ADMINISTRATIVE LAW SECTION
Newsletter
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Practice Pointers

by John G. Van Laningham, Administrative Law Judge, Division of Administrative Hearings

I. PREPARATION

No less than a civil or criminal litigator, any lawyer who tries cases before DOAH should be well prepared. The administrative hearing is, after all, a legal proceeding in which issues of great importance to the parties will be decided, pursuant to the governing rules of law (which are often difficult and complex), based upon the evidence presented. Advocacy matters in this forum—and the lawyer who comes unprepared to make a persuasive case does a disservice to his or her client.

Being prepared means not just understanding the basic facts and being able to articulate what your client wants, but being fully engaged in the matter. Thus, you are prepared when you have a well thought out strategy, based on a defensible legal theory with which you are completely conversant; when you have talked to the witnesses upon whom your case depends and know what they will say at hearing; when you have studied the documents that you and your opponent will offer; and when you have planned how you will prove each fact material to your case. To be prepared means, as well, that you have examined, and can talk confidently about, the governing statutes and rules. It means that you have analyzed all of the relevant decisions, even the ones that can hurt your case. It means that you have thought through all the issues, the obvious ones as well as those that might arise; considered your opponent's likely

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From the Chair

by Jowanna N. Oates

As we embark upon a new Bar year, I am humbled and excited to serve as your chair. First, I would like to thank immediate past chair Richard Shoop for his leadership over the past year. Under Richard's leadership, the Section has raised its visibility and the membership has been reinvigorated. I hope to model his responsiveness, thoughtfulness, and promptness during my tenure.

I would like to take this opportunity recognize outgoing executive council members Andy Bertron and Brent McNeal. The Section has enduring gratitude for your many years of tireless service. I would also like to take this opportunity to welcome (and welcome back) Dan Nordby, Gigi Rollini, and Colin Roopnarine to the executive council. Thank you for devoting your time and talent to the Section.

This year as chair, my primary goal is to grow and engage our membership. As such, the focus will be on the three R's: recruitment, retention, and reclamation. We want to *recruit* new members, *retain* our current members, and *reclaim* those members who have allowed their memberships to lapse. In his final column, immediate past chair Shoop challenged each member to persuade at least one person to join the Section. I renew that challenge, as growing the membership is essential to the long-term health of the Section. Section dues are affordable (only $25.00) and provide benefits such as: reduced tuition at high quality continuing

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legal education courses; four newsletters a year which include summaries of recent state appellate administrative law cases, DOAH cases, agency snapshots, articles of interest to administrative practitioners, and announcements; invitations to meetings and other events; and the opportunity to network with colleagues across the state.

The Section's work is primarily handled by committee chairs, who need your help. The committees and chairs for the upcoming year are as follows:

Budget

The budget committee is headed by Brian Newman, who also serves as the Section's treasurer. The committee is comprised of the Section chair, immediate past chair, and treasurer, and prepares proposed budgets for approval by the executive council.

Continuing Legal Education

The CLE committee, headed by Bruce Lamb is preparing another year of high quality courses for members. On October 7, 2016, the Section will host the Pat Dore Administrative Law Conference at Hotel Duval in Tallahassee, Florida. Judge Cathy Sellers and Patty Nelson, the conference chairs, have worked hard to prepare a top-notch conference with fresh topics and exciting speakers. The theme of this year's conference is "Hail to the APA," which is timely as we celebrate the 42nd anniversary of the "modern" Administrative Procedure Act. The program brochure for the conference is available at www.flaadminlaw.org. Please review it and register for the conference. If you have any ideas for future CLE topics or speakers, please reach out to Bruce.

Law School Outreach

The law school outreach committee is responsible for coordinating activities at the state's law schools in order to increase the number of students interested in the practice of administrative law. This committee gives our membership throughout the state an opportunity to get involved with the Section. Last year, Judge Lynne Quimby-Pennock created a series of "networking noshes" which allowed the Section to interact with students across the state. I had the pleasure of attending the networking nosh at the University of Florida Levin College of Law. It was great fun interacting with the students and answering questions about the practice of administrative law. Judge Quimby-Pennock has graciously agreed to continue as chair and Vilma Martinez and Sharlee Edwards will co-chair the committee. The first two noshes have been scheduled for September 14, 2016 (University of Florida Levin College of Law) and September 29, 2016 (Western Michigan University Thomas M. Cooley Law School). If you are located in an area near one of the state's 12 law schools, please consider volunteering to serve as a panelist at one of the networking noshes.

Legislation

This committee is responsible for monitoring all bills which impact administrative law and making recommendations for action to the executive council. Linda Rigot will serve as chair of this committee.

Long Range Planning

The long range planning committee is responsible for reviewing the Section's present activities and making recommendations for activities for upcoming year. The committee also plans the Section's annual long-range planning retreat. Chair-elect Robert Hosay will lead this committee.

Ad Hoc Strategic Plan

This new ad hoc committee, chaired by Judge Gar Chisenhall, is tasked with developing a strategic business plan that will provide a road map for growing the Section. The strategic plan will closely examine all current Section activities, establish goals, and provide an action plan for achieving those goals.

Ad Hoc Young Lawyers

Christina Shideler is returning as the chair of the ad hoc young lawyer's committee. Under Christina's leadership the committee has hosted a number of social and educational activities designed for new administrative lawyers. This year, the committee plans to continue its popular Table for Eight" event which connects young lawyers with more experienced administrative lawyers. Additionally, the committee is planning another installment of the "Afternoon at DOAH" seminar, as well as other social and volunteer activities.

Ad Hoc Pro Se Consultation

For the past several years, the ad hoc pro se consultation committee has worked to provide assistance to pro se litigants. Last year, the committee established a pilot program at the Florida State University College of Law to train law students to assist pro se litigants with employment discrimination cases. Judge Suzanne Van Wyk will chair this committee

Ad Hoc Certification Review Study Guide

Judge John Van Laningham serves as the chair of this committee, which addresses the void left by the discontinuation of the annual certification review course. The committee is in the process of compiling study materials for the State and Federal Government and Administrative Practice certification examination. Hopefully, the committee's efforts will help more Section members become board-certified.

Nominating

The nominating committee will be chaired by immediate past chair Richard Shoop. Richard and his committee are responsible for identifying potential candidates for election to the executive council.

Publications

The publications committee is responsible for preparing the Section's newsletter and facilitating the submission of articles for publication in *The Florida Bar Journal*. Judge Elizabeth McArthur and I will continue in our roles as co-editors of the newsletter. Stephen C. Emmanuel, has agreed to continue as co-chair of the committee and *Journal* editor. The publications committee is always looking for authors; please contact me or Stephen if you are interested in submitting an article.

Related to the publications committee is the *Florida Administrative Practice* steering committee, which is chaired by Judge McArthur. Although technically not standing committee of the Section, the *Florida Administrative Practice* steering committee provides assistance to The Florida Bar/ Lexis-Nexis publication. They are actively working on reviewing chapter submissions for the 11th edition of *Florida Administrative Practice*.

Public Utilities Law

Michael Cooke and Cindy Miller are planning a busy year for the public utilities law committee (PULC). The PULC is preparing a CLE seminar to be held in Gainesville in October 2016. The registration information for the event will be placed on the Section's website as soon as it is available. The committee is working with the Federal Energy Bar and the University of Florida's Public Utility Research Center to plan the seminar, which will focus on solar energy issues in Florida, such as proposed constitutional amendments 1 and 4 and other renewable energy issues. The PULC invites anyone interested in assisting the committee to contact Michael Cooke or Cindy Miller.

Liaisons

The Section is continuing its outreach to other sections with practice areas that involve administrative law through the use of liaisons. The Section's participation with other sections and Florida Bar committees helps to ensure that we are offering programs that serve the needs of our membership. This year, the liaisons are as follows: Ralph De Meo (Animal Law); Gigi Rollini (Appellate Court Rules); Timisha J. Brooks (Diversity and Inclusion); Judge Lynne Quimby-Pennock (Government Lawyers); Francine Folkes (Environmental and Land Use Law); Amy Schrader (Health Law); Fred Dudley (Real Property, Probate and Trust Law); and Judge Robert Kilbride (Labor and Employment Law). We are excited to welcome Paul Drake, who will serve as the Section's liaison to the Young Lawyers' Division.

Additionally, we are fortunate to have Clark Jennings continue as the Section representative to The Florida Bar Council of Sections. Clark's knowledge of Bar procedures and longstanding involvement with the Section allows him to effectively communicate our needs and concerns to the Council. Bruce Lamb will continue to represent the Section as the liaison to The Florida Bar CLE Committee. As a member of the CLE committee, Bruce represents the Section's interests and keeps us informed about new developments. Larry Sellers will continue as the Section's liaison to the Florida Bar Board of Governors. Larry does a wonderful job of keeping the Section apprised of the important Bar issues of the day.

If you have never served on a committee, please consider doing so this year. The contact information for the committee chairs can be found at: http://www.flaadminlaw.org/about-the-Section.php#one.

Finally, I would like to extend an invitation to each member to attend an executive council meeting. The executive council meets at least three times a year, with one meeting occurring at the annual Bar conference in Boca Raton or Orlando. Attending an executive council meeting is a great opportunity to interact with other Section members and to learn more about Section activities. The executive council's next meeting is scheduled for October 6, 2016. Please do not hesitate to contact me if you have any questions about getting involved with the Section.

APPELLATE CASE NOTES

by Tara Price, Gigi Rollini, and Larry Sellers

Agency Authority – Exhaustion of Administrative Remedies
A.F. v. Seminole County School Board, 190 So. 3d 1149 (Fla. 5th DCA 2016).

A.F. appealed the Seminole County School Board's dismissal, with prejudice, of her petition seeking a formal administrative hearing regarding the School Board's incorrect scoring of her two minor children's matrices for services. Such matrices are used to determine eligibility for aid from the John M. McKay Scholarship for Students with Disabilities Program (McKay Scholarship Program). According to A.F., the children would receive substantially less money as a result of the incorrect scoring than they were otherwise entitled to receive from the program.

The court concluded that the School Board "properly determined that it lacked subject matter jurisdiction to hear A.F.'s petition because A.F. was required to pursue her administrative remedy through the Florida Department of Education (DOE), pursuant to the complaint process set forth in section 1002.39(6)(c), Florida Statutes (2015), and Florida Administrative Code Rule 6A-6.0970(8)-(9)," which govern the McKay Scholarship Program.

A.F. argued that the DOE complaint process would be ineffectual because a matrix of services "may only be changed by the school district … to correct a technical, typographical, or calculation error," according to rule 6A-6.0970(4)(a). The court rejected this argument on the basis that rule 6A-6.0970(9)(c)3.c. granted DOE authority to "direct a school district to amend a matrix of services so as to correct a technical, typographical, or calculation error."

The court concluded, however, that while the School Board lacked jurisdiction to entertain A.F.'s petition, the dismissal should have been without prejudice to A.F. to refile her petition with the DOE. The court noted that A.F. may seek relief in circuit court after exhausting her administrative remedies.

Agency Jurisdiction – Purpose of Petition Prevails to Determine Timeliness
American Heritage Window Fashions, LLC v. Department of Revenue, 191 So. 3d 516 (Fla. 2d DCA 2016).

American Heritage Window Fashions, LLC, appealed the Department of Revenue's dismissal of its petition to review the denial of a tax refund. Pursuant to section 72.011(2)(a), Florida Statutes, an action to contest the denial of a refund of tax payments must be brought within sixty days of the date the refund's denial becomes final. On the other hand, an action to contest a tax assessment must be brought within sixty days of the date the assessment becomes final. The Legislature has expressly stated in statute that these time limits are jurisdictional. Although American Heritage's petition was filed within sixty days of the refund's denial, the Department dismissed the petition on the ground that it was actually "an untimely effort to contest a tax assessment made in 2010."

In 2010, after an audit of American Heritage's sales tax remittances, the Department served American Heritage with a notice of proposed assessment requiring it to pay a tax deficiency and interest. The notice informed American Heritage that it had sixty days to file an informal protest before the assessment would

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become final, and then sixty days after the assessment became final to seek administrative or judicial review, as mandated by statute.

American Heritage took the position that the tax deficiency was improperly assessed, but never filed an informal protest, administrative petition, or civil complaint. The Department did receive some funds from American Heritage in 2013, which were applied to the unpaid sales tax deficiency. American Heritage requested a refund on the ground that the funds received in 2013 constituted an audit overpayment, implicitly arguing that this was not payment on the assessment because the underlying tax assessment was not properly assessed in the first instance. The Department denied this request.

American Heritage filed a petition for a chapter 120 hearing to review the refund's denial. Once at DOAH, the Department filed a motion to relinquish jurisdiction on the basis that the challenge to the 2010 assessment was time-barred under section 72.011(2)(a). The motion was granted, and the Department entered a final order dismissing American Heritage's petition on the ground that it lacked jurisdiction to review what amounted to an untimely challenge to a tax assessment.

The court concluded that the petition, brought for the purpose of contesting the 2010 tax assessment, was untimely. The court also determined that American Heritage's action was not really taken to obtain a refund of the sum it had paid in 2013, which amounted to only three percent of the 2010 assessment, but to absolve it of responsibility for the ninety-seven percent it had not paid. The court explained that "labeling an action brought to contest an assessment as one brought to contest a refund denial does not change its purpose as an action brought to contest an assessment."

The court emphasized that allowing a taxpayer to contest a tax assessment through a petition to review a refund denial, after paying such a nominal amount, would "render the statute's sixty-day limitation on actions brought to contest tax assessments meaningless."

Finally, the court rejected American Heritage's argument that it was denied procedural due process. The court noted that this was not a case in which American Heritage "reasonably relied on the apparent availability of a post-payment refund when paying the tax," mentioning *Newsweek, Inc. v. Department of Revenue*, 689 So. 2d 361, 363-64 (Fla. 1st DCA 1997).

Accordingly, the court affirmed the final order of dismissal.

Attorney's Fees—Meaning of "Nonprevailing Adverse Party"
Johnson v. Department of Corrections, 191 So. 3d 965 (Fla. 1st DCA 2016).

Randall Johnson appealed the ALJ's final order finding that he was not entitled to an award of attorney's fees against the Department of Corrections (Department) because the Department did not fall within the definition of "nonprevailing adverse party" under section 120.595(1)(e)3., Florida Statutes.

Mr. Johnson was employed by the Department as a corrections officer until September 19, 2014, when the Department terminated him under the procedure established in section 110.227(5)(b), Florida Statutes. Pursuant to section 110.227(5)(b), the Department gave Mr. Johnson a letter of dismissal, which he appealed to the Public Employees Relations Commission (PERC). During the appeal, the Department rescinded its termination of Mr. Johnson and reinstated him on February 13, 2015.

Mr. Johnson sought attorney's fees under sections 120.595 and 120.569, Florida Statutes. PERC referred the matter to DOAH for determination by an ALJ, as PERC's hearing officers are not authorized to rule on an attorney's fees request under section 120.595. Before the ALJ, Mr. Johnson proceeded under only section 120.595(1). The ALJ determined that Mr. Johnson could not receive attorney's fees, because the Department did not qualify as a "nonprevailing adverse party" who "participated in the proceeding for an improper purpose." Mr. Johnson appealed the ALJ's final order to the First District Court of Appeal.

The court held that although the Department did not "prevail" in its attempt to terminate Mr. Johnson, it was not a "nonprevailing adverse party" under section 120.595(1)(e)3. A party meets this definition when it is "a party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of the proceeding." The court concluded that the "Department did not seek to substantially change its own action," nor did it "fail to change the outcome of its own action." As such, the Department could not be held liable for attorney's fees under section 120.595(1)(e)3. Finally, the court noted that attorney's fees may be available in certain cases under sections 57.105 and 57.111, Florida Statutes, even if a prevailing party is not eligible for attorney's fees under section 120.595(1)(e)3. Thus, the court affirmed the ALJ's final order finding that Mr. Johnson was not entitled to attorney's fees under section 120.595.

PSC Authority—Declarations Regarding Utility Service in Certain Geographical Areas
Board of County Commissioners Indian River County v. Graham, 191 So. 3d 890 (Fla. 2016).

The City of Vero Beach's (City) Agreement with the Board of County Commissioners for Indian River County, Florida (County), allowed the City the exclusive right to build, maintain, and operate an electric system in unincorporated areas of the County. The Agreement expires in 2017, and the County did not agree to a renewal.

Before the City and County executed the Agreement, the Public Service Commission (PSC) had issued a series of orders approving a territorial agreement between the City and Florida Power and Light (FPL) which established the boundaries between their respective electric service areas.

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One of those PSC orders recognized the "right and obligation" of the City and FPL "to serve within" certain territorial areas. The Agreement defines the City's electric service boundaries as those that "are or may be defined in the Service Territory Agreement between the City[] and [FPL]."

As the Agreement was nearing expiration, the County filed a petition for declaratory statement with the PSC seeking 14 declarations regarding its "rights, duties, and responsibilities" upon the expiration of the Agreement. The County also requested, in the alternative, that the PSC "initiate . . . proceedings . . . to address the territorial agreements, service boundaries, and electric grid reliability responsibilities so as to ensure the continued and uninterrupted supply of electric service throughout the County." The City and FPL intervened in opposition to the County's petition.

Separately, the City filed a petition for declaratory statement with the PSC, alleging that the County's petition, upon the expiration of the Agreement, threatened to "evict the City" from providing electric service in the unincorporated areas of the County that the PSC had previously approved. The City sought two declarations from the PSC: (1) that neither the "existence, non-existence, nor expiration" of the Agreement had any "effect on the City's right and obligation to provide retail electric service" in the PSC-approved territorial service areas; and (2) that "[t]he City can lawfully, and is obligated to, continue to provide retail electric service" in those PSC-approved areas, regardless of the Agreement's status "and without regard to any action that the County might take in an effort to prevent the City from continuing to serve in those areas." The County intervened in opposition to the City's petition.

The PSC denied the County's petition on the grounds that it failed to meet necessary statutory requirements. The PSC did not issue the broad declarations requested by the City. Instead, it simply declared that the City "has the right and obligation to continue to provide retail electric service in the territory described in the Territorial Orders upon expiration of the Franchise Agreement."

The County appealed both PSC orders to the Florida Supreme Court. The Court affirmed the PSC order denying the County's petition without explanation. The County's appeal of the PSC's order on the City's petition raised four arguments: (1) the City lacked standing to file the petition; (2) the PSC lacked the authority to issue its declaration; (3) the PSC's declaration erroneously gave the County's property rights to the City; and (4) the PSC's declaration violated section 366.13, Florida Statutes, which prohibits the PSC from affecting a franchise fee "in any way."

The Court rejected all four of the County's arguments. First, the Court held that the City had standing to seek a declaratory statement from the PSC under section 120.565, Florida Statutes, because it was "an electric utility subject to regulation by the PSC and a party to PSC territorial orders that the County intends to treat as invalid."

Second, the Court held that the PSC had the authority to issue the declaration. The Court noted that it could reverse the PSC's declaratory statement only if the PSC's interpretation of the law was "clearly erroneous." Although the County argued that the PSC improperly interpreted the Agreement, the PSC's order expressly stated that it was not interpreting the Agreement. The PSC simply issued a declaration that the City must continue to provide electric service pursuant to the PSC's earlier territorial orders, which the Court found to be within the agency's authority.

Third, the Court held that the PSC's declaration did not grant the City rights to the County's property. The Court noted that whether the utility is required to pay a fee under a franchise agreement with the local government is a separate issue from whether a utility has an obligation to serve under a territorial order.

Fourth, the Court held that the PSC's declaration did not violate section 366.13. As an initial matter, the Court noted that the County failed to raise this argument before the PSC. Even if it had, the Court ruled the argument was without merit, holding that the PSC's order merely requires the City to provide electric utility service and "does not prevent the County from receiving remuneration for the City's use of its property" or "suggest that [the City] would be able to use the County's property without payment." Thus, the Court affirmed the PSC's orders on the City's and County's petitions for declaratory judgment.

PSC Authority—Electric Utility Recovery of Natural Gas Investments out of State
Citizens of the State of Florida v. Graham, 191 So. 3d 897 (Fla. 2016).

Citizens of the State of Florida, through the Office of Public Counsel (Citizens), Florida Industrial Power Users Group, and Florida Retail Federation (collectively, Appellants), appealed an order of the Public Service Commission (PSC), which authorized Florida Power and Light (FPL) to recover through electricity rates the costs incurred in a joint venture with an oil and natural gas company.

In 2014, FPL filed a petition with the PSC requesting approval and recovery of its investments in a joint venture agreement between FPL and publicly traded oil and natural gas company PetroQuest, that would pursue "the exploration, drilling, and production of natural gas in the Woodford Shale Gas Region in Oklahoma." Under the agreement, FPL would invest in the shale gas reserves directly and receive rights to some of the physical gas produced. FPL contended that the joint venture agreement would serve as a "long-term physical hedge" against the volatility of natural gas prices, and would allow FPL to acquire natural gas at production costs, which would be lower than market prices.

Appellants intervened. Two of the appellants moved to dismiss FPL's petition, arguing that the PSC did not have authority to approve the recovery of FPL's investments in the joint venture agreement. The PSC ruled that it had jurisdiction to set rates

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for public utilities, and denied Appellants' motion. The PSC also ruled that FPL could recover its costs in the joint venture agreement because it was "expected to produce customer benefits and is in the public interest." Thus, FPL was permitted to recover its costs through the rates it charged to consumers.

Appellants appealed the PSC's order to the Florida Supreme Court. Both Appellants and FPL raised a number of arguments, but the Court discussed only whether the PSC had the authority to allow FPL to recover its capital investment and operations costs in the joint venture agreement through the rates it charges electric customers.

The Court examined section 366.06(1), Florida Statutes, which authorizes the PSC to set rates that are "fair, just, and reasonable" for the public utility's service. The Court also noted that section 366.02(2) defines an electric utility as a "municipal electric utility, investor-owned electric utility, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state." Reading those two statutes together, the Court observed that "cost recovery is permissible only for costs arising from the 'generation, transmission, or distribution' of electricity" in Florida. Thus, the Court concluded that the PSC did not have the authority to approve cost recovery of FPL's joint venture since that venture involved "the exploration, drilling, and production of fuel [which] falls outside the purview of an electric utility as defined by the Legislature."

Next, the Court held that the PSC lacked the authority to approve FPL's cost recovery, even if it were characterized as a long-term physical hedge, because the joint venture agreement did not specify that FPL would receive a "certain quantity of fuel for a certain price." The Court concluded that FPL's requested recovery of costs in its joint venture agreement would reimburse FPL for investment, operation, and maintenance in the natural gas project, not the purchase of a known quantity of fuel. Ultimately, the Court held that while the venture "may be a good idea," it was up to the Legislature, not the PSC, to determine whether an electric utility should be able to receive advance cost recovery for "speculative investments in gas exploration and production."

The Court reversed the order and held that the PSC lacked the authority to approve of FPL's recovery of its costs in the joint venture agreement.

Public Records – Delay in Production Due to Potential Discovery of Exempt Records
Schweickert v. Citrus County Florida Board, 193 So. 3d 1075 (Fla. 5th DCA 2016).

Robert A. Schweickert, Jr., the publisher of an internet newspaper, submitted repeated public records requests to Dorothy F. Green, a private attorney who was investigating charges against a county commissioner. Schweickert requested all documentation regarding the case Green was handling for Citrus County Florida Board (the Board), but Green denied the request on the basis that the records were exempt under section 119.071(2)(g)1., Florida Statutes.

Schweickert filed a complaint to enforce the public records law, and Green provided him with a copy of her investigatory report in response. Schweickert then filed an amended complaint, which requested the court to declare that the Board unlawfully denied his request, and sought an award of attorney's fees and costs. The trial court dismissed Schweickert's amended complaint with prejudice, finding that it was moot because Schweickert had already received Green's report.

On appeal, Schweickert contended that his case was not moot, because of his right to attorney's fees. The court agreed, concluding Schweickert's case was not rendered moot simply because the Board produced the requested documents after the filing of the initial complaint, but prior to filing the amended complaint.

The Board asked the court to uphold the dismissal with prejudice of the amended complaint, however, under the "tipsy coachman" doctrine. The Board argued that Green was justified in initially withholding the documents because they were exempt from immediate production. The Board's argument rested on the theory that because a complaint alleged that the county commissioner's misconduct created a "hostile work environment," Green might have discovered or generated records during her investigation that related to discrimination, which would be exempt under section 119.071(2)(g)1.

The court called this a "wait and see" policy that would exempt immediate inspection of public records in any case where the scope of the investigation could possibly lead to the discovery or creation of exempt documents, an approach not justified by the statutory language. Additionally, the court held that the delay in providing the requested public records was unlawful because the exemption did not apply.

Accordingly, the court reversed and remanded the case for determination and award of reasonable costs and attorney's fees to Schweickert.

Public Records – "Unlawful Refusal"
Citizens Awareness Foundation, Inc. v. Wantman Group, Inc., 41 Fla. L. Weekly D1233e (Fla. 4th DCA May 25, 2016).

Citizens Awareness Foundation, Inc. (CAFI), appealed a circuit court's summary final judgment that ruled against it on its complaint against Wantman Group, Inc. (Wantman), for failure to permit access to public records.

Wantman served as a contractor with the South Florida Water Management District. A public records request was submitted by what was ultimately determined to be a "suspicious email that could not be easily verified," from an undisclosed sender. There was no indication that the email request was made on behalf of a person or company. The email did not contain any information about how to contact the person or corporation making the request. The email was also directed to an independent

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contractor and not a governmental agency familiar with fielding public records requests.

CAFI waited only 18 days, without making any further inquiry, before filing suit in circuit court, claiming a right to be awarded attorney's fees. In circuit court, Wantman presented unrebutted affidavit testimony that it believed the request to be illegitimate and spam, and did not respond to it as a result. Shortly after the lawsuit was filed, Wantman voluntarily provided the requested documents to CAFI after learning that the email was a legitimate records request.

On appeal, the court agreed with the circuit court that the case was controlled by *Consumer Rights, LLC v. Union County*, 159 So. 3d 332 (Fla. 1st DCA 2015), which involved a curious email request for records that was "intentionally designed to appear to be deceptive." Similarly, the court found that the request to Wantman was one that "would lead anyone familiar with the perils of email communication to exercise caution, if not to disregard the communication entirely," citing *Consumer Rights*, 159 So. 3d at 886. Because Wantman acted in good faith, and its delay in responding was attributable to the suspicious nature of the email, the court concluded that there was no "unlawful refusal" to provide public records, noting "[t]he public records law should not be applied in a way that encourages the manufacture of public records requests designed to obtain no response, for the purpose of generating attorney's fees." The court also distinguished cases like *Chandler v. City of Greenacres*, 140 So. 3d 1080 (Fla. 4th DCA 2014), stating "there is a difference between allowing anonymous public records requests and evaluating an agency's response when such requests are justifiably handled with caution."

Finally, the court denied an award of attorneys' fees on the basis that because there was no "unlawful refusal" by an agency, there was no violation of the Public Records Act that triggered entitlement to statutory attorney's fees.

Note: Section 119.0701, Florida Statutes, was amended, effective March 8, 2016. *See* Ch. 2016-20, Laws of Fla. The amendment directs that any request to inspect or copy public records relating to a public agency's contract for services must be made directly to the public agency. Under the amended statute, when the public agency requests records from the contractor, the contractor must provide them to the public agency or allow the records to be inspected or copied within a reasonable time. A contractor that fails to do so may be subject to penalties, such as the reasonable cost of enforcement, including attorney's fees—but only if the plaintiff provides the written notice required by the new law at least 8 days before filing the action for enforcement. Each agency contract for services entered into or amended on or after July 1, 2016, is also required to include a specific statement identifying the contact information for the public agency's custodian of public records, and a provision requiring the contractor to comply with the public records law.

Ripeness—Raising Constitutional Challenges to Imposition of Ethics Commission Penalties
Rivera v. Fla. Comm'n on Ethics, 41 Fla. L. Weekly D1568a (Fla. 1st DCA July 6, 2016).

David Rivera appealed the Final Order and Public Report of the Florida Commission on Ethics (Commission), which found that he had committed numerous ethical violations as an elected member of the Florida House of Representatives and recommended public censure, reprimand, civil penalties, and restitution.

Mr. Rivera was a member of the Florida House of Representatives from 2002 until 2010. In 2010, the Commission received two complaints that Mr. Rivera had committed ethical violations as a member of the Florida House, and following an investigation, the Commission found probable cause to believe that he committed those violations, as well as numerous other violations. The Commission referred the matter to DOAH for an evidentiary hearing before an ALJ. The ALJ held a hearing and issued a recommended order finding that Mr. Rivera committed multiple ethical violations. But the ALJ did not include a recommended penalty, so the Commission remanded the case to the ALJ for a penalty recommendation. Mr. Rivera objected, and the ALJ amended the recommended order to include a penalty recommendation of public censure, reprimand, civil penalties of $16,500, and restitution exceeding $41,000. The Commission adopted the ALJ's amended recommended order in full in its Final Order and Public Report.

Mr. Rivera appealed to the First District Court of Appeal, arguing: (1) the Commission violated his due process rights by remanding the matter to the ALJ for a recommended penalty; and (2) section 112.324(8)(e), Florida Statutes, which states that the Speaker of the House is authorized to impose any penalties recommended by the Commission, is unconstitutional because it violates separation of powers and the Speaker has no jurisdiction over former members.

The court "summarily reject[ed]" Mr. Rivera's due process claims and declined to rule on the constitutional challenge to section 112.324(8), finding that it was not yet ripe. The court reviewed section 112.324(3), which states that the Commission can recommend, but not impose, penalties. Although the statute gives the Speaker the power to impose the Commission's recommended penalty, nothing requires the Speaker to accept the recommendation or impose any penalty at all. The court noted that "here, there is no indication in the record that the Speaker intends to take disciplinary action against [Mr.] Rivera since he is no longer a member of the House." As such, the court declined to rule on the constitutional challenge, concluding that it would be an improper advisory opinion.

The court affirmed the Commission's Final Order and Public Report.

Validity of FDLE Rules—Blood Alcohol Collection & Testing
Goodman v. Florida Department of Law Enforcement, 41 Fla. L. Weekly D1247b (Fla. 4th DCA May 25, 2016).
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APPELLATE CASE NOTES
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John Goodman was charged with DUI Manslaughter/Failed to Render Aid and Vehicular Homicide/Failed to Give Information or Render Aid after an automobile accident that caused the death of another person. Mr. Goodman's blood was drawn for alcohol testing pursuant to sections 316.1932-34, Florida Statutes (accepting a driver's license in Florida means a person is deemed to have consented to blood alcohol testing). Mr. Goodman moved the trial court to exclude the blood alcohol test results, challenging the validity of Fla. Admin. Code Rules 11D-8.012 and 11D-8.013. The trial court transferred the rule challenge, pursuant to the doctrine of primary jurisdiction, to DOAH for a ruling. After an evidentiary hearing, the ALJ dismissed Mr. Goodman's petition and issued an order concluding that rules 11D-8.012 and 11D-8.013 were valid exercises of delegated legislative authority. The trial court denied Mr. Goodman's motion to exclude his blood test results, and he was convicted and sentenced.

On appeal, Mr. Goodman raised three issues: (1) whether FDLE lacked authority to promulgate rules 11D-8.012 and 11D-8.013; (2) whether rule 11D-8.012 fails to establish standards for the method of collecting blood for chemical analysis; and (3) whether rule 11D-8.013 fails to include a process to identify and exclude the testing of unreliable blood samples.

The court affirmed the ALJ's finding regarding the FDLE's authority in one sentence, concluding that the statutes clearly granted FDLE the authority to promulgate rules 11D-8.012 and 11D-8.013.

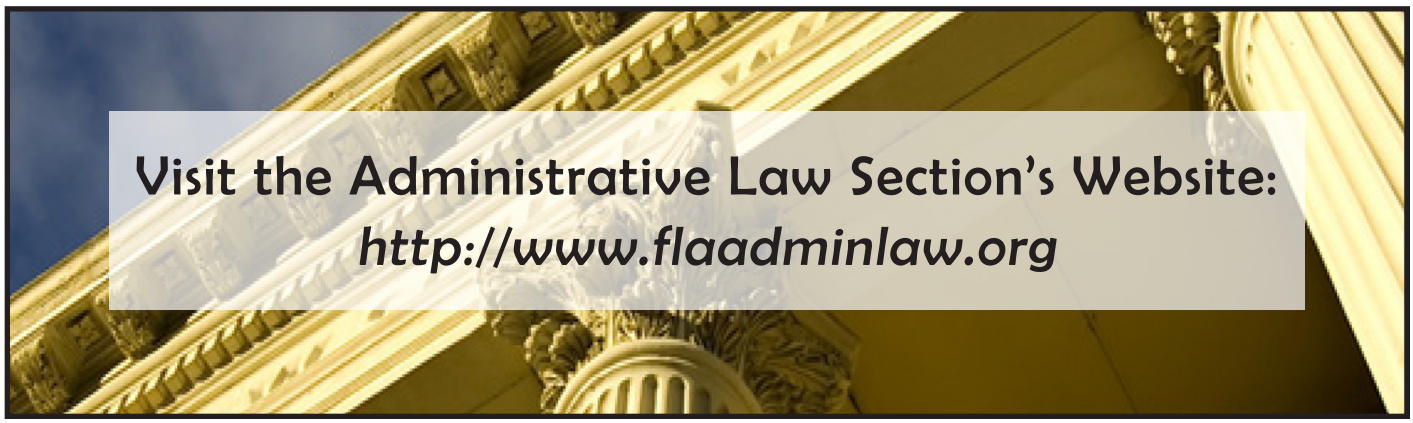
The court also found that the record contained competent, substantial evidence to support the ALJ's ruling that rule 11D-8.012 is valid. Mr. Goodman argued that rule 11D-8.012 failed to provide standards for the type or size of the needle to be used during the blood collection process. Mr. Goodman alleged that his blood was drawn with a twenty-five gauge butterfly needle instead of the standard twenty-one gauge straight needle, and he argued the use of a butterfly needle could cause an increase in blood clotting, which could affect the test results of the blood sample. During the evidentiary hearing, the ALJ heard testimony from seven experts, and ultimately concluded that even though the smaller butterfly needle was more likely to cause blood clotting, such clotting did not "inevitably preclude[]" accurate test results, because curative procedures could be employed to avoid inaccurate results. The court recognized that the testimony presented to the ALJ "was subject to multiple conclusions." But ultimately, the court found that the record contained sufficient expert testimony for the ALJ to conclude that increased blood clotting did not necessarily render the testing of blood samples inaccurate.

Additionally, the court found that the record contained competent, substantial evidence to support the ALJ's ruling that rule 11D-8.013 is valid. Mr. Goodman argued that rule 11D-8.013 failed to require those who tested the blood samples to screen, remove, and/or document irregular blood samples. But the testimony of the experts—including two of Mr. Goodman's experts—showed that written documentation of clotted or irregular blood samples was always recorded. The evidence supported the ALJ's conclusion that it was standard laboratory practice to examine and document the condition of blood samples and the "omission of such a requirement does not provide a basis to invalidate" the rule. The court further noted that it would be "a hopeless endeavor" to require "FDLE to regulate for *every* possible contingency that may arise in the collection or testing process," and that the rules are sufficient to protect defendants and the interests of the judicial system when combined with basic laboratory practices. Thus, the court affirmed the ALJ's order dismissing Mr. Goodman's petition.

Tara Price *is an attorney with Holland & Knight LLP, practicing in the firm's Tallahassee office.*

Gigi Rollini *is a shareholder with Messer Caparello, P.A., in Tallahassee, and AV-rated in both appellate and administrative law, and was assisted by student intern Jaclyn Weinell.*

Larry Sellers *is a partner with Holland & Knight LLP, practicing in the firm's Tallahassee office.*



DOAH CASE NOTES

Substantial Interest Hearings

Alicia Chilito, M.D. v. Dep't of Health, DOAH Case No. 15-3568 (Recommended Order Feb. 29, 2016); DOH Final Order No. DOH-16-0933-FOF-MQA (Final Order May 2, 2016)

FACTS: In the last newsletter, this case was summarized following an administrative hearing and issuance of a Recommended Order. Briefly, an application by Alicia Chilito ("Chilito"), a licensed physician, to renew her license with the Department of Health ("DOH"), was initially denied by DOH. Chilito's challenge to the denial of her application sought to invoke the default license provision in section 120.60(1), Florida Statutes, because DOH did not act to approve or deny the licensure application within 90 days. DOH argued in the hearing that Chilito's phone conversation with a DOH employee was a sufficient denial under the law, and that Chilito was not entitled to a default license because she did not notify the agency clerk of her intent to obtain a license by default. The ALJ rejected the arguments and recommended that DOH issue a final order approving the license renewal pursuant to section 120.60(1), and directing the agency clerk to issue Chilito's default license upon proper notification. For a more detailed summary, see the DOAH Case Notes published in the June 2016 newsletter.

OUTCOME: The DOH advocate filed exceptions to the Recommended Order. However, by Final Order rendered on May 2, 2016, DOH accepted the ALJ's recommendation and ruled that "[u]pon [Chilito]'s notification to the agency clerk in compliance with section 120.60(1), Florida Statutes, [Chilito]'s license is to be renewed and may include reasonable conditions as [DOH] is authorized by law to require."

Nikki Henderson, d/b/a Henderson Family Day Care Home v. Dep't of Children & Families, DOAH Case No. 15-5820 (Recommended Order May 2, 2016).

FACTS: Nikki Henderson submitted an application to the Department of Children and Families ("DCF"), for a license to operate a family day care home. DCF preliminarily denied the application. In support of its initial decision, DCF cited five abuse and neglect reports.

Ms. Henderson requested an administrative hearing to contest the denial of her application.

OUTCOME: The ALJ determined that the abuse and neglect reports were hearsay, and included hearsay within hearsay, because they primarily consisted of summaries of records reviewed by the reporter or summaries of statements by other individuals. The ALJ determined that the reports did not satisfy the business records or public records exceptions to the hearsay rule. The ALJ also rejected DCF's argument that section 39.202(2)(a)5., Florida Statutes, created an exception to the hearsay rule by making the abuse and neglect reports available to DCF's licensing staff. The ALJ reasoned that it would be "irrational for the Legislature, which codifies hearsay exceptions in the evidence code, to create an implied exception in a different chapter of the statutes." Instead, "[t]he more rational interpretation of the statute is that the Legislature intended for DCF to use the information in the reports to identify witnesses to contact and documents to review." In addition, and with regard to the events described in the reports, the ALJ found Ms. Henderson's live testimony to be a more credible and accurate representation of what actually happened than the contents of the reports. Accordingly, the ALJ recommended that DCF enter a final order granting Ms. Henderson's application to operate a family day care home.

Alejandro Javier Friguls v. Dep't of Fin. Servs., DOAH Case No. 15-7354 (Recommended Order June 1, 2016).

FACTS: The Department of Financial Services ("DFS") licenses personal lines insurance agents. Section 626.207(3), Florida Statutes, establishes a permanent bar to licensure for any applicant who has committed a first degree felony; a capital felony; a felony involving money laundering, fraud, or embezzlement; or a felony directly related to the financial services industry. Subsection (3) further provides that the permanent bar "applies to convictions, guilty pleas, or nolo contendere pleas, regardless of adjudication, by any applicant . . . ." In addition, section 626.207(4)(b) provides for a 7-year disqualifying period for all felonies to which the permanent bar in subsection (3) does not apply. On September 11, 2015, Alejandro Javier Friguls filed an application for licensure as a resident personal lines insurance agent. On November 23, 2015, DFS issued a notice of denial based on the fact that Mr. Friguls had pled nolo contendere on January 19, 2012, in the Seminole County Circuit Court to one count of possessing Oxycodone, a third-degree felony. The court accepted Mr. Friguls' plea, but withheld adjudication. In the notice of denial, DFS also stated that the 7-year disqualifying period in section 626.207(4)(b) prevented Mr. Friguls from being eligible for licensure until 2021. Mr. Friguls requested a formal administrative hearing and asserted that he had never been convicted of a felony. He also asserted that he was not subject to the 7-year disqualifying period because the prohibition in paragraph (4)(b) only applies to actual felony convictions or findings of guilt. DFS referred the case to DOAH on December 30, 2015.

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OUTCOME: The ALJ recommended that DFS enter a final order granting Mr. Friguls' licensure application. In doing so, the ALJ observed: "By not including a reference to nolo contendere pleas in section 626.207(4)(b), the Legislature indicated that it did not desire the 7-year disqualifying period to apply to all other felonies in which an applicant entered a nolo contendere plea. In comparing the two subsections, the undersigned concludes that the plain and ordinary meaning of the word 'felony' as used in section 626.207 does not automatically include 'nolo contendere pleas, regardless of adjudication.' Accordingly, the term 'all felonies' in section 626.207(4)(b) does not include nolo contendere pleas where adjudication of guilt was withheld." "[I]f the drafters of section 626.207 had intended for the permanent bar for felony 'nolo contendere pleas, regardless of adjudication' in section 626.207(3) to also apply to other 'felonies' governed by section 626.207(4)(b), the drafters would have specifically included that language in both sections."

McCrory's Sunny Hill Nursery, LLC v. Dep't of Health, Case No. 16-1934 (Recommended Order of Dismissal June 3, 2016).

FACTS: Pursuant to section 381.986, Florida Statutes (the Compassionate Use of Low-THC Cannabis Act), McCrory's Sunny Hill Nursery, LLC ("McCrory's"), and several other applicants sought to become the single dispensing organization ("DO") of low-THC cannabis in the central Florida region. The Department of Health ("DOH") determined that Knox Nursery ("Knox") achieved the highest aggregate score and approved Knox as the single DO for the central Florida region. McCrory's and several other denied applicants filed petitions for formal administrative hearings to contest DOH's decision to approve Knox's application. Those petitions were referred to DOAH and consolidated; the McCrory's petition was assigned Case No. 15-7275 ("McCrory's I"). Before a final hearing could be held in McCrory's I, the Legislature enacted an immediately-effective law which provides in pertinent part that "any applicant that received the highest aggregate score through the department's evaluation process, notwithstanding any prior determination by the department that the applicant failed to meet the requirements of s. 381.986, Florida Statutes, must be granted cultivation authorization by the department and is approved to operate as a dispensing organization for the full term of its original approval and all subsequent renewals pursuant to s. 381.986, Florida Statutes." On April 25, 2016, McCrory's filed a second petition contesting the same initial denial of its application as challenged in McCrory's I, alleging that the new language requires that its application be approved, because but for clear errors made in the scoring, it would have received the highest aggregate score. After that petition was referred to DOAH and assigned Case No. 16-1934 ("McCrory's II"), DOH moved to dismiss McCrory's II because the second petition's allegations (even if accepted as true) do not entitle McCrory's to automatic approval under the new language.

OUTCOME: The ALJ recommended that DOH render a final order dismissing McCrory's II. The ALJ rejected the argument that McCrory's was entitled to a hearing to prove that there were blatant errors made in scoring its application such that it would have been entitled to the highest aggregate score, because the new law authorized automatic approval for an applicant that received the highest aggregate score from DOH in its initial review, not the applicant that would have received the highest score if errors had not been made. "No matter how egregious McCrory's claims the scoring errors were, no matter how minute the corrections that McCrory's contends it can prove should be made for it to leapfrog over Knox and become the highest aggregate scorer, the remedy available to McCrory's is the litigation option [McCrory's I], not the automatic legislative approval option."

Disciplinary/Enforcement Actions

Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering v. Hamilton Downs Horsetrack, LLC, DOAH Case No. 15-3866 (Recommended Order May 26, 2016).

FACTS: The Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("the Division") is the state agency charged with regulating pari-mutuel wagering activities in Florida. Hamilton Downs Horsetrack, LLC ("Hamilton Downs"), holds a quarter horse racing permit and was licensed to run 160 races from June 18-22, 2014. During that time period, Hamilton Downs conducted "flag drop" racing. The Division issued an Amended Administrative Complaint alleging that the so-called flag drop races did not meet racetrack standards because of the way in which the races were conducted. Hamilton Downs was charged with violating section 550.01215(3), Florida Statutes, by failing to "operate all performances at the date and time specified on its license." Hamilton Downs requested an administrative hearing.

OUTCOME: The ALJ found that the flag drop races at Hamilton Downs "involved two horses racing simultaneously on a crude dirt 'track' approximately 110 yards in length. The track was straight for about 100 yards, with a pronounced rightward turn to the finish line, and was haphazardly lined with white stakes. The race was started by a person who waved a red cloth tied to a stick whenever it appeared that both horses were in the general vicinity of what the starter perceived to be the 'starting line.' There was no starting box or gate." The ALJ noted that according to Louis Haskell, Jr., the state official who oversaw the Hamilton Downs races, "nothing about Hamilton Downs is real in terms of racetrack standards." The ALJ

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concluded that the manner in which Hamilton Downs conducted the races on June 18-22, 2014, did not result in Hamilton Downs committing the charged violation, and did not appear to violate any specific statute or administrative code rule. Accordingly, the ALJ recommended that the Division issue a final order dismissing the Amended Administrative Complaint. Nevertheless, the ALJ stated in an endnote that "[d]espite the conclusion reached herein, the undersigned agrees with Mr. Haskell, who expressed amazement that the June 18 through June 22, 2014, performances could be construed as horse racing. Indeed, the videos of the events in Petitioner's Exhibit 5 must be viewed in order to capture the flavor of the event. This case has been decided on the failure of the Division to prove, by clear and convincing evidence, that a standard applicable to quarter horse racing was violated. In all likelihood, the Division probably believed it to be unnecessary to establish a 'standard' that would define a 'race' as something other than horses ambling slowly down a crude dirt path through a field. While the 'races' in this case violated no established standard for the conduct of a contest between horses, the video established that the 'races' occurring on June 18 through 22, 2014 were more evocative of an Our Gang comedy short than the undercard at Pimlico."

Dep't of Children & Families v. Teddy and Kathleen Arias, DOAH Case No. 16-0072 (Recommended Order June 3, 2016).

FACTS: The Department of Children and Families ("DCF") is the state agency that licenses foster parents and foster homes. Teddy and Kathleen Arias have been foster care parents for at least 16 years, and they began caring for K.S. in 2013. Prior to his placement with the Ariases, K.S. had engaged in inappropriate sexual behavior and continued to receive therapeutic services while under the Arias's care. After an incident on September 17, 2014, a safety plan was developed to prevent K.S. from continuing to engage in inappropriate sexual behavior. One provision within that safety plan required that K.S. be within eyesight and earshot of a responsible adult who will enforce the safety plan at all times. After an incident on May 28, 2015, when K.S. engaged in inappropriate sexual behavior after being allowed to leave Ms. Arias's eyesight at a public gym facility, a DCF investigation concluded that Ms. Arias had violated the safety plan. DCF's investigation also resulted in a verified finding of abuse against the Ariases based on inadequate supervision, and a DCF administrative rule required that the Ariases execute a corrective action plan. However, the Ariases refused to sign the corrective action plan because they were concerned that doing so would amount to an admission that they inadequately supervised K.S. When the Ariases applied to renew their foster care license, DCF denied their application because they would not sign the corrective action plan.

OUTCOME: The ALJ recommended that DCF issue a final order placing the Ariases' foster care license in provisional status for six months. If the Ariases fail to sign the corrective action plan during that six-month period, then the ALJ recommended that the Ariases no longer be licensed. In doing so, the ALJ noted that an applicant for licensure usually has the burden of proving by a preponderance of the evidence that it satisfies the requirements for licensure and is entitled to receive a license. In contrast, DCF's denial in the instant case is based on specific instances of wrongdoing rather than the merits of the renewal application. Accordingly, the ALJ concluded that DCF had the burden to establish by a preponderance of the evidence that the Ariases committed the violation supporting DCF's decision to deny their renewal application. Despite disagreeing with other ALJs who have held that the clear and convincing evidence standard applied under such circumstances, the ALJ in the instant case opined that "[h]ad DCF not waited until after the expiration of the license to take action, and instead, filed an administrative complaint seeking either the penalty of a fine or revocation, there would be no question that the burden of proof on DCF in such a proceeding would be by clear and convincing evidence." The ALJ also noted that the outcome would have been unaffected if a different burden of proof had been applied.

Jonathan Bleiweiss v. Dep't of Mgmt. Servs., DOAH Case No. 16-0524 (Recommended Order June 7, 2016).

FACTS: Section 112.3173, Florida Statutes, provides that any public officer or employee convicted of a "specified offense" prior to retirement forfeits the large majority of his or her retirement benefits. In order to be a "specified offense," the criminal act in question must be: (a) a felony; (b) committed by a public employee; (c) done willfully and with the intent to defraud the public of the employee's faithful performance of his or her duties; (d) done to obtain some manner of personal gain; and (e) done through the use of the authority associated with the employee's public position. Jonathan Bleiweiss was a deputy sheriff employed by the Broward County Sheriff's Office from 2002 until 2011. On October 1, 2009, Broward County authorities charged Mr. Bleiweiss with committing multiple acts of false imprisonment and sexual battery on the persons in his custody. On February 12, 2015, Mr. Bleiweiss pled guilty to 14 counts of armed false imprisonment. During his plea colloquy, Mr. Bleiweiss stipulated that the State could have proven that he was wearing a police uniform and driving a marked police vehicle when he confined 7 people against their will. The Broward County Circuit Court then sentenced Mr. Bleiweiss to five years in prison to be followed by ten years of probation. The Department of Management Services, Division of Retirement ("the Division") learned of Mr. Bleiweiss's conviction and concluded that he had been convicted of a "specified offense." Accordingly, the Division notified Mr. Bleiweiss via

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a letter dated November 24, 2015, that he had forfeited his retirement benefits. During the formal administrative hearing in this matter, the Division offered no non-hearsay evidence that Mr. Bleiweiss committed sexual batteries against anyone who he had unlawfully detained.

OUTCOME: Finding that the Division failed to prove that Mr. Bleiweiss intended to defraud the public or that he gained a personal benefit through his crimes, the ALJ recommended that the Division issue a final order restoring Mr. Bleiweiss's retirement benefits. In doing so, the ALJ noted that the Division asserted in its proposed recommended order that Mr. Bleiweiss obtained a personal gain by forcing his "untoward intentions" on his victims through "unwanted intentional touching and repeated, malicious harassment." However, the ALJ rejected this argument, stating: "To begin, and to be as clear as possible, there is NO EVIDENCE IN THIS RECORD that Bleiweiss forced his 'untoward intentions' upon anyone. The reference to 'untoward intentions' is a transparent attempt to insinuate that Bleiweiss engaged or attempted to engage in sex acts with persons in his custody. Bleiweiss was charged with crimes involving such despicable conduct, to be sure, and, yes, the fact of his arrest for those crimes implies that probable cause existed to believe that he had committed them. But those accusations were NEVER PROVED, either in the underlying criminal prosecutions or in this proceeding. It would be wrong, to say the least, to rescind Bleiweiss's earned retirement benefits based not upon proven facts but, with a wink and a nod, upon shocking allegations that we 'just know' must be true even though we have not seen evidence of them." The ALJ also rejected DMS's argument that its interpretation of section 112.3173(2)(e)6., Florida Statutes, is entitled to deference. According to the ALJ, "administrative law judges (unlike courts) are under no obligation to defer to an agency's interpretation of any statute or rule, nor should they, given that de novo administrative hearings (unlike judicial proceedings conducted under the constitutional powers of a separate governmental branch) are designed to give affected parties an opportunity to change the agency's mind."

Pam Stewart, as Commissioner of Education v. William Doran, DOAH Case No. 15-5645PL (Recommended Order June 20, 2016).

FACTS: Petitioner filed an Administrative Complaint against William Doran, a licensed general science, social science, and exceptional student education teacher. The Administrative Complaint alleged that Mr. Doran violated specified provisions of Florida's Education Code and implementing rules, based on his behavior during a verbal altercation between himself and a 13-year old male student (M.M.). Mr. Doran disputed the allegations and the case was referred to DOAH. At the hearing, Petitioner offered a video recording of a portion of the altercation between Mr. Doran and M.M., which was recorded by another student on her cell phone. At the hearing, the student testified that she did not ask Mr. Doran if she could take the video and that no one knew that she was videotaping the incident. The student also testified that she was aware that she violated a rule of the school board that prohibited cell phone use in class. The ALJ admitted the video into evidence over Mr. Doran's objection.

OUTCOME: The ALJ concluded that Petitioner established by clear and convincing evidence that Mr. Doran committed the statutory and rule violations alleged in the Administrative Complaint. A point of interest to administrative law practitioners is the Recommended Order's analysis of the admissibility of the video recording evidence. The ALJ cited section 934.06, Florida Statutes, which prohibits the use as evidence of intercepted wire or oral communications. The ALJ noted that section 934.02(2) defines "oral communication" to mean a communication "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation," which cannot be construed to mean "any public oral communication uttered at a public meeting." Instead, as the Court made clear in *State v. Inciarrano*, 473 So. 2d 1272 (Fla. 1985), this provision requires a reasonable expectation of privacy. The ALJ concluded the video recording was not prohibited under section 934.06, because Mr. Doran did not have a reasonable expectation of privacy with regard to his comments to M.M. in a public school classroom in the presence of many students besides M.M.

Pam Stewart, as Commissioner of Education v. Jean-Baptiste Guerrier, DOAH Case No. 16-1693PL (Recommended Order June 20, 2016).

FACTS: An investigator for the Miami-Dade County School Board received allegations that Jean-Baptiste Guerrier, a teacher employed by the school board, made inappropriate comments of a sexual nature to his students and inappropriately touched female students. The investigator interviewed students and prepared an investigative report detailing what each student told her regarding Mr. Guerrier's conduct in the classroom. The investigative information was transmitted to the Florida Department of Education, and the Commissioner of Education subsequently filed an Administrative Complaint against Mr. Guerrier's professional license, alleging three statutory violations and three rule violations. Mr. Guerrier requested an administrative hearing, and the case was sent to DOAH.

OUTCOME: At the hearing, the investigator testified regarding what the students told her during her investigation of Mr. Guerrier. The ALJ also admitted the investigative report into evidence, with the caveat that it was hearsay and could only be used to supplement or explain other competent evidence as provided by section 120.57(1)(c), Florida Statutes. Mr. Guerrier testified at the

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hearing and denied all the allegations, speculating that his accusers had a motive to fabricate their stories because they were poor students. The ALJ found that neither the testimony of the investigator nor her investigative report provided competent evidence to support a finding that Mr. Guerrier engaged in the behavior alleged in the Administrative Complaint. The investigator's testimony as to what the students told her or what her report said that the students told her was hearsay. The ALJ also found that the investigative report did not fall within the business records exception of section 90.803(6), Florida Statutes, because the relevant information in the report was supplied by the students--not by a person with knowledge acting within the course of regularly conducted business activity. The ALJ further noted that the information in the report provided by the students was hearsay within hearsay. The ALJ thus concluded that Petitioner failed to meet its burden to prove by clear and convincing evidence that Mr. Guerrier committed the statutory and rule violations alleged in the Administrative Complaint. Significantly, the ALJ noted that while Respondent's testimony was "not very credible, nonetheless it was not his burden to prove his version of events." Rather, the ALJ explained that the onus lies with Petitioner to establish the conduct it alleged and cited *Bose Corp. v. Consumers Union*, 466 U.S. 485, 508 (1984), for the proposition that while a trier of fact may disregard testimony that is not believed, "discredited testimony is not considered a sufficient basis for drawing a contrary conclusion."

Attorney's Fees

Flo-Ronke, Inc. v. Ag. for Health Care Admin., DOAH Case No. 15-0982 (Recommended and Final Orders May 6, 2016).

FACTS: On March 27, 2015, the Agency for Health Care Administration ("AHCA") issued a "Second Amended Notice of Intent to Deny" Flo-Ronke, Inc.'s ("Flo-Ronke") request to renew its assisted living facility license. AHCA's intended denial was based on the fact that Flo-Ronke had employed someone who had not passed a background screening examination and was thus ineligible for employment at an assisted living facility. The intended denial was also based on the fact that Flo-Ronke had not paid fines imposed by AHCA in two other cases. After a formal administrative hearing, the ALJ rendered an order recommending that AHCA deny renewal of Flo-Ronke's licensure renewal request. AHCA rendered a Final Order on January 13, 2016, denying renewal. AHCA then filed a motion on February 10, 2016, seeking an award of fees pursuant to sections 57.105 and 120.595, Florida Statutes.

OUTCOME: Because a motion for fees under section 57.105 is addressed via a final order and a motion for fees under section 120.595 is addressed via a recommended order, the ALJ issued two separate orders to address AHCA's request for fees. With regard to the request for fees pursuant to section 120.595, the ALJ found that Flo-Ronke's opposition to AHCA's grounds for denial was frivolous. Accordingly, the ALJ recommended that AHCA enter a final order awarding itself $4,900.00 in attorney's fees and $1,316.50 in costs. The fee award was based on a $200 hourly rate for the AHCA attorney who handled the underlying litigation. As for AHCA's request for attorney's fees pursuant to section 57.105, the ALJ issued a Final Order denying AHCA's request because there was no evidence that AHCA had complied with the portion of section 57.105 requiring a party seeking fees to serve the motion for fees on the opposing party at least 21 days before filing the motion.

ALJ Q&A

by Richard J. Shoop

In the last year or so, I have received some feedback from young attorneys and other members of the Section stating that they would like to find out more about the administrative law judges ("ALJs") who work for the Division of Administrative Hearings (DOAH). As a result, I came up with the idea of interviewing some of the ALJs at DOAH in an informal setting. So, with the support of the Section's newsletter co-editor, and current Section chair, Jowanna N. Oates; and DOAH's Chief Judge, Robert S. Cohen, I bring you my inaugural ALJ Q&A article.

For my first interview, I chose the Honorable Garnett "Gar" Chisenhall, one of DOAH's newest ALJs. Judge Chisenhall is also a close colleague of mine, having worked with me for a few years at the Agency for Health Care Administration (AHCA), as well as serving alongside me on the Administrative Law Section's executive council. Judge Chisenhall began his legal career in 2000 as a staff attorney at the First District Court of Appeal. In 2002, he began working for AHCA and split his time between appeals and DOAH hearings. Judge Chisenhall was promoted to AHCA's chief appellate counsel in 2005 and held that position before leaving in 2007 to join the Administrative Law Section of the Attorney General's Office. From December 2008 until August 2015, when he became an ALJ, Judge Chisenhall was the chief appellate counsel for the Department of Business and Professional Regulation, Florida's largest regulatory agency. Judge Chisenhall graciously agreed to sit down for an interview with me over lunch recently, and what follows is my question and answer session with him.

RS: So tell me how you became involved in the practice of administrative law.

GC: I was clerking at the First District Court of Appeal, and my time was coming to an end since many clerks work on a two-year rotation. I was looking for an opportunity, but didn't feel like I had enough experience to work for a law firm. AHCA offered me the opportunity to work on appeals for half the time, which I knew I could handle, and do administrative hearing cases the other half, which was new to me. Ironically, I never intended to stay with an agency. My original plan was to work in government for a few years and then go on to private practice. However, I really enjoyed the opportunity to work on big cases by myself, which is the great thing about working for an agency. You weren't the fifth chair or sixth chair, just doing research on a case. In fact, I defended a constitutional challenge to one of AHCA's rules in the first year I was there I believe. I had a very good and experienced attorney Tom Barnhart assisting me, but it was my case. I thought about moving back to my hometown of Pensacola a few years after I had started working at AHCA, but my dad told me that it would be hard for me to have the same kind of opportunities to work on such big cases if I went elsewhere. That is why I got into administrative law and stayed with it for so long.

RS: Now you were an appellate attorney for most of your career, and the chief appellate counsel at both AHCA and the Department of Business and Professional Regulation. What made you decide to take the leap to become an ALJ?

GC: To be honest, being an ALJ was not even on my radar until 2011 when a very good friend of mine applied to become one, and encouraged me to do so as well. I didn't think I had a chance because most of my experience was in appellate law. So, I had no expectation of being hired for the position. I actually thought one of my co-workers was playing a practical joke on me when I got the call from Chief Judge Robert Cohen's assistant for an interview. However, in the years following that initial interview, I learned that ALJs have diverse backgrounds, and that enables us to consult a colleague if we encounter a difficult issue related to that ALJ's past experience. I've even fielded a few questions about appeals in my short time at DOAH. I should also add that when I clerked at the First DCA I liked the fact that you didn't need to take a side until you had seen all the evidence. Being an ALJ is just like that. In contrast, when you are representing a party, you have to advocate for that party even when you think that the other side may have a better argument. You can suggest that your client take a certain course of action or look to reach a settlement, but you are still there to advocate that client's position.

RS: What do you enjoy the most about being an ALJ?

GC: I would have to say my co-workers. And by that I mean everyone in the building at DOAH. Everyone is so collegial and pleasant. We all get along. Everyone does their job to the utmost. I also really enjoy doing the hearings and being able to interact with the attorneys and pro se parties, and asking questions to get down to what the case is really about.

RS: Describe what a typical day looks like.

GC: A typical day is usually just me trying to make sure that I am where I need to be at any given time. My schedule is very fluid and changes very quickly. We have hearings, phone conferences, and meetings. Cases get settled or continued. Things pop up. I use both an electronic calendar and a day planner to keep me on track. I write things in pencil so I can go back and erase it later. It can be a challenge making sure I am where I am supposed to be.

RS: How do you use technology in your work?

continued...

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GC: I am definitely not on the cutting edge of technology like a lot of attorneys. I use a combination of old school and new school. I have an Outlook calendar and cell phone that enables me to see my work emails, but I also have an old fashioned day planner. Rather than bringing a laptop to a hearing, I use legal pads and pens. I still like paper because you can highlight it and mark it up. I can't type fast enough to take notes on a laptop.

RS: In your opinion, what has been the most significant change in the practice of administrative law since you've started practicing?

GC: I would say technology. When I started, everything was still paper, paper filings, paper faxes. Now it is all electronic. We have email communications, scanning and electronic filing.

RS: Let's talk about your involvement with the Administrative Law Section. How did you become involved and why do you think it's so important?

GC: Well, the great thing about the Section is that anyone can get involved. Why did I become involved? I became involved with it because I thought it was a great opportunity for networking.

RS: What is the most important piece of advice you could give a young lawyer that you had wished someone had given you when you were first starting out?

GC: The very most important thing is that if you want to get ahead, you have to devote time to networking. Even if you do great work, if people don't know about you, you won't get promotions or things like that. People like to hire people that they know. You have to promote yourself. A close second to that would be that you don't stop learning after law school. You still need to keep abreast of case law and other things that affect your practice area. And a great way to do that is by joining the Administrative Law Section.

RS: What do you like to do for fun?

GC: I definitely enjoy spending time with my wife. That would be first. When I am not doing that I like to exercise and follow my favorite teams, the Alabama Crimson Tide football team and Atlanta Braves baseball team. I like to tell people I have one team that rarely loses and one team that rarely wins.

RS: You have a very busy job. How do you manage to balance your work and your personal life?

GC: That's a constant challenge, and I definitely need to improve my time management skills. One thing I've been focusing on lately is reducing my down time. It's easy to not be productive on Monday mornings and Friday afternoons. I have been working at using those time periods to maximize my productivity. If I have 15 minutes, I try to use those 15 minutes. And if I use that time, it gives me more time to spend with my wife.

RS: When it's all said and done, how would you like to be remembered as an ALJ?

GC: Well, I hope I'll be remembered as someone who was fair to all parties, and who handled pro se parties in such a way that they weren't disadvantaged by not having an attorney. On that last point I'd like to add that I think that all the ALJs at DOAH are sensitive to the challenge of pro se parties and try very hard to keep a level playing field in cases that involve them.

Richard J. Shoop *is the Agency Clerk for the Agency for Health Care Administration. He attended the University of Miami for both undergraduate studies and law school, obtaining a Bachelor of Arts in History with General Honors in 1996 and a Juris Doctor in 1999. He began his legal career at the Quincy office of Legal Services of North Florida, Inc. In 2001, Mr. Shoop went to work for the State of Florida, first with the Agency for Health Care Administration and then with the Department of Health as a prosecuting attorney for the Boards of Medicine, Osteopathic Medicine and Psychology. He accepted the position of Agency Clerk for the Agency for Health Care Administration in 2004. Mr. Shoop has been a member of the Administrative Law Section's executive council since 2009, and is currently serving as the immediate past chair of the Section.*

Agency Snapshot: Department of Environmental Protection

by Francine M. Ffolkes

The Florida Department of Environmental Protection, the state's lead agency for environmental management and stewardship, is a diverse agency, established to protect and manage our state's natural resources, including our air, water, and land. The Department is an executive agency headed by the Secretary, who is appointed by the Governor. The Department's business is conducted by its various divisions located in Tallahassee and six district offices located throughout the state.

The Division of Air Resource Management (DARM) is charged with the regulation and management of Florida's air resource, including air quality monitoring, permitting and ensuring compliance of emission sources, and implementing the Siting Acts. DARM regulates Florida's air resource, while implementing state and federal requirements. DARM provides these services through its Office of Business Planning, Office of Air Monitoring, and Office of Permitting and Compliance. The Division's Siting Coordination Office implements Florida's Siting Acts, which establish procedures for licensing the construction and operation of power plants, transmission lines, and natural gas pipelines.

The Division of Water Resource Management is responsible for implementing state laws for the protection of the quality of Florida's drinking water, ground water, rivers, lakes, estuaries, and wetlands; reclamation of mined lands; and the preservation of the state's beach and dune systems. The Division is the central point of contact for federally delegated water programs such as the National Pollutant Discharge Elimination System (NPDES), Drinking Water, and Underground Injection Control (UIC).

The Division of Waste Management is responsible for overseeing a number of program areas, such as hazardous waste regulation, solid waste management facilities, storage tanks compliance, and a variety of specialized cleanup programs. Division staff are responsible both for rule development and overall coordination and consistency of these statewide regulatory programs, and also have direct regulatory responsibilities for a variety of permitting and inspection functions. In some cases, those functions are facilitated by the Division's management of contracts with local entities.

The Division of Environmental Assessment and Restoration (DEAR) is charged with monitoring and assessing Florida's surface water and ground water quality; identifying, verifying and prioritizing pollution problems; developing strategies to resolve the problems; and implementing those strategies through comprehensive restoration actions in partnership with local stakeholders. The Department's laboratory also is housed in DEAR and is integral to fulfilling the division's responsibilities and supporting other Department programs and objectives.

The Division of State Lands' core mission is to provide consistent and efficient real estate and land management services to the Board of Trustees of the Internal Improvement Trust Fund. The Division's Negotiations/Litigation Services (NLS) team tackles some of the Division's more complex, historically unresolved boundary determination projects, as well as new projects, across office boundaries. The primary purpose of the NLS team is to provide litigation support to the Office of General Counsel for all cases involving the ownership of state lands for the public use. NLS provides expertise and guidance to the district offices, private sector, and Office of General Counsel in support of State Lands. In addition to litigation support, NLS works with the public on their individual issues for the privately owned lands adjacent to sovereignty lands.

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Number of Lawyers on Staff: 42

Kinds of Cases:

The Department is involved in and has expertise in a wide variety of cases. Many of these cases include different facets of administrative, environmental, land use, and real property law. A sample of the types of cases the Department handles includes permit challenges, rule challenges, enforcement actions, bid protests, takings litigation, land acquisitions, property disputes, and any related appeals that might result from these cases.

Practice Tips:

Prior to filing matters with the Department, practitioners should ensure that filings conform, both in content and in timeliness, with the Uniform Rules of Procedure in chapter 28-106, Florida Administrative Code; and the Department's Exceptions to the Uniform Rules of Procedure in chapter 62-110, Florida Administrative Code.

Law School Liaison

Fall 2016 Update from the Florida State University College of Law

by David Markell, Steven M. Goldstein Professor

This column highlights recent accomplishments of our College of Law students and faculty. It also features several of the programs the College of Law will be hosting during the fall 2016 semester.

We are delighted that our Environmental Law Program has again been ranked in the top 20 in the United States by *U.S. News & World Report*, for the twelfth consecutive year.

Preliminary List of Fall 2016 Events

Environmental Law without Courts Conference

On Friday, September 16, 2016, FSU Law will host a conference, Environmental Law without Courts. Following our successful 2014 event, Environmental Law without Congress, the 2016 conference will explore several ways in which administrative agencies have implemented environmental policies largely without court supervision or intervention. The conference will bring together prominent scholars from across the country. The event will begin at 9:30 a.m. in Room 310 of Roberts Hall.

Fall 2016 Distinguished Lecture

Robert Percival, Robert F. Stanton Professor of Law and Director of Environmental Law Program, the University of Maryland Francis King Carey School of Law, will be the fall Distinguished Lecturer. Professor Percival's lecture will begin at 3:30 p.m. on October 19, 2016, and will be followed by a reception in the College of Law Rotunda.

Environmental Certificate & Environmental LL.M. Luncheon Speakers

Professor Blake Hudson, Burlington Resources Professor of Environmental Law and Edward J. Womac, Jr. Professor of Energy Law, Louisiana State University Paul M. Hebert Law Center, will serve as the first luncheon speaker. Professor Hudson's luncheon will begin at 12:30 p.m. on October 5, 2016, in Room A221.

Professor Roberta Mann, Mr. and Mrs. L. L. Stewart Professor of Business Law, University of Oregon School of Law, will serve as the second luncheon speaker. Professor Mann's luncheon will begin at 12:30 p.m. on November 16, 2016, in Room A221.

Fall 2016 Externship Seminar Guest Lectures

Our Externship Seminar Guest Lectures will feature several leading attorneys, including Magistrate Judge Charles Stampelos, U.S. District Court; Administrative Law Judge Larry Johnston, Division of Administrative Hearings; Herb Thiele, Leon County Attorney; and Ross Vickers, Department of Business Regulation.

Networking Luncheon

Michael Gray, United States Department of Justice Environment and Natural Resources Division. This networking luncheon will be held on October 24, 2016.

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.

Recent Student Achievements

- Stephanie Schwarz and Sarah Logan Beasley, representing FSU Law, were one of nine teams (out of almost 100) to reach the semifinal round at the 2016 Pace Environmental Law Moot Court competition. Sarah Logan Beasley was named the competition's overall Best Oralist out of more than 200 competitors.
- The 2016-2017 Journal of Land Use & Environmental Law Executive Board consists of: Travis Voyles, Editor-in-Chief; Daniel Wolfe, Executive Editor; Tyler Parks, Executive Editor; Suhail Chhabra, Senior Articles Editor; Brent Marshall, Administrative Editor; and Melina Garcia, Associate Editor.
- The 2016-2017 Environmental Law Society Executive Board consists of: Jess Melkun, President; Jessica Farrell, Vice President; Blair Schneider, Treasurer; Janaye Garrett, Secretary; and Travis Voyles, Networking Chair.

Recent Faculty Achievements

- Shi-Ling Hsu was recently named the D'Alemberte Professor of Law. In March, Professor Hsu was a speaker at the

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J.B. and Maurice Shapiro Environmental Law Symposium at George Washington University Law School, where he presented "The Case for a Carbon Tax 2.0", and also at the University of Illinois School of Law, where he presented his work on climate change technologies.

- David Markell's recent and forthcoming publications include: *EPA Next Generation Compliance*, 30 Natural Resources & Environment 22 (Winter 2016); *Compliance and Enforcement of Environmental Law* (L. Paddock and D. Markell, eds., Edward Elgar, forthcoming 2016); *Big Data and Environmental Compliance*, 43 Ecol. L. Q. __ (forthcoming 2016) (with Robert L. Glicksman); *Emerging Legal and Institutional Responses to Sea-Level Rise in Florida and Beyond*, 42 Columbia Journal of Environmental Law __ (forthcoming 2016); and *Dynamic Governance in Theory and Application, Part I* (with Robert L. Glicksman), 58 Arizona L. Rev. __ (forthcoming 2016).
- Erin Ryan presented *Secession and Federalism in the United States* in November at an international federalism conference at the University of the Basque Country, Spain. She presented a new book chapter, *Environmental Federalism's Tug of War Within*, at the University of Kansas in September and at a Federalist Society Conference in January. In March, she presented a version adapted for Chinese academics at the University of Chicago, as the opening presentation for an international environmental governance project, *Chinese and American Environmental Governance Compared: System, Capacity, and Performance.* In April, she presented an article, *Federalism, Regulatory Architecture, and the Clean Water Rule* at a symposium about the Waters of the United States Rule at Lewis & Clark Law School. In February, she published a short essay, *The Clean Power Plan, The Supreme Court, and Irreparable Harm*, on the American Constitution Society Blog, The Huffington Post, and the Envtl. Law Prof Blog. This year she has provided media interviews with Bloomberg BNA, CQ Researcher, Rise, High Country News, and Foreign Policy.
- Hannah Wiseman was a panelist at the Nicholas Institute for Environmental Policy Solutions, Duke University conference entitled "Navigating the EPA's Clean Power Plan: Charting a Course for Southeast Energy." Additionally, she presented her paper "Disaggregating Preemption in Energy Law" in colloquia at the Buchmann Faulty of Law, Tel Aviv University and at the Northwestern University Pritzger School of Law. Professor Wiseman also presented her article on "Regional Energy Governance and U.S. Carbon Emissions" (co-authored with Hari Osofsky) at the Society for Environmental Law and Economics conference at the University of Texas Law School and delivered a "hot topics" presentation on energy preemption at Vermont Law School.

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moves; and probed the weaknesses in your case, developing fallback positions to which you can retreat if necessary. Being prepared means that you already have a good idea, heading into the final hearing, what your proposed recommended order should look like, but remain flexible enough to use a different approach if circumstances warrant.

II. RESPONSE TO INITIAL ORDER

In most cases, DOAH issues an Initial Order ("IO") after a case is docketed and assigned to an ALJ, which directs the parties to file, within seven days, a Response to the Initial Order ("RIO") that includes useful information for the ALJ to consider in scheduling the final hearing, such as the estimated length of the final hearing, the proposed venue, and the dates on which both parties are available for hearing. The IO also invites the parties to state whether they prefer an in-person hearing or a hearing by video-teleconference ("VTC").

The RIO is an important document, and you should never fail timely to file one, jointly with the other side whenever possible, unilaterally if necessary. ALJs are encouraged to move cases from the "assigned not set" category to "set for hearing" status as quickly as possible, and thus in the absence of a timely RIO the ALJ will likely schedule the final hearing without the parties' input.

The dates proposed by the parties for the final hearing should not be outside the window (usually the period between 30 and 70 days after the IO) prescribed in the order. Internal guidelines require that the final hearing should be scheduled, pursuant to the initial Notice of Hearing, to take place on a date not later than, usually, 70 or 90 days after the case was docketed, depending on the type of case. The ALJ will almost always follow the scheduling policy. As a result, proposed dates that are not within the applicable time frame will likely be disregarded. Of course, if good cause exists to postpone the original final hearing date, a motion for continuance may later be filed.

The parties should affirmatively express a preference for either an in-person hearing or a VTC hearing, or state that they have no preference, if that is the case. If the parties have conflicting preferences in this regard, the disagreement should be noted, together with a brief explanation of the grounds for each party's position.

III. MOTION PRACTICE

The time for responding to motions is relatively long in administrative practice, given that the period between the referral of a case to DOAH and the final hearing is usually only a few months. A party generally has seven days after service in which to respond to a motion, see Florida Administrative Code Rule 28-106.204(1), plus five additional days if the motion is served by regular mail instead of email, see rule 28-106.103. If, as the moving party, you believe that a ruling cannot be delayed for seven days or longer, you should make that clear in the motion and request appropriate relief, such as a shortened response time or an immediate telephone hearing.

A motion which, if granted, would terminate the proceeding before DOAH should be filed far enough ahead of the final hearing to allow time for meaningful opposition and disposition. For example, a motion that seeks both to have matters deemed technically admitted pursuant to Florida Rule of Civil Procedure 1.370(a) for failure of the opposing party to timely serve answers or objections to a request for admissions, and to have the ALJ relinquish jurisdiction in light of the technical admissions (based on the absence of disputed material facts), should be filed several weeks before the final hearing, so that an opportunity to seek relief from the technical admissions can be afforded the adversely affected party.

Rule 28-106.204(1) provides that motions will generally be decided on the papers, but motion hearings by telephone conference call ("TCC") are commonly conducted. If you want a TCC, it is usually helpful to contact the ALJ's assistant, find out when the ALJ is available (if he or she agrees to conduct a TCC), and offer to help coordinate the call. If a telephone hearing is scheduled, be prepared to present a persuasive argument for the judge; do not wing it. (Also, remember that a telephone hearing is a hearing, not a conversation. Just as you would in person, you should address your presentation to the ALJ, not your opponent. Interjections such as "Jack, you're lying again, that didn't happen and you know it," are not constructive.) In any event, because you are not guaranteed a telephone hearing, put everything you need to say, including citations to authorities, in your motion or response in opposition.

You should generally confer with opposing counsel to find out if your motion is opposed. Rule 28-106.204(3) requires that this be done in connection with all motions except a motion to dismiss, and some ALJs will deny a motion without prejudice for failure to comply with that rule. An unopposed motion is likely to be granted fairly quickly, whereas a motion that is presumed to be opposed (as it will be if it is silent about the nonmoving party's position) might sit on the ALJ's desk for seven or more days until the time for responding runs, so it is to your advantage, as the moving party, to tell the ALJ that the other side does not object, if that is the case.

A thoughtful, persuasive, and well-written motion or response affords a party an opportunity not only to obtain some needed relief, but also to inform the ALJ about the case. A motion that is unpersuasive, unsupportable, or frivolous can damage your credibility. Be mindful of that. The ALJ will not be impressed by a motion or response that was obviously dictated but not read. If you must file a motion or response, take the time to do it right.

IV. CONTINUANCES

In theory, "good cause" is required for every continuance. In practice, joint or unopposed motions for continuance are often granted, but not always. If you take for granted the availability of a continuance in a given case, you might be disappointed. To increase the likelihood of

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receiving a continuance, lawyers can take the following steps.

Before requesting a continuance, however, consider whether jurisdiction could be relinquished to the agency, with an agreement that the agency would refer the case back to DOAH at a later date, should a hearing still be necessary. This is a good way to handle the situation that arises when a settlement is close at hand, but some additional time is needed to work out the details. (It is also a possible alternative to a lengthy period of abeyance based on an extrinsic circumstance, such as the outcome of a parallel criminal proceeding or pending appeal.)

When there is no option and you need to write a motion for continuance, first, explain in the motion why you *need* a continuance. Include specific details rather than vague generalities. "I have a scheduling conflict," or "I will be traveling out of state," are not nearly as persuasive as, "I am lead trial counsel in a murder case in which the judge just rescheduled the trial date for the same 3-day period as the final hearing in this case, and the judge in that case has denied a motion for continuance."

Second, explain what steps, if any, you have taken to try to avoid or change the circumstances that form the basis for your request for a continuance, making clear that you have filed the motion as a last resort, at the earliest reasonable opportunity. If the situation is something that you knew or should have known about at the time the parties responded to the Initial Order, or something that you clearly should have known about for some time prior to the motion, then you should explain the delay. Needless to say, motions received a couple days before the final hearing based on "my wedding anniversary" or "my long-planned vacation" are regarded with disfavor.

Third, state the position of opposing counsel on your request for a continuance. If opposing counsel opposes your motion for continuance for a specific reason, be candid and include that reason in your motion.

Fourth, ask for only as much continuance as you need to resolve the problem that is the basis for your request for continuance. If you are going to have surgery, it might be reasonable to ask for a continuance of several weeks or longer. If you want a continuance of the hearing set for next Monday because it's your child's first day of school, then you really don't need a continuance of more than a few days, so don't ask for several weeks.

Last, but not least, include in your motion a list of dates on which you are available for hearing if the continuance is granted and the hearing is rescheduled. And, if at all possible, include the same availability information for opposing counsel.

V. PRE-HEARING STIPULATION

Too often, the pre-hearing stipulation is treated as a busy-work project, something that must be done, but not enthusiastically or artfully. When you dash off a pre-hearing stipulation that merely repeats the allegations of a petition or administrative complaint, however, you lose a chance to narrow the issues and streamline the hearing, not to mention an opportunity for advocacy.

In most cases, there are many basic facts that are not genuinely in dispute, to which the parties should stipulate. (Once you have a stipulation as to a fact, however, do not waste time at the final hearing proving that fact.) Additionally, because the pleadings in administrative cases are oftentimes sparse, use the pre-hearing stipulation as a vehicle to tell the ALJ about the case and your client's position. Cite the relevant statutes, rules, and—if appropriate—principal cases. Providing copies of these authorities to the ALJ in advance of the hearing is a good idea, too.

If there are unresolved issues or motions, be sure to identify them in the pre-hearing stipulation. It is also helpful, in some cases, to note which party has the burden of proof, and which party will proceed first with the evidence. Discussing these issues with your opponent in advance, in connection with the pre-hearing stipulation, reduces the risk of surprise at the final hearing.

Joint pre-hearing stipulations are preferable to unilateral "stipulations," although a unilateral stipulation is better than nothing. Do not simply ignore the requirement of filing a pre-hearing stipulation.

VI. EXHIBITS

Your exhibits should be listed and described in the pre-hearing stipulation. A description such as "all documents produced in discovery" is not helpful. Each exhibit should be separately identified with a number or letter.

Pre-mark your exhibits. We do not have clerks to do this at the final hearing, and valuable time is wasted if the ALJ has to stop the examination to mark an exhibit for identification.

Most lawyers come to the final hearing, as they should, with several copies of their exhibits. Sometimes, however, an attorney will only have copies for the witness and for his or her own use, but none for the ALJ. Less often, but frequently enough to be remarkable, a lawyer will have only one copy of each exhibit; he or she will then invariably resort to looking over the witness's shoulder, which is awkward. These are practices to avoid.

Many lawyers put their exhibits in a notebook, with tabs and an index. This is helpful and appreciated. If you do this, be sure to mark the exhibits as well, because some or all will probably be removed from the notebook at some point in the process. Also, it is better to use two or three smaller notebooks than one gigantic binder.

Finally, if you offer as a composite exhibit some sort of file comprising numerous documents (e.g., a patient file from a health care facility), it is a good idea to Bates-stamp the papers. That way, everyone knows exactly which papers are in evidence, and anyone can easily refer to a particular paper in the set.

VII. THE FINAL HEARING

A comprehensive discussion of the final hearing, where so much can happen, is beyond the scope of this article. The following are a few points for the practitioner to consider.

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Make an effective opening statement. Keep in mind that at the beginning of the hearing, the ALJ probably has only a general idea of what the evidence will show. Obviously, when you present your case, you want important details to have an immediate impact on the fact-finder, to make an impression, to be remembered. Therefore, in your opening, give the ALJ a roadmap of your proof, paint the big picture, establish your narrative, so that when the evidence comes in, the ALJ will hear it in the context of your design. If you do not initially provide a framework for the facts, you run the risk that the ALJ will not appreciate the significance of particular facts that you are trying to prove, particularly when the factual point is a subtle one.

Avoid repetitious proof. Having the witness say the same thing over and over will usually not impress the ALJ, who is almost certainly paying close attention. Similarly, as a general rule, do not call witness after witness to prove the same fact(s), particularly if those facts are not contested.

If you represent an agency, do not spend a great deal of time proving the details of your client's investigation into, and preliminary disposition of, the problem that led to the dispute. It might be helpful to provide some brief background concerning these subjects to put the dispute into context, but ultimately what matters are the facts surrounding the problem—not (usually) how the agency found, evaluated, and responded to the problem. Likewise, if you represent the licensee, do not waste time proving the details concerning how your client responded to the investigation. The investigation is usually not material; the underlying facts always are.

Avoid asking witnesses to read and comment upon statutes and rules. You can argue the law.

Avoid examinations that go something like this:

> LAWYER: Showing you a document that has been marked for identification as Petitioner's Exhibit 1. Do you recognize this document?
>
> WITNESS: Yes.
>
> LAWYER: Is that your signature on the document?
>
> WITNESS: Yes it is.
>
> LAWYER: Thank you. Move Petitioner's 1 into evidence.
>
> OPPOSING COUNSEL: No objection.
>
> ALJ: Petitioner's 1 is admitted without objection.
>
> LAWYER: Thank you. Now I'm handing the witness a document marked as Petitioner's Exhibit 2 . . . .

This kind of examination is not interesting, doesn't tell a story—and it doesn't even lay a proper foundation to admit the document over a hearsay objection, assuming the document is being offered for the truth of the matters asserted therein. It is almost always preferable to have the witness recount what he saw and heard and did, in addition to having him lay whatever predicate is required to admit relevant documents. And if the *only* purpose for calling the witness is to lay a foundation for a document, find out beforehand whether your opponent will stipulate to the admission of the document. If a stipulation cannot be had, be sure to cover all the elements for admitting the document; simply demonstrating its authenticity does not satisfy any recognized hearsay objection.

Try to use your objections thoughtfully. Interposing a technically correct objection to an obviously harmless question is usually a bad idea. A good example of this is objecting to a leading question on direct that was clearly designed to orient the witness or quickly elicit some information that is plainly not contested before moving on to the disputed matters. Also, avoid letting your speaking objections, if any, become too long-winded or devolve into obvious witness coaching.

Listen to the ruling on an objection. I'm surprised at how often, after I overrule an objection, the examining lawyer quickly asks another, different question before the witness has answered that last one.

Avoid arguing with your opponent. Refrain from ad hominem attacks. Be firm and be aggressive, but be polite and professional.

As a general rule, be respectful of the witnesses, even the adverse ones.

If the ALJ asks the witness a question, pay close attention to what is being asked.

Do not count on having a "re-cross-examination." I prefer that re-direct be the last word with the witness, unless I ask questions, which opens the door to a follow-up round of examination by each side.

Some ALJs like to hear closing arguments; others do not. If you have a question about whether closing argument will be permitted or encouraged, you should ask the ALJ at the outset of the hearing.

VIII. POST-HEARING SUBMISSIONS

An effective proposed recommended order starts with a clear and concise, well organized statement of the facts. Your proposed facts should be fairly supported by record evidence, to which a citation is helpful. If you are proposing a fact-finding based on inference, it should be identified as such, along with an explanation as to why it is reasonable to draw the inference based on the facts proved directly.

Remember that the evidence of record is a part of the record, but the record includes lots of material that is not evidence of record. See § 120.57(1)(f), Fla. Stat. (prescribing the contents of the "record in a case"). For example, documents that one party files (and hence places in the record of the case) are not in evidence unless offered and received at the final hearing. Fact-findings can be based only on evidence admitted at hearing and matters officially recognized. See § 120.57(1)(j), Fla. Stat.

In writing your proposed facts, avoid the "transcript summary" format. In this format, each proposed finding begins, "Mr. Smith testified that . . ." as in, "Mr. Smith, the agency's surveyor, testified that on March 23, 2015, he saw patient

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PRACTICE POINTERS
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A.B. with a bedsore on her left leg. Tr. 131." I have received proposed recommended orders that summarize practically the entire transcript in this fashion. This is not effective. You want findings as to what happened before the hearing, regarding the circumstances in dispute, not about what someone said at hearing, which is rarely in question. Put another way, the fact that the witness said "X" is irrelevant; what matters is whether "X" is true. In the recent example, then, the proposed finding should be: "On March 23, 2015, patient A.B. had a bedsore on her left leg. Tr. 131." If it is important to identify the source of the information, as it sometimes is, propose a finding which makes it clear that the fact-finder has accepted the relevant testimony as true, e.g.: "Mr. Smith testified credibly, and it is hereby found, that on March 23, 2015, patient A.B. had a bedsore on her left leg. Tr. 131."

Your proposed conclusions of law should be thorough and persuasive, systematically applying the facts to the law and using legal reasoning to progress to logical conclusions. Discuss all the elements that needed to be proved. Do not leave out the "reasoning" part of the analysis. Simply stating a rule and a conclusion, or worse, just a conclusion, is not persuasive.

Be sure that your legal research is thorough and current.

John G. Van Laningham *holds degrees from the University of Florida (B.A. 1985) and the Florida State University College of Law (J.D. 1988). After graduating from law school with highest honors, Judge Van Laningham clerked for the Honorable Albert J. Henderson of the United States Court of Appeals for the Eleventh Circuit. He joined Steel Hector & Davis, LLP, in 1989 and became a partner in the firm in 1994. While in private practice, Judge Van Laningham concentrated on commercial and administrative litigation and tried cases in many forums, including state county and circuit courts, federal district courts, and the Florida Division of Administrative Hearings. Since October 2000, Judge Van Laningham has been an Administrative Law Judge. Judge Van Laningham is board-certified in State and Federal Government and Administrative Practice and is a frequent speaker and lecturer on topics relating to administrative law.*

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