applicants, but also would undermine the integrity of the licensing process."

Disciplinary/Enforcement Actions

Indian River County Sch. Bd. v. Joseph Nathaniel, Case No. 16-272TTS (Recommended Order Jan. 31, 2017).

FACTS: During the 2015-16 school year, while Joseph Nathaniel was employed as a teacher at Sebastian River High School, he was involved in a physical altercation with an 18-year old student in a classroom. As a result, the Indian River County School Board ("the School Board") voted to approve the superintendent's recommendation that Mr. Nathaniel's employment be terminated. Mr. Nathaniel requested a formal administrative hearing. At the hearing, the School Board's prosecution substantially relied on a cell phone video of the altercation recorded by another student.

OUTCOME: The ALJ recommended that the School Board issue a final order exonerating Mr. Nathaniel of the charges. In doing so, the ALJ found that Mr. Nathaniel "had the fortitude to stand tall, roll up his sleeves, and do the tough job of keeping a foul-mouthed, defiant, and violently aggressive student from causing further damage. For this he should be given a pat on the back, not a pink slip." With regard to the cell phone video, the ALJ commented that "video evidence has strengths and weaknesses that are different from those of, say, an eyewitness. Filmic evidence is potentially very strong evidence, to be sure, but moving pictures should not be considered inherently superior to other types of evidences, and video proof should not be accorded great deference or automatic credibility on the ground that film is special. Video evidence is especially useful in accurately conveying what someone said (where the audio is clear) and for establishing precise time frames. It might assist us in visualizing what occurred. But filmic proof is not helpful, or is at best of limited value, when it comes to making assertions about the significance, meaning, and story of the images captured therein; these require the application of human intelligence based upon a careful consideration of all the available evidence. Ultimately, the fact-finder must critically review video evidence, keeping in mind the limitations of this medium, and determine its relative persuasive value in the context of the entire record. That is what the undersigned has done in this case."

Dep't of Bus. & Prof'l Reg., Div. of Pari-Mutuel Wagering v. Teresa M. Pompay, Case No. 16-6423PL (Recommended Order Feb. 7, 2017).

FACTS: The Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("the Division") is the state agency responsible for regulating pari-mutuel wagering. Under section 550.2415(1)(a), Florida Statutes, it is unlawful for a racing animal to have a prohibited substance in its system or to be impermissibly medicated. Every licensed racetrack in Florida has an equine detention barn where Division employees obtain urine and blood samples from racehorses. The Division used the Equine Detention Barn Procedures Manual ("the 2010 Manual") between June 2010 and April 7, 2016. The 2010 Manual contained detailed procedures for collecting blood samples, spinning the blood in a centrifuge in order to extract the serum, pouring the serum into an evergreen tube, sealing the evergreen tube with evidence tape, and mailing the specimen to a testing laboratory at the University of Florida. On January 11, 2016, the Division issued two final orders agreeing with DOAH Recommended Orders concluding that subsection 4.6 of the 2010 Manual, at issue in those two cases, was an unadopted rule. Accordingly, the Division could no longer base agency action on blood serum samples obtained pursuant to subsection 4.6 of the 2010 Manual. On April 7, 2016, the Division distributed 2016 Guidelines to all equine detention barn facilities. The 2016 Guidelines were effective on their distribution date and superseded the 2010 Manual. Unlike the 2010 Manual, the 2016 Guidelines do not contain the detailed procedures described above for collecting and processing blood samples for testing. However, since the 2016 Guidelines went into effect, Division employees have continued to follow the procedures detailed in the 2010 Manual for collecting and processing blood samples for testing.

Teresa M. Pompay was the trainer of record for a horse named R Bling Shines who raced at Gulfstream Park on February 20, 2016. Ms. Pompay was also the trainer of record for a horse named Run Saichi who raced at Gulfstream Park on May 13, 2016. Post-race blood testing revealed that both horses had excessive amounts of a permitted medication in their systems. Division employees utilized the procedures in the 2010 Manual for collecting and processing blood samples obtained from R Bling Shines and Run Saichi. On October 13, 2016, the Division served an Amended Administrative Complaint alleging that Ms. Pompay was the trainer of record of thoroughbred horses found to have illegal substances in their systems, in violation of section 550.2415(1)(a). Ms. Pompay requested a formal administrative hearing, and the case was referred to DOAH.

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OUTCOME: The ALJ recommended that the Division issue a final order dismissing the Amended Administrative Complaint. In doing so, the ALJ agreed with Ms. Pompay that the Division was improperly relying on an unadopted rule. The ALJ rejected the Division's argument that amendments to Florida Administrative Code Rule 61D-6.005 removed all references to sealing of serum samples and thus rendered the corresponding portions of the 2010 Manual "technical implementation" rather than rules. Instead, the ALJ concluded that "[e]limination of all references in the rule to the sealing of the blood serum specimen leaves the critical sealing procedures mandated by the 2010 Manual without support in statute or adopted rule. The 2010 Manual provisions governing sealing can hardly be considered as mere technical implementation that is implicit and incidental to an explicit policy of sealing blood serum specimens when no such policy is established either in statute or properly adopted rule. The surgical excision of provisions of the rule relating to the sealing of specimens thus only reinforced the 2010 Manual's status as unadopted policy. The 2010 Manual's provisions should have been incorporated by rule, or other provisions regarding these critical processes should have been adopted." Accordingly, the ALJ concluded that the Division could not discipline Ms. Pompay's license based on serum obtained from R Bling Shines on February 20, 2016, pursuant to the unadopted procedures of subsection 4.6 of the 2010 Manual. As for the serum obtained from Run Saichi on May 13, 2016, after the 2016 Guidelines went into effect, the ALJ concluded that "[r]eplacement of the 2010 Manual with the 2016 Guidelines was a formalistic charade masking the reality that there was no change in actual Division policy as to the sampling procedures to be followed by track personnel." Furthermore, the ALJ noted that the Division cannot "continue to follow established Division policies at all of the racing tracks in Florida while denying trainers and the public the opportunity to be aware of, and the opportunity to participate in the development of, these important policies." As a result, the ALJ concluded that the Division could not discipline Ms. Pompay's license based on serum obtained from Run Saichi pursuant to unadopted policies.

On March 24, 2017, the Division rendered a Final Order accepting the ALJ's recommendation.

Rule Challenges

The Seminole Tribe of Fla., City of Miami, Fla. Pulp and Paper Ass'n Envtl. Affairs, Inc., and Martin County v. Dep't of Envtl. Protection and Fla. Envtl. Reg. Comm'n, Case Nos. 16-4431RP, 16-4836RP, 16-4875RP, and 16-4912RP (Corrected Order of Dismissal Sept. 13, 2016).

FACTS: The Environmental Regulation Commission ("the ERC") is part of the Department of Environmental Protection ("DEP") and exercises DEP's standard-setting authority. On June 30, 2016, the ERC published notice of proposed amendments to rules 62-302.400 and 62-302.530. The former rule contains surface water classifications, and the latter contains surface water criteria for each classification, in a chart. On July 20, 2016, the Joint Administrative Procedures Committee ("JAPC") issued a letter to DEP stating that the strike-through/underline version of proposed rule 62-302.530 that appeared in the notice made the proposed changes "incomprehensible." DEP responded to JAPC's comment by publishing a "Notice of Correction" on August 4, 2016, providing some additional explanation of the proposed changes. Petitioners challenged the proposed rule amendments on various dates between August 8, 2016, and August 25, 2016.

In response to motions to dismiss based on untimeliness, the Petitioners argued that their challenges to the proposed rules should go forward because: (1) the notice published on June 30, 2016, was so inadequate that it cannot control the timeline for challenging the proposed rules; (2) the final public hearing was held 26 days after the June 30, 2016, notice rather than 28 days afterward as supposedly required by section 120.54(3)(a)2, Florida Statutes; and (3) the Notice of Correction was actually a notice of change, and a rule challenge petition can be filed within 20 days following publication of a notice of change. In another argument, Florida Pulp and Paper Association Environmental Affairs ("Florida Pulp and Paper") argued that its challenge to rule 62-302.530 was timely because DEP published a Notice of Change for rule 62-302.400. Even though the notice of change did not address rule 62-302.530, Florida Pulp and Paper argued that the notice of change should apply to both rules and thus extend the time for challenging rule 62-302.530.

OUTCOME: The ALJ rejected the Petitioners' arguments and dismissed the rule challenges. With regard to the argument that the June 30, 2016, notice was inadequate to establish the time frame for initiating a rule challenge, the ALJ rejected JAPC's characterization of the strike-through/underline version of proposed rule 62-302.530 as "hyperbole." Instead, the ALJ noted that "[t]he strike-through/underline version is difficult to read and difficult to use for comparing existing water quality criteria with proposed criteria. It is not incomprehensible." The ALJ then concluded that "[w]hen a person is not certain whether a proposed rule would adversely affect his or her substantial interests, reasonable inquiry should be made. If the person is still confused after making reasonable inquiry and the deadline for challenging the proposed rule is near, the prudent person will file a petition challenging the rule." As for the argument that the final public hearing was held two days early, the ALJ rejected that argument by noting that section 120.54(3)(a)2 requires notice to be published at least 28 days prior to "the intended action." By reading provisions of section 120.54(3) together, the ALJ concluded that "intended action" refers

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to the creation, amendment, or repeal of a rule rather than the conduct of a final public hearing. With regard to the Notice of Correction argument, the ALJ rejected any assertion that proposed rule 62-302.530 had been changed: "If the Notice of Correction revealed an effect of the proposed rule that was not previously apparent, that is no different than if this effect was revealed by an oral or written statement from a DEP employee. Such statements do not change the rule that is proposed for adoption. Because rule 62-302.530 was not changed in any way, the provisions of chapter 120 applicable to rule changes are not applicable here." As for Florida Pulp and Paper's argument regarding the notice of change, the ALJ rejected that argument by concluding that "Petitioners' interpretation of section 120.56(2)(a) allows for a situation the Legislature was unlikely to have intended, where a person substantially affected by a proposed rule fails to file a petition to challenge the rule within the available deadlines, but, serendipitously, gets a new opportunity to challenge the rule because of an unanticipated notice of change or revised SERC, even though the challenger has no interest in the rule provisions being changed or the revision to the SERC."

Appeals have been filed in the Third District Court of Appeal by Petitioners the City of Miami (Case No. 3D16-2129) and the Seminole Tribe of Florida (Case No. 3D16-2440) (traveling together); and in the First District Court of Appeal by Petitioner Florida Pulp and Paper (Case No. 1D16-4610).

Associated Industries of Fla. Inc., et al. v. Dep't of Envtl. Protection, Case No. 16-6889RP (Final Order Dec. 30, 2016).

FACTS: The Department of Environmental Protection ("DEP") is the state agency responsible for regulating air and water pollution. Proposed rule 62-4.161 would require a person who has a reportable release of a regulated substance to notify DEP, the general public, and the local government within 24 hours after the release. Within 48 hours after the release, more information must be provided to the same entities. Each of the Petitioners has a substantial number of members capable of having "reportable releases" and Petitioners challenged the proposed rule on behalf of their members, as an invalid exercise of delegated legislative authority.

OUTCOME: The ALJ ultimately concluded that the proposed rule is invalid. In the course of doing so, the ALJ rejected DEP's argument that the ALJ must defer to DEP's determination that the statutes it administers convey the necessary authority for the proposed rule. Instead, the ALJ concluded that "deference to an agency's interpretation is a judicial principle. It is not required by any provision of the Administrative Procedure Act, chapter 120, Florida Statutes. Deference to an agency's interpretation of law would be inconsistent with chapter 120's emphasis on *de novo* proceedings and its prohibition against an agency's rejection of an Administrative Law Judge's conclusion of law unless the agency makes a specific finding that its own interpretation of law is 'as or more reasonable' than the rejected interpretation." The ALJ further concluded that "[i]n the context of a challenge to a proposed rule, deference to an agency's interpretation would conflict with chapter 120's directive not to presume the validity of a proposed rule. Deference to an agency is inappropriate when determining whether there is specific authority for a rule."

Shands Jacksonville Med. Ctr., Inc., et al., v. Dep't of Health, et al., Case Nos. 16-5837RP, 16-5838RP, 16-5839RP, 16-5840RP, and 16-5841RP (Final Order March 28, 2017).

FACTS: A trauma center is a hospital that has made a substantial investment in order to have the resources and personnel capable of caring for severely injured patients. Section 395.402(4)(b), Florida Statutes, requires the Department of Health ("DOH") to adopt rules governing the number of trauma centers that can be operated in Florida. The Legislature has assigned each county in Florida to a trauma service area ("TSA"). At present, there are 19 TSAs in Florida. Rules adopted by DOH determine how many trauma centers can be in a particular TSA. Pursuant to section 395.402(2)(b), DOH must annually assess Florida's trauma system and evaluate the number of trauma centers needed in each TSA. DOH's process for evaluating each TSA's need is set forth in rule 64J-2.010 and begins with DOH's evaluation of each TSA pursuant to a series of criteria. DOH then assigns points to each TSA, and the points measure the need in each TSA for trauma center services. Rule 64J-2.020(3) contains a table setting forth the results of the March 24, 2014, Amended Trauma Service Area Assessment. For example, the table in rule 64J-2.010(3) indicates that TSA 1, consisting of Escambia, Okaloosa, Santa Rosa, and Walton Counties, has a maximum need for one trauma center. In contrast, the table indicates that TSA 19, consisting of Dade and Monroe Counties, has a maximum need for three trauma centers.

DOH proposed to amend the rules governing the number of trauma centers that can be operated in Florida. Under the proposed rules, the calculations pursuant to rule 64J-2.010(1)(b) would establish the minimum number of trauma centers needed in a particular TSA rather than the maximum number of trauma centers allowed in that TSA. The Petitioners, all of whom already operate trauma centers, filed a petition challenging the proposed rule amendments, alleging that they: (a) exceed DOH's grant of rulemaking authority; (b) enlarge, modify, or contravene the specific provisions of law to be implemented; (c) vest unbridled discretion in DOH; and (d) are arbitrary and capricious. Several hospitals, either planning to apply to become a trauma center or provisionally but not finally certified to operate as a trauma center, intervened in support of the proposed rule amendments.

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OUTCOME: The ALJ rejected the Petitioners' arguments that DOH lacked the necessary rulemaking authority and that the proposed rules are arbitrary and capricious. However, the ALJ concluded that the proposed rules directly contravene at least two of the laws that they purport to implement. For example, section 395.4025(5) requires that trauma center applicants must be located in a TSA "that has a need for such a trauma center." The ALJ concluded that "[u]nder the Proposed Rules, there would always be a need for a trauma center in every TSA because the table in rule 64J-2.010 would set forth the minimum number of trauma centers needed in each of the TSAs rather than the maximum." Also, section 395.402(4)(b) already establishes one trauma center as a floor or a minimum for trauma centers that can be in a particular TSA. According to the ALJ, "[t]he Proposed Rules would implicitly supercede section 395.402(4)(b) when Proposed Rule 64J-2.010 determines a particular TSA's 'need' to be greater than 1." Finally, the ALJ concluded that the Proposed Rules would confer unbridled discretion on DOH.

Appeals have been filed in the First District Court of Appeal by DOH (Case No. 1D17-1713) and by the Intervenors (Case No. 1D17-1717).

Nicole Yontz, O.D. and Tammy Johnson, O.D. v. Dep't of Health, Bd. of Optometry and Fla. Optometric Ass'n, Case No. 16-6663RX (Final Order April 14, 2017).

FACTS: Florida Administrative Code Rule 64B13-4.001 applies to the practice of optometry and requires that applicants for licensure in Florida must have passed the National Board of Examiners in Optometry Examination ("the NBEO exam") within a seven-year period immediately preceding the application for licensure ("the look-back period"). The Petitioners have been practicing optometry in states outside Florida and want to practice optometry in Florida. However, both Petitioners passed the NBEO exam more than seven years ago. The Petitioners asked the Board of Optometry ("the Board") to waive the look-back period, but their requests were denied. The Petitioners then filed a petition challenging the look-back period rule as an invalid exercise of delegated legislative authority.

OUTCOME: The petition failed to specifically cite section 120.52(8)(b), Florida Statutes, as a basis for the rule's alleged invalidity. Accordingly, the ALJ addressed at the outset of her analysis whether the petition adequately alleged that the Board had exceeded its grant of rulemaking authority. In ruling that the rule challenge could proceed under section 120.52(8)(b), the ALJ concluded that "an express citation to section 120.52(8)(b) would have simplified matters for all. However, given the allegations contained in the Petition and the statement of issues for consideration contained in Petitioners' and Respondent's Pre-hearing Stipulation, it cannot be said that any party, including Intervenor, is embarrassed in its defense to the allegation that the Board exceeded its rulemaking authority in adopting the look-back period." As for the validity of the look-back period, the parties stipulated that some version of the look-back period had been in the rule since 1979. Nevertheless, the ALJ concluded that the look-back period was not insulated from the requirements of chapter 120 and amounted to an invalid exercise of delegated legislative authority: "Its lengthy tenure means that it was originally adopted at a time when the standards for rulemaking were vastly different than what emerged with the creation of section 120.536 and the amendments to the rulemaking standards passed by the Legislature in 1996. While the look-back period might have survived under the prior standards, it cannot survive under the rulemaking standards governing rules today." The ALJ concluded that the look-back period exceeded the Board's grant of rulemaking authority and contravened the specific provisions of law implemented. However, she ruled that the look-back period was not arbitrary and capricious because it "is an attempt to protect the safety of the public and to make sure that optometrists have received the appropriate and up-to-date training, given the changes in optometry."

Attorney's Fees

Playbig Therapy and Recreation Zone, LLC, et al. v. Ag. for Health Care Admin., Case No. 16-3972F (Partial Final Order Jan. 27, 2017).

FACTS: The Agency for Health Care Administration (AHCA) is the state agency responsible for managing Florida's Medicaid program. 42 C.F.R. § 455.23(a)(1) requires state Medicaid agencies such as AHCA to "[s]uspend all Medicaid payments to a provider after the agency determines there is a credible allegation of fraud." PlayBig Therapy and Recreation Zone, LLC ("PlayBig"), is a pediatric therapy provider, and PlayBig's client base includes Medicaid recipients. The Medicaid Fraud and Control Unit ("MFCU") received a complaint that PlayBig was defrauding the Medicaid program. Therefore, MFCU obtained a warrant to search PlayBig's premises and executed that search warrant on April 14, 2016. Later that day, officials from MFCU and AHCA met during a regularly-scheduled bi-weekly meeting, and the MFCU officials asserted that PlayBig was defrauding the Medicaid program. Because AHCA believed that it had received a credible allegation of fraud, AHCA notified PlayBig that its Medicaid payments had been suspended. PlayBig petitioned for a formal administrative hearing, and its case was eventually referred to the Division of Administrative Hearings. Because AHCA was concerned that it would be forced to disclose information that would compromise MFCU's ongoing criminal investigation of PlayBig, AHCA notified PlayBig on May 18, 2016, that the payment suspension was being lifted. After AHCA and PlayBig agreed that the case was

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moot, the ALJ relinquished jurisdiction back to AHCA. On July 11, 2016, PlayBig filed a motion for fees pursuant to section 57.111, Florida Statutes, the Florida Equal Access to Justice Act.

OUTCOME: AHCA partially defended against PlayBig's motion for fees by asserting that its suspension of PlayBig's Medicaid payments was "substantially justified" within the meaning of section 57.111(4)(a). In evaluating this argument, the ALJ noted that AHCA's assessment of the allegations against PlayBig was overwhelmingly based on the source of the allegations, i.e., MFCU, and the nature of those allegations. However, the ALJ concluded that "[t]he pertinent federal regulations do not excuse AHCA from evaluating the credibility of allegations if their source is the entity responsible for prosecuting Medicaid fraud. Nor do those regulations excuse AHCA from performing the necessary assessment if the allegations in question are of a certain nature." As for the fact that MFCU had obtained a search warrant, the ALJ concluded that "even if the undersigned were to accept the search warrant into evidence, it would not further AHCA's substantial justification defense. The search warrant contains no information about what information led the circuit court judge to sign the warrant. In fact, the search warrant does not even enumerate MFCU's allegations against [PlayBig]." Furthermore, the ALJ concluded that "any weight or credibility that could be assigned to this search warrant is lessened by the fact that the authorities do not have to clear a high evidentiary bar in order to obtain a search warrant." Accordingly, the ALJ issued a Partial Final Order determining liability for attorney's fees and allowing the parties an opportunity to reach agreement as to the amount.

Non-Final Orders

Shands Jacksonville Med. Ctr., Inc., et al., v. Dep't of Health, et al., Case Nos. 16-5837RP, 16-5838RP, 16-5839RP, 16-5840RP, and 16-5841RP (Non-Final Order Nov. 18, 2016).

FACTS: The Petitioners challenged proposed amendments to four of the rules that regulate trauma centers in Florida (see summary of Final Order above). Prior to the final hearing, a question was raised by the parties regarding the order of presentation in light of amendments to section 120.56(2)(a), Florida Statutes, during the 2016 legislative session. The statute provides in pertinent part that "[t]he petitioner has the burden to prove by a preponderance of the evidence that the petitioner would be substantially affected by the proposed rule going forward. The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised." Because there was no dispute that the Petitioners had standing to challenge the proposed rules at issue, the parties expressed uncertainty as to whether the Petitioners or the Department of Health would proceed first.

OUTCOME: The ALJ noted that the final legislative staff analysis stated that the amendment to section 120.56 was intended to clarify the "parties' respective burdens of proof in challenges to proposed rules and unadopted rules." As a result, the resolution of this question could be gleaned from existing precedent. Accordingly, in ruling that the Petitioners would present their case first, the ALJ relied on a passage in St. Johns River Water Mgmt. Dist. v. Consolidated-Tomoka Land Co., 717 So. 2d 72, 76-77 (Fla. 1st DCA 1998) stating that "[a] party challenging a proposed rule has the burden of establishing a factual basis for the objections to the rule, and then the agency has the ultimate burden of persuasion to show that the proposed rule is a valid exercise of delegated legislative authority."

ADDITION AND SUBTRACTION

We are pleased to report the addition of **Tiffany A. Roddenberry** to the DOAH Case Notes Team. Ms. Roddenberry is an associate in Holland & Knight's Tallahassee office and practices administrative, commercial, and appellate litigation. Her experience includes litigation involving government contracts and bid protests, public records and sunshine laws, and antitrust. She has also authored amicus curiae briefs on behalf of clients on significant civil justice reform issues before the Florida Supreme Court and Florida's district courts of appeal. Prior to joining Holland & Knight, Ms. Roddenberry clerked for the Honorable Robert L. Hinkle of the U.S. District Court for the Northern District of Florida and the Honorable Frank M. Hull of the U.S. Court of Appeals for the Eleventh Circuit.

Katie Sabo, one of the long-time DOAH Case Notes Team members, recently gave birth to her second child and is taking a hiatus from reviewing orders. Katie currently handles appeals for the Reemployment Assistance Appeals Commission and previously worked at the Department of Business and Professional Regulation. The Team, and the newsletter editors on behalf of the Section, thank Katie for her outstanding work and will eagerly welcome her back whenever she wants to return to the Team.

Agency Snapshot: Department of Management Services

by Tiffany A. Roddenberry

Background:

The Department of Management Services (DMS) is an executive branch agency that serves as the business arm of Florida government. DMS's primary mission is to support other state agencies, as well as current and former state employees, with workforce and business-related functions so that agencies can focus on their core missions as defined in law. Created in 1993 after the Departments of Administration and General Services merged, DMS now serves more than one million customers by administering retirement benefits and health insurance, advising on human resource policy, and maintaining the state's human resource information system. DMS also provides statewide telecommunication services, coordinates real estate and facilities management, and monitors Florida's private prisons and fleet of vehicles. Additionally, DMS oversees the state's procurement of commodities and services, and as part of that role DMS manages the MyFlorida Marketplace, the Vendor Bid System, and the State Term Contracts system.

The head of DMS is the Secretary. The Secretary is appointed by the Governor and subject to confirmation by the Senate. The Secretary is responsible for planning, directing, coordinating, and executing the powers, duties, and functions vested in DMS, its divisions, bureaus, and other subunits.

Secretary:
Erin Rock, Interim Secretary
Office of the Secretary
4050 Esplanade Way
Tallahassee, Florida 32399-0950
Phone: 850-488-2786
Fax: 850-922-6149

The current Interim Secretary of DMS is Erin Rock. She was appointed by Governor Rick Scott in April 2017. Prior to becoming Interim Secretary, Ms. Rock served as the chief of staff for DMS for nearly a year. Before joining DMS, Secretary Rock served as a committee staff director in the House of Representatives, director of communications for the Department of Education, and director of communications for the Department of Children and Families. Secretary Rock's first job in state government was at the former Department of Community Affairs, where she coordinated the state's public information efforts on behalf of the Emergency Operations Center during the 2004 and 2005 hurricane seasons.

Secretary Rock holds a Bachelor of Arts in Communication from the University of North Florida.

Agency Clerk:
Diane Wint
850-487-1082
diane.wint@dms.myflorida.com

Address:
4050 Esplanade Way, Suite 160
Tallahassee, FL 32399-0950
Phone: 850-487-1082
Fax: 850-922-6312

Hours for Filings:

Filings may be submitted by hand delivery, regular mail, email, or fax. Filings are accepted during business hours, 8:00 a.m. until 5:00 p.m., Monday through Friday, with the exception of state recognized holidays or office closures. Filings received after 5:00 p.m. will be filed on the next regular business day.

General Counsel:
J. Andrew ("Drew") Atkinson
Office of the General Counsel
4050 Esplanade Way, Suite 160
Tallahassee, FL 32399-0950
Phone: 850-487-1082
Fax: 850-922-6312

Drew Atkinson leads the DMS legal team and serves as the liaison to the Governor's general counsel and other government agencies. He also serves as the chief ethics officer and chief legal advisor, and he coordinates the representation of DMS in litigation and mediation before state, federal, and administrative forums. Mr. Atkinson joined DMS after serving as general counsel for the Department of State. Mr. Atkinson received his Bachelor of Arts degree from Florida State University and his Juris Doctor degree from Nova Southeastern University.

Number of lawyers on staff: 13

Kinds of Cases:

The Office of the General Counsel provides legal guidance and representation to DMS and its divisions. DMS attorneys handle the following types of cases: employment and personnel issues; disputes related to retirement benefits, insurance coverage, eligibility, overpayments of benefits, and benefit forfeitures; procurement challenges; contract disputes; and public records and sunshine law disputes.

Practice Tips:

Prior to filing matters with DMS, practitioners should ensure that filings conform, both in content and in timeliness, with the Uniform Rules of Procedure contained within rule chapters 28-101 through 28-110 and 28-112, Florida Administrative Code.

Requests for variances and waivers should be filed with the Agency Clerk's office. Requests must be submitted according to the guidelines outlined in section 120.542, Florida Statutes, and rule chapter 28-104, Florida Administrative Code.

For information on requesting public records, visit http://www.dms.myflorida.com/about_us/open_government.

Law School Liaison

Spring 2017 Update from the Florida State University College of Law

by David Markell, Steven M. Goldstein Professor

This column highlights recent accomplishments of our Florida State University College of Law students and faculty. It also features the rich menu of programs the College of Law hosted during the spring 2017 semester.

Spring 2017 Events

Environmental Certificate Enrichment Lecture

Robert Scheffel "Scheff" Wright, shareholder of Gardner, Bist, Bowden, Bush, Dee, LaVia, & Wright, P.A., presented our Environmental Certificate Enrichment Lecture this spring. His lecture, entitled "Optimizing Energy Policy for Long-Term Economic Welfare," was held on February 15, 2017.

Municipal Utilities and Cooperatives: Transitioning to a Lower-Carbon Future Conference

On March 24, 2017, FSU College of Law and the University of North Carolina School of Law co-hosted "Municipal Utilities and Cooperatives: Transitioning to a Lower-Carbon Future." This conference explored the challenges and opportunities faced by these entities as they transition to lower-carbon energy sources in response to changing market forces. A full day of panel discussions featured energy law experts and municipal and co-op representatives from around the United States.

Environmental, Energy, and Land Use Law Student Colloquium

The FSU College of Law Environmental, Energy and Land Use Law program held its annual Spring Colloquium for student papers on April 5, 2017. The Colloquium, sponsored by Hopping, Green & Sams, provided an opportunity for students to be recognized for their outstanding research and writing achievements, to give a short presentation of their work, and to get feedback on their hard work. Five students presented their work during the Colloquium: Sharon Wyskiel, "An Analysis of the National Flood Insurance Program Community Rating System as it Pertains to Florida Communities"; Justin Peters, "Deep Pockets on the Horizon: Will Non-Home Rule States' Greed Harm Counties Affected by Deepwater Horizon?"; James Brent Marshall, "Geoengineering: A Precise Weapon or an Unregulated Disaster in the Fight Against Climate Change"; Jessica Farrell, "The Centennial Shakeup: Is the National Park Service Losing its Ability to Manage and Create Aquatic Preserves?"; and Michael Melli, "State-led Initiatives on Climate Change – Their Authority, Precedent, and Potential Paths to Success."

Administrative Law Guest Lecture – The Honorable Bram Canter, Division of Administrative Hearings, guest lectured to Professor David Markell's administrative law class on the practice of administrative law before the Division of Administrative Hearings.

Legislation and Regulation Guest Lecture – The Honorable Suzanne Van Wyk, Division of Administrative Hearings; Vinette Godelia, partner, Hopping Green & Sams; and Brent McNeal, Deputy General Counsel, Department of Education, guest lectured to Professor Markell's Legislation and Regulation class.

Recent Student Achievements

- Several College of Law students are gaining invaluable administrative law and environmental law experience this semester and in the fall through our outstanding externship Program:
  - Lauren Angulo - Florida Housing Finance Corporation
  - Amanda Campen - Executive Officer of the Governor, Division of Emergency Management
  - Mandi Cohen - Executive Officer of the Governor, Division of Emergency Management
  - Valerie Chartier-Hogancamp - Department of Transportation, Environmental Compliance Office
  - Lauren Collier - Leon County Attorney's Office
  - Jessica Melkun - Department of Environmental Protection
  - Justin Peters - Division of Administrative Hearings
  - Sharon Wyskiel - Division of Administrative Hearings
  - Guerline Rosemond - NextEra Energy
  - Enio Russe-Garcia - Florida Sea Grant
  - Yanyu Chen - Leon County Attorney's Office
  - Sal Coppolino - Division of Administrative Hearings
  - Jazz Tomassetti - Division of Administrative Hearings
  - Austin Dailey - Department of Environmental Protection
  - Kelsey Makeever - Florida Housing Finance Corporation
- John Baker's article *Oil and Reform a la Mexicana: Past Troubles, Present Challenges, and Future Expectations* is being published in Volume 44 of the Florida State University Law Review.

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LAW SCHOOL LIAISON
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- Mackenzie Medich received an award from the Rocky Mountain Mineral Law Foundation to attend the Rocky Mountain Mineral Law Foundation's Special Institute "Oil & Gas Agreements: Surface Law in the 21st Century" in May 2017 in Denver, Colorado.
- Mark Seidenfeld presented at the 2017 Advanced Topics in Administrative, Environmental and Government Law course offered by the Administrative, Environmental and Land Use, and Government Lawyers Sections on April 21, 2017.
- Shi-Ling Hsu published *Capital Transitioning: An International Human Capital Strategy for Climate Innovation,* in the journal Transnational Environmental Law, and *Carbon Tax Rising?* in the ABA Section of Environment, Energy and Resources journal Trends. This ABA article is the short version of a forthcoming article *Climate Policy in the Trump Era: Carbon Tax Rising?* Finally, Professor Hsu weighed in on efforts by Washington State environmentalists to derail a ballot initiative for a state carbon tax in *Environmentalists' Disdain for Washington's Carbon Tax*, Slate.com.
- David Markell presented about the NAFTA Environmental Side Agreement during a February 2017 Workshop at Columbia Law School on International Investment Law and the Environment organized by Columbia Law School's Center on Sustainable Investment. Professor Markell has been named a Senior Fellow at Melbourne University Law School. A recent article is *Technological Innovation, Data Analytics, and Environmental Enforcement,* 44 Ecol. L. Q. 41 (forthcoming 2017) (with Professor Robert L. Glicksman).
- Erin Ryan published *Fishery Management Without Courts: A Response to Robin Craig,* 32 J. Land Use & Envtl. L __ (2017). She was invited to share forthcoming pieces at several academic conferences, including *The Public Trust Doctrine, Private Water Allocation, and Mono Lake*, at Texas A&M University and the University of Michigan, and *Negotiating Environmental Federalism*, at the University of Wisconsin and Arizona State University. She was interviewed on Florida Public Radio about President Trump's executive order requiring the Environmental Protection Agency (EPA) to begin rolling back the Obama Administration's "Waters of the United States Rule."
- Hannah Wiseman presented her draft article *Dysfunctional Delegation* at the Environmental Research Workshop at Georgetown Law in January 2017, the Public Policy Workshop at Berkeley Law in March 2017, and a faculty workshop at the University of Georgia School of Law in April 2017. Professor Wiseman also gave an invited presentation entitled *Governing Local Unconventional Oil and Gas Impacts Within Preemption Gaps* as part of a panel at the University of Houston Law Center's North American Environment, Energy & Natural Resources Symposium. In March 2017, Professor Wiseman organized a conference at FSU Law, which was cosponsored by the University of North Carolina School of Law Center for Climate, Energy, Environment & Economics and was entitled "Municipal Utilities and Cooperatives: Transitions to a Lower-Carbon Future." This conference addressed the challenges and opportunities associated with this transition and featured seventeen speakers and moderators from municipal utilities, cooperatives, municipal utility trade associations, and universities around the country.

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
MEMBERSHIP APPLICATION (ATTORNEY)
(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.

To join, make your check payable to **"THE FLORIDA BAR"** and return your check in the amount of $25 and this completed application to:

ADMINISTRATIVE LAW SECTION
THE FLORIDA BAR
651 E. JEFFERSON STREET
TALLAHASSEE, FL 32399-2300

NAME _____ ATTORNEY NO. _____

MAILING ADDRESS _____

CITY _____ STATE _____ ZIP _____

EMAIL ADDRESS _____

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

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progression. Though she is no longer a member of the press, Blanton today remains a "news junkie," and enjoys a daily dose of the Sayfie Review, listens to National Public Radio, and spends Sundays with the New York Times.

While at Florida State University College of Law, she took Pat Dore's administrative law class and knew instantly that administrative law would be the area where she focused her practice. After law school, Blanton clerked at the Florida Supreme Court for then-Chief Justice Rosemary Barkett. Blanton recalls the working environment at that time encouraged substantive and open conversations between the justices and law clerks about the cases before the Court. These discussions and debates helped shape Blanton's style of practicing law.

Blanton's first final hearing, a bid protest matter, was also her first real experience with litigation. She continues to have a particular fondness for procurement disputes as well as rule challenges because the time limitations in these proceedings require full immersion. Additionally, each presents unique factual circumstances frequently touching on a previously foreign subject area, giving rise to a welcomed opportunity to learn something new--yes, even prison canteens can be fascinating.

Blanton finds the true gift of practicing in the area of administrative law to be the people. It is not an insubstantial thing to be able to say you share your work experience with people that you like and who are steadfast in their commitment to civility. It seems to me that such a collegial atmosphere makes for a happy lawyer and a happy lawyer is a better lawyer.

In 2015, Blanton had the privilege and unusual experience of participating in the negotiated rulemaking process when she was selected by the Department of Health's Office of Compassionate Use to serve as the Florida administrative law expert on the twelve-member negotiation team that developed the draft rule for the cultivation, processing, and dispensing of low-THC cannabis. See § 120.54(2)(c)-(d), Fla. Stat. Negotiated rulemaking is seldom used by agencies and, in this instance, was employed by the Department of Health after the traditional rulemaking approach was unsuccessful. The negotiation team, with the assistance of a mediator, met for approximately twenty-three hours over a period of two days to reach agreement and finalize a set of rules. The team focused on the mistakes learned from the rule challenge to the initial rulemaking effort by the agency to steer the development of the new rules, which were ultimately upheld. Blanton found the process to be extremely beneficial.

Blanton reveals herself to be diligent, conscientious towards detail, and dedicated to consistently creating an excellent work product. She admits that she does not put up too many barriers between work and home life. Blanton maintains flexibility in her schedule and does not underestimate the importance of being responsive and thorough with clients. However, she has also learned to take advantage of slower times when they emerge and enjoys spending time with family and reading. Blanton, who ran the New York Marathon in 1993, also knows the necessity of exercise. Her current workout of choice is attending pure barre classes. Having accepted her invitation to try a one, I can attest that this is not for wimps.

Brian Newman
Pennington, P.A.

Newman grew up in Pensacola and is a dedicated Seminole, having earned both his undergraduate and law degrees from Florida State University. He was introduced to administrative law practice as a young lawyer when his firm was in need of assistance with its growing administrative litigation practice. This opportunity launched Newman into a practice area that has kept his interest over the course of a legal career spanning over twenty years.

When asked what he enjoys most about working in the administrative law field, Newman promptly responds that it is the people--the culture. The administrative law community is fairly small and this intimacy fosters familiarity, connections, and close relationships between the attorneys. Newman adds that it is a privilege to work with a group of people who are truly "cordial and professional." He notes the importance of the role played by Administrative Law Judges in engendering civility within the community and credits them with always "being prepared and paying close attention to the cases before them."

In discussing lessons learned as a young attorney, Newman recalls an experience from his first final hearing where, about forty-five minutes into his opening statement, the Administrative Law Judge suggested he prove his case through actual evidence as opposed to his speech and move on. Newman, of course, did so and maintains a practice of creating opening statements rich in brevity. He also shares that early in his practice he tended to spend more time worrying about what his opponent might argue instead of preparing his own case. "I hope I am better at that now," Newman said. He identifies Cynthia Tunnicliff as his mentor with whom he credits his problem-solving ability: "Cynthia taught me how to analyze a case from multiple angles and to think first about how to solve your client's problem."

Newman has created a considerable sphere of expertise in administrative law through his continuous investment of hard work--a virtue inculcated by his parents. In his moments of leisure, he enjoys recharging by reading, sailing, and spending time at the beach. At the time of the interview, he was reading *Food: A Love Story* by Jim Gaffigan.

William "Bill" Williams
Gray Robinson

Williams is from Madison, a small town almost halfway between Jacksonville and Tallahassee. His devotion to Madison is evident and he describes it as an ideal setting in

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which to grow up. However, Williams's ambitious nature showed itself in early childhood when he set his mind to attending college and creating a life somewhere other than Madison. Williams's uncle, Homer Faircloth, with whom he spent a lot of time, taught him how to read by using the Willie the Kool Penguin advertisements which appeared on the back of his Kool menthol cigarette / packs. Willie and his charming ads are easily found with a quick Google search. One such ad shows Willie in a boat, fishing and smoking a cigarette, with the caption: "Willie the Penguin Says: Fish not biting? Temper shot? Clean fresh Kools will Help A lot. Reel in Kools for the clean Kool taste in your mouth!" The rhythmic lines of prose certainly do lend themselves to good source material for phonetic training. It is interesting to note that some people credit Willie as the inspiration for Batman's villain, the Penguin. Williams quickly developed a love of reading and curiosity for knowledge. Having a home library consisting of just one book--the Bible--Williams began to regularly borrow books from his neighbors who maintained a vast collection, and upon completing one book, he would return it and select another.

During the summer when Williams was twelve, a murder trial captivated all of Madison. Most every day that summer, Williams would ride his bike to watch the proceedings from the back of the courthouse. He vividly recalls open windows, the utter lack of cool air, and Judge Hal Adams behind the bench wearing a string tie and making use of a nearby spittoon. Williams was mesmerized. For a twelve-year-old, it felt very much like a "real life Perry Mason" and planted the seed for law school.

Williams is a 1970 graduate of University of Florida College of Law. He began his legal career at Mahoney, Hadlow, Chambers & Adams in Jacksonville--Florida's oldest statewide law firm in continuous existence at that time. Williams recalls having some autonomy as a young associate and trying his first jury trial on his own. The judgment did not go in his favor that first trial, but he learned something as he won his next two. Once exposed to administrative law and the formal administrative hearing process, Williams chose to pursue it. He believes there to be real "value" in the Division of Administrative Hearings (DOAH) system.

Williams left private practice in 1978 to serve six years as a Hearing Officer for DOAH, just four years after DOAH's creation as Florida's adjudicatory body for administrative proceedings. During his tenure with DOAH, he wrote some 1500 orders covering a wide variety of subjects. During his early years as a Hearing Officer, chapter 120 permitted prisoners to initiate rule challenges--a right barred by the Legislature in 1992 due to misuse and abuse. See ch. 92-166, Laws of Fla. (1992). Williams handled a large number of these proceedings initiated by prisoners and recalls with amusement arriving for one such hearing at the Union Correctional Institution in Raiford only to be led to a "small broom closet" where the court reporter and others were gathered for the hearing. This location was indeed a shock and a massive downgrade from the spacious hearing room in which he typically conducted hearings at this prison. He jokes that an adverse ruling against the institution may or may not have followed closely on the heels of the radical change of venue.

In 1995, Williams, as the chair of the Administrative Law Section, had the exceptional experience of being actively involved in the debates surrounding the first major rewrite of the Florida Administrative Procedure Act (APA) since its enactment in 1974. Though there had been two previous legislative attempts to make substantive changes to the APA, it was Governor Chiles's personal frustration with the overreach of governmental regulations--specifically, his inability to secure a permit to construct a cook shack--that inspired him to create the APA Review Commission (Commission). The Commission's goal was to draft a more simplified APA and Governor Chiles dedicated his energies to its passage. Donna Blanton was also instrumental in this process, serving as the executive director of the Commission.

Williams has a generous energy and seems to be one who handles the stresses of life and career with an irrepressible joy. He continues to enjoy the practice of administrative law. The depth and longevity of his career are no doubt a credit to, at least certainly in part, a habit he inherited from his parents--hard work.

Virginia Ponder *is an attorney with the Office of Public Counsel. She is a graduate of Florida State University (1993) and Barry University School of Law (2011). Mrs. Ponder began her legal career as an associate with Pennington, P.A. Prior to joining the Office of Public Counsel in January 2017, she worked for the Department of Economic Opportunity. She is a member of the Administrative Law Section and the DOAH Case Notes Team.*

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