NEWSLETTER

VOL. XLII, NO. 3 JOWANNA N. OATES AND TIFFANY RODDENBERRY, CO-EDITORS MARCH 2022

APPELLATE CASE NOTES

BY MELANIE LEITMAN, TARA PRICE, ROBERT WALTERS, GIGI ROLLINI, AND LARRY SELLERS

Agency Deference – Mixed Questions of Fact and Law Imbued with Policy

Latson v. Sch. Bd. of Palm Beach Cty., 328 So. 3d 1006 (Fla. 4th DCA 2021) (per curiam) (Werner, Levine, and Klingensmith, JJ.).

Dr. William Latson, a 26-year public educator, was discharged by the School Board of Palm Beach County ("School Board"). The discharge was based on his having "acted in a manner unbecoming a school leader in the days following a July 5, 2019, newspaper article quoting emails sent from him to a parent," including for not returning a supervisor's phone calls while on vacation and relating to an email to his staff concerning his reassignment. The specific charges were misconduct in office, incompetence, and gross insubordination.

Following a four-day hearing, the ALJ issued a recommended order that included as ultimate findings of fact that the record failed to establish by a preponderance of the evidence that Latson engaged in misconduct in office, incompetence, or gross insubordination.

Neither party filed exceptions. The School Board initially adopted the recommended order as its final order. However, about a month later, the School Board reversed its position, disagreeing with findings of fact and conclusions of law in the recommended order, and rendered an amended final order upholding the original decision to discharge Latson. Latson appealed.

In a brief opinion, the Fourth District Court of Appeal affirmed the School Board's order terminating Latson's employment. The court determined that the School Board's rejection of conclusions reached in the ALJ's recommended order, which it said were mixed questions of fact and law, were imbued with policy considerations on which the appellate court should defer to the agency.
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From the Chair

BY STEPHEN C. EMMANUEL

As we enter 2022, I am pleased to report the Section is growing in numbers and advancing its mission. Last year, the Section formed two ad hoc committees, one with a goal of increasing membership and the other to review our bylaws. Thanks to the leadership of ad hoc membership committee chair Gigi Rollini and the efforts of Brittany Griffith and the other members of this committee, the Section has gained 75 new members, for a total membership of approximately 1,100. The ad hoc bylaws committee led by former Section Chair Richard Shoop solicited input from Section members regarding potential updates and improvements to our bylaws and will be making recommendations to the Executive Council.

Coinciding with the new year, the Section is working to create a fresh look by updating our branding and logo. Thanks to the efforts of Gregg Morton and others, the Executive Council has a number of logo designs to consider. Stay tuned for the big reveal this spring!

After having sponsored several in-person CLE's, including our signature Pat Dore Administrative Law Conference in October, our CLE Committee, chaired by Brittany Adams Long, is now planning a number of webinars for the spring. Please check our Section's website for details. Also, if you have any topics you would like to see addressed in future
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FEATURE

Deposing an Agency Head in Light of Florida's Newly Codified Apex Doctrine

BY BRUCE CULPEPPER,
ADMINISTRATIVE LAW JUDGE, DIVISION OF ADMINISTRATIVE HEARINGS

In 2021, the Florida Supreme Court adopted Florida Rule of Civil Procedure 1.280(h), thereby formally incorporating the "Apex Doctrine" into Florida's discovery framework. *In re Amend. to Fla. R. Civ. P. 1.280*, 324 So. 3d 459 (Fla. 2021). Although Florida courts did not officially recognize the Apex Doctrine prior to rule 1.280(h), the concept was well-established through a series of First District Court of Appeal cases beginning with *Department of Health & Rehabilitative Services v. Brooke*, 573 So. 2d 363 (Fla. 1st DCA 1991). Florida courts informally referenced the term when considering whether to compel the deposition or testimony of a high-ranking government official. The most widely recognized description of the Apex Doctrine comes from the Texas case of *Crown Central Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 126 (Tex. 1995), which used the expression to refer to those individuals at the "apex," or the top, of an agency, company, or organization.

As stated in *In re Amendment*, the Supreme Court established the Apex Doctrine to prevent "harassment and unduly burdensome discovery" involving a "high-level government or corporate officer." In the administrative arena, one can easily envision how issues involving the Apex Doctrine arise. Florida statutes typically entrust the head of a state agency to oversee all decisions enacted by the agency. Accordingly, when a dispute arises regarding agency action, in theory, the agency head would or should possess information that might prove pertinent to the contested issues. It is not difficult to see how an agency head who is deposed in every fact or policy dispute would hardly have time to focus on the ongoing affairs of the agency. Hence, the Apex Doctrine serves the specific purpose of forestalling potentially abusive discovery tactics targeting an official at the highest level (the "apex") of government management.

So, how does an agency use the Apex Doctrine to protect a "high-level government ... officer" from undue abuse or harassment? Rule 1.280(h) explains that a party (the agency) contests the deposition through a motion. And, this motion "must be accompanied by an affidavit or declaration of the officer explaining that the officer lacks unique, personal knowledge of the issues being litigated." Based on this instruction, the Apex Doctrine analysis focuses on two key factors, (1) whether the agency head possesses "unique, personal" knowledge of the issues, and (2) whether this knowledge relates to the "issues being litigated."

Two recent cases help illustrate these factors. Regarding the first component, the case of *Office of Insurance Regulation v. Department of Financial Services*, 159 So. 3d 945 (Fla. 1st DCA 2015), addressed whether an agency head's knowledge was "unique." The underlying dispute involved the solvency of a Florida insurance company. Among the statutory responsibilities of the Office of Insurance Regulation ("OIR"), section 631.031(1), Florida Statutes, specifically tasks the Insurance Commissioner to notify the Department of Financial Services that it must initiate delinquency proceedings against insolvent companies. In this case, the Commissioner did so through three separate letters, which he personally signed.

Several years later, an issue arose as to the specific date the insurance company became insolvent. The parties (not OIR) sought to depose the Commissioner regarding the content of the letters he issued. OIR strenuously objected to such efforts arguing that if the Commissioner could be summoned to provide a deposition for every letter or order he signed as the "final decision-maker" for the agency, he would not be able to competently and reasonably

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fulfill the numerous duties of Insurance Commissioner for the state of Florida.

The First District Court of Appeal agreed with OIR. The court held that, based on the facts of the matter, the Commissioner should not be deposed because his knowledge was not "unique." Instead, the court recognized that the Commissioner's decision was based on a "collaborative process" with his staff. In particular, the court noted that (based on his affidavit) the Commissioner did not conduct an independent review of the company's solvency; he did not have firsthand factual information; and, he based his letters on findings and recommendations from OIR staff. Thus, the court found that the specific questions to be asked the Commissioner could "be answered by others," and did not call for information from the Commissioner's "unique" knowledge of the circumstances.

Regarding the second factor, an excellent analysis of whether an agency head's knowledge relates to the "issues being litigated," was recently issued in the Division of Administrative Hearings concerning an effort to depose the Commissioner of Education. In *Corcoran v. Velazquez*, DOAH Case No. 21-2514PL (Order Jan. 13, 2022), the Department of Education ("Department") initiated a disciplinary action to sanction an educator's teaching certificate. Pursuant to section 1012.796(3), Florida Statutes, the Commissioner, following an investigation by Department staff, must personally determine whether probable cause exists to prosecute the alleged misconduct, which he did. The respondent educator subsequently sought to depose the Commissioner regarding the basis of his decision.

By granting the Department's motion for protective order, the Administrative Law Judge ("ALJ") denied the respondent's effort. Essentially, the ALJ found that the central issue to be decided in the evidentiary hearing was whether the underlying facts warranted discipline, not how the Commissioner reached his preliminary probable cause determination. The ALJ rejected the respondent's argument that the Commissioner somehow acquired unique knowledge of the facts through the internal Department activity preceding the administrative action. The ALJ perceptively expressed that application of the Apex Doctrine "requires a relevancy nexus between the information sought and the issues of fact in litigation," and no evidence established that the Commissioner possessed unique knowledge "germane to the issue being litigated in this proceeding." On the contrary, no evidence demonstrated that the Commissioner had personal knowledge of the material facts "that could not be addressed fully by others who were present that day." Accordingly, the Department presented sufficient argument under the Apex Doctrine to prevent its agency head from being subjected to a deposition.

To conclude, Florida statutes task agency heads to manage and oversee the business their agencies conduct. Consequently, parties to administrative or civil litigation might be tempted to depose these "high-level" officials based on their statutory roles as the "ultimate decision-makers" of their agencies. As recognized by the Supreme Court, allowing these depositions to proceed unchecked invites the risk of oppressive or unjustified discovery. The Apex Doctrine prevents this unwanted development by restricting depositions of agency heads to testimony that both consists of their "unique, personal" knowledge, as well as is relevant to the "issues being litigated." As stated in *In re Amendment*, knowing how to protect an agency head from exposure to this danger will ensure "the efficient operation of the agency in particular and state government as a whole."

***

Judge Bruce Culpepper *currently serves as an Administrative Law Judge for the Florida Division of Administrative Hearings, a position he has held since 2015. Judge Culpepper attended the University of Florida for both his undergraduate and law degrees. He began his legal career in the U.S. Air Force as a Judge Advocate. Thereafter, he spent a number of years in private practice, before venturing back into public service with the Florida Department of Financial Services, as well as the Florida Office of Insurance Regulation. Judge Culpepper is a board member of the National Association of Administrative Law Judiciary, holding the position of president-elect.*

ETHICS QUESTIONS?

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Constitutional Right – Firearms – Agency Infringement of Constitutional Right Based on Hearsay Document

Lynch v. Fla. Dep't of Law Enforcement, 330 So. 3d 140 (Fla. 1st DCA 2021) (Roberts, J.; Rowe, C.J., and Jay, J., concur).

Lynch challenged a Florida Department of Law Enforcement ("FDLE") determination that he was prohibited from purchasing a firearm, which FDLE based on a check of the information contained in the National Instant Criminal Background Check System ("NICS"). FDLE asserted it performed the NICS check in accordance with its statutory duty. Lynch argued that upon a potential buyer appealing a nonapproval for a purchase of a firearm, FDLE must take additional, affirmative steps by reviewing the underlying documents before relying on the information obtained from an NICS check. The First District Court of Appeal agreed and reversed FDLE's nonapproval.

Prior to purchasing a firearm from a federal firearm licensee ("FFL"), a federal background check of the purchaser is required. In Florida, instead of the FFL directly accessing NICS, FDLE, as the governmental point of contact, performs the check for the FFL and provides the determination as to whether the purchaser is eligible. Upon determination that a purchaser is not eligible, FDLE will provide a nonapproval number.

An ineligible purchaser can appeal the nonapproval, upon which FDLE is to provide the individual with more information, such as the state or agency that possesses documentation revealing why the individual is ineligible. FDLE also informs the individual that they may clear or correct any disputed issue with the state or agency that led to the nonapproval.

After receiving the nonapproval, Lynch appealed the decision. FDLE argued that it determined, based on the NICS information, that Lynch was ineligible to purchase a firearm due to a New York mental incompetency record. FDLE argued that it had no further statutory obligation to confirm whether the information it received from NICS was accurate. Additionally, FDLE argued it was unable to request the documents from New York, and only Lynch could.

The district court of appeal concluded that FDLE had an affirmative obligation to confirm the legitimacy of the underlying documents the NICS information relied upon. Further, FDLE could not rely on hearsay (the NICS information) to deprive an individual of the constitutional right to purchase a firearm. The First District thus reversed FDLE's nonapproval and remanded for further proceedings.

Due Process – Failure to Appear – Appeal of Penalty

Moran v. Corcoran, 46 Fla.L.Weekly D2661 (Fla. 3d DCA Dec. 15, 2021) (Logue, J.; Hendon and Lobree, JJ., concur).

Moran, a middle school principal who was the subject of an administrative complaint against his license, requested an informal hearing, but did not appear at the hearing. The Education Practices Commission ("Commission") adopted the findings of fact in the administrative complaint and imposed a penalty that was within the statutory parameters, but was more severe than the penalty the Department of Education ("DOE") had recommended. The basis for the Commission's penalty stemmed from its characterization of certain acts that gave rise to the complaint filed against Moran.

Moran appealed, claiming that in exceeding the DOE's recommended penalty, the Commission violated Moran's due process rights because he would have attended the meeting had he known how the Commission would have characterized the conduct alleged in the administrative complaint and that it would lead to a harsher penalty.

The court rejected his claim and affirmed the final order, explaining that the court may not impose its own view of the appropriate penalty where it is authorized by statute.

Licensure – Exemption from Disqualification Standards and Limits to Agency Discretion

Garcia v. Agency for Health Care Admin., 330 So. 3d 542 (Fla. 4th DCA 2021) (Gross, J.; May and Damoorgian, JJ., concur).

Garcia, a licensed advanced practice registered nurse and certified nurse midwife, sought an exemption under section 435.07, Florida Statutes, from disqualification from employment as a Medicaid provider after a misdemeanor theft no contest plea unrelated to her work. The Agency for Health Care Administration ("AHCA") denied her exemption request and the matter proceeded to an administrative hearing.

The issues to be determined by the ALJ were whether Garcia had provided clear and convincing evidence of rehabilitation from her disqualifying offense, and if so, whether AHCA abused its discretion in denying the exemption request.

On the evidence, the ALJ found that Garcia established by clear and convincing evidence that she was rehabilitated from her disqualifying offense and that she posed no danger to Medicaid patients. Indeed, the ALJ determined that "no reasonable individual" could find that Garcia was not rehabilitated on the record presented, which included information not available to AHCA at the time the original agency decision was made, and it would be an abuse of discretion to deny the exemption.

AHCA adopted all of the ALJ's findings of fact and conclusions of law, except the conclusion that it would be an abuse of discretion to deny the exemption. AHCA again denied the exemption request, pointing to the nature of the offense, the fact only one year had passed since Garcia completed probation, and that Garcia continued to voluntarily participate in mental health counseling despite no longer being required to do so.

On appeal, the Fourth District found that AHCA abused its discretion in denying the exemption, and concluded that the ALJ's factual findings were supported by competent, substantial evidence. While acknowledging that an applicant is merely eligible for an exemption and not entitled to one upon establishing rehabilitation, the court said an agency's discretion to deny the exemption is not unbridled and subject to a review for reasonableness. Here, AHCA's arguments suggesting rehabilitation had not occurred were belied by the record. The court contrasted Garcia's case from *Heburn v. Department of Children & Families*, 772 So. 2d 561 (Fla. 1st DCA 2000), which involved "persistent criminal behavior and more

serious disqualifying offenses" than Garcia's conduct. Accordingly, the court reversed AHCA's decision with directions to approve the requested exemption.

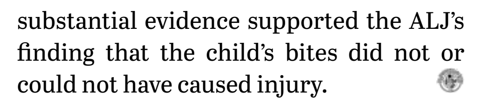
Substantial Interest Proceedings – Agency Rejection of ALJ Findings Supported by Evidence

Chappell Schs. v. Dep't of Child. & Families, 47 Fla. L. Weekly D47a (Fla. 1st DCA Dec. 22, 2021) (Rowe, C.J.; Bilbrey and Jay, JJ., concur).

A child care facility licensed and regulated by the Department of Children and Families ("DCF") was served with an administrative complaint for allegedly violating its disciplinary policies by failing to address the conduct of a child in its care who bit another child. Child care facilities are required to have disciplinary policies which address persistent, inappropriate behavior of children, and if a facility fails to discipline a child deemed to be in violation of the disciplinary policy, it may be subject to an administrative complaint.

After the complaint was filed, the child care facility requested a formal administrative hearing before the Division for Administrative Hearings. The facility presented two witnesses who stated the child did not need to be disciplined under its disciplinary guidelines because the bites did not cause injury or require treatment. DCF presented one witness who testified that the bites could have caused injury, and failed to rebut the facility's testimony that an injury did not occur. The ALJ concluded the facility had not violated its disciplinary policies. DCF rejected those findings and found a violation occurred.

The facility appealed. The First District Court of Appeal reversed, concluding DCF abused its discretion by rejecting the ALJ's findings of fact because competent, substantial evidence supported the ALJ's finding that the child's bites did not or could not have caused injury.



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DOAH CASE NOTES

BY GAR CHISENHALL, MATTHEW KNOLL, DUSTIN METZ, PAUL RENDLEMAN, TIFFANY RODDENBERRY, AND KATIE SABO

Rule Challenges—Unadopted Rules

Marine Indus. Ass'n of Palm Beach Cty., Inc. v. Fla. Fish & Wildlife Conservation Comm'n, Case No. 21-1661RP (Final Order Nov. 4, 2021) (Early, ALJ)

FACTS: Section 327.46(1), Florida Statutes, provides for the establishment of vessel speed and traffic restrictions on Florida waters if such restrictions are necessitated by "vessel traffic congestion." An area with such a restriction is denominated as a "boating-restricted area." Section 327.46(1)(a) empowers the Florida Fish and Wildlife Conservation Commission ("Commission") to adopt rules establishing boating-restricted areas. Municipalities and counties also have statutory authority to establish boating-restricted areas, and the Commission set forth detailed standards in Florida Administrative Code Rule 68D-21.004(3)(c) by which local governments can determine if vessel traffic congestion on a local water body justifies establishment of a boating-restricted area. While the Commission has established numerous boating restricted areas, the Commission has no formal standard by which it determines whether vessel traffic congestion in a particular area justifies establishment by the Commission of a boating restricted area. Instead, the Commission has an unwritten policy by which it relies upon the standards in rule 68D-21.004(3)(c) in creating its boating-restricted areas. The Marine Industries Association of Palm Beach County, Inc. filed a petition alleging that the Commission's reliance on vessel traffic congestion standards in rule 68D-21.004(3)(c) as the basis for its proposed rule pertaining to the Jupiter Narrows in Palm Beach County amounted to an unadopted rule.

OUTCOME: The ALJ concluded that rule 68D-21.004(3)(c), on its face, has no applicability to boating-restricted areas established by the Commission. By utilizing local government vessel traffic congestion standards to establish its boating-restricted areas, the Commission created a statement of general applicability that had the force and effect of law, i.e., an unadopted rule. The ALJ found that the Commission did not prove that rulemaking

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to adopt its own vessel traffic congestion standards was not feasible or practicable.

Leafly Holdings, Inc. v. Dep't of Health, Case No, 21-2431RU (Final Order Oct. 25, 2021) (Van Wyk, ALJ)

FACTS: Leafly Holdings, Ins. ("Leafly") advertises the products of marijuana retailers, manufacturers, producers, and distributors on its website. Therefore, as an alternative to separately visiting the websites of individual medical marijuana dispensaries, a medical marijuana patient can visit Leafly's website and simultaneously search for specific marijuana products and product types offered by several dispensing facilities. Section 381.986(8)(e), Florida Statutes, prohibits medical marijuana treatment centers ("MMTCs") from "contract[ing] for services directly related to the cultivation, processing, and dispensing of marijuana or marijuana delivery devices." The Department of Health ("Department") regulates medical marijuana in the State of Florida and issued a letter on February 1, 2021, to all MMTCs stating that contracting with Leafly, or any other third-party website, for services directly related to dispensing is a violation of section 381.986(8)(e). Leafly filed a petition on August 6, 2021, alleging that the statement was an unadopted rule. **OUTCOME:** The ALJ ruled that the statement at issue was an unadopted rule. In doing so, she concluded that "[t] he statement does not merely reiterate the statute, but places a construction on the statement that is not readily-apparent on its face." She reasoned that "[t]he letter constitutes the Department's interpretation that online ordering is a service directly-related to dispensation of medical marijuana; thus, the letter implements the statute and prescribes policy. The letter has the direct and consistent effect of prohibiting the practice of MMTCs contracting with third-party websites for online ordering of medical marijuana." In a separate ruling, the ALJ rejected Leafly's request that she engage in a preemptive analysis and determine whether the statement at issue would also amount to an invalid exercise of delegated legislative authority if the Department were to initiate rulemaking and formally adopt the statement at issue as a rule. The ALJ analyzed section 120.56, Florida Statutes, and determined she lacked jurisdiction to address that issue. The Department has appealed the ALJ's ruling to the First District Court of Appeal.

Rule Challenges—Proposed Rules

Positive Behavior Support v. Agency for Health Care Admin., Case No. 21-2714 (Final Order Nov. 18, 2021) (Cohen, ALJ)

FACTS: The Agency for Health Care Administration ("AHCA") operates Florida's Medicaid program and works to ensure that fraudulent behavior occurs to the minimum extent possible. Applied behavior analysis is an optional Medicaid service often utilized by those with autism or other developmental disabilities. Because a significant amount of fraud has been associated with applied behavior analysis services billed to Medicaid, AHCA implemented a program requiring applied behavior analysis providers in Medicaid Regions 9, 10, and 11 to submit their Medicaid claims through an electronic visit verification system ("EVV") rather than directly to AHCA. EVV has financially burdened the applied behavior analysis providers in the aforementioned Medicaid regions, in part, by causing payment delays and improper denial of Medicaid claims. AHCA proposed a rule that would require all Florida Medicaid providers submitting home health or behavioral analysis claims to submit those claims to AHCA's designated EVV vendor. Positive Behavior Support ("PBS") challenged the proposed rule alleging that AHCA exceeded its grant of rulemaking authority. PBS also argues that the proposed rule is vague and arbitrary or capricious. **OUTCOME:** The ALJ dismissed PBS's rule challenge. In doing so, he ruled that AHCA "is concerned first and foremost with paying valid, reimbursable claims in a timely manner. The fact that payments may have previously been made within 48 hours of submission, and now may take a week or two, does not render the rule invalid. There may be some form of action that could be brought in state court to deal with delayed payments, but a rule challenge under chapter 120 is not the method for dealing with [an EVV] vendor the providers deem to be inadequate."

Rule Challenges—Emergency Rules

Sch. Bd. of Miami-Dade Cty. v. Dep't of Health, Case No. 21-3066RE (DOAH Final Order Nov. 5, 2021) (Newman, ALJ)

FACTS: Via the adoption of rule 64DER21-15 ("the Emergency Rule") on September 22, 2021, the Department of Health ("Department") issued protocols for controlling COVID-19 in school settings. On October 6, 2021, the Superintendent of the Leon County School Board and the School Boards of Miami-Dade, Leon, Duval, Orange, Broward, and Alachua Counties (collectively referred to as "the Petitioners") challenged two provisions within the Emergency Rule. One of the provisions at issue mandated that a "school must allow for a parent or legal guardian of the student to opt the student out of wearing a face covering or mask at the parent or legal guardian's sole discretion." The other provision at issue mandated that "[p]arents or legal guardians of students who are known to have been in direct contact with an individual who received a positive diagnostic test for COVID-19" are given the sole discretion to allow their child to return to school, without restrictions, so long as the student remains asymptomatic. **OUTCOME:** The Petitioners argued that: (a) the Emergency Rule was unjustified because there was no immediate public health emergency; (b) the Emergency Rule prevented them from implementing more restrictive protocols to keep children safe; and (c) the protocols in the Emergency Rule should have been adopted months ago via non-emergency rulemaking because any threat from COVID-19 was foreseeable. The ALJ rejected the Petitioners' argument that there was no immediate public health emergency by citing the current amount of COVID-19 circulating among the populace, the percentage of COVID-19 cases attributable to the highly transmissible Delta variant, and declining scholastic performance among Florida's students. With regard to the latter justification, the ALJ noted testimony indicating that students learn best in school. As for the argument that the Department should have utilized non-emergency rulemaking, the ALJ found that "[o]ne to three months is too long to adopt COVID-19 protocols that are informed by changing COVID-19 case

data" and that "the process is fair under the circumstances because COVID-19 presents an immediate danger to the public health, safety and welfare and because COVID-19 protocols must adapt to changing COVID-19 case data." Finally, the ALJ found that the Emergency Rule's opt-out provisions "strike the right balance by ensuring that the protocols that govern the control of COVID-19 in schools go no further than what is required to keep children safe and in school."

Substantial Interest Proceedings

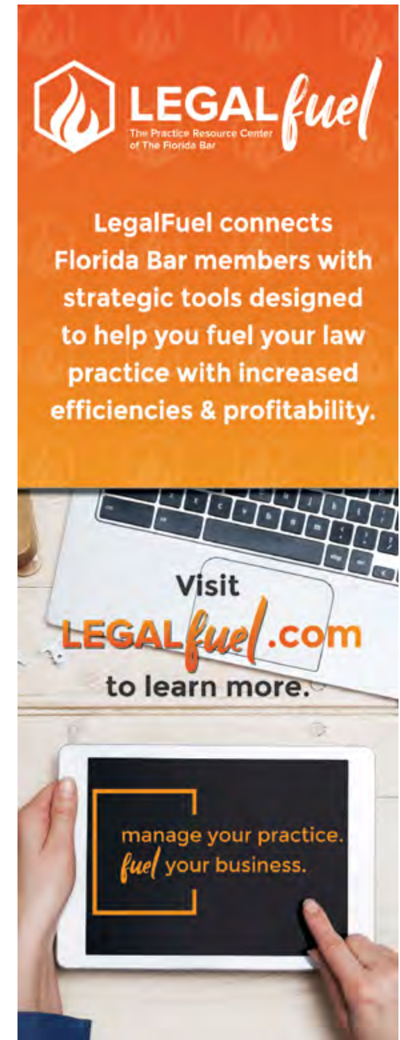
Lyons v. Dep't of Mgmt. Servs., Case No. 21-1362 (DOAH Recommended Order Nov. 2, 2021) (Desai, ALJ)

FACTS: The Florida Retirement System Deferred Retirement Option Program ("DROP") is a retirement benefits program that enables eligible members of the Florida Retirement System ("FRS") to defer receipt of retirement benefits while continuing to work. Section 121.091(13), Florida Statutes, specifies the time by which certain employees must elect to participate in DROP and that failure to transmit a timely election will result in forfeiture of all rights to participate in DROP. The Department of Management Services, Division of Retirement ("Division") administers the DROP program. Celeste Lyons is a fiscal administrator for the Office of the State Attorney, Twentieth Judicial Circuit ("SAO-20"), and SAO-20 employees participate in DROP. The Justice Administration Commission ("JAC") acts as a conduit between SAO-20 and the Division for the processing of all retirement benefit paperwork. Ms. Lyons received notice that December 31, 2020, was her deadline for electing to participate in DROP, and that her eligibility to participate in DROP would be forfeited if the Division did not receive her election notice by the aforementioned deadline. Ms. Lyons completed her DROP paperwork on January 9, 2020, and the Director of Human Resources for SAO-20 then e-mailed Ms. Lyons' DROP paperwork to the JAC retirement coordinator. However, that DROP paperwork was not transmitted to the Division before December 31, 2020. The Division issued a letter on March 10, 2021, notifying Ms. Lyons that her application to participate in DROP had been denied because the Division did not receive her application within the required timeframe. Ms. Lyon requested a formal administrative hearing, and this matter was referred to DOAH.

OUTCOME: The ALJ determined that Ms. Lyons, as a matter of law, was ineligible to participate in DROP because the Division did not receive the necessary paperwork within the timeframe outlined in section 121.091(13). While noting that "strict enforcement of the statute seems harsh," the ALJ concluded that "neither the undersigned nor [the Division] has the statutory authority to allow [Ms. Lyons] to join [DROP] retroactively."

WKDR II, Inc. v. Dep't of Revenue, Case Nos. 21-0844 & 21-0845 (Recommended Order Nov. 30 2021) (Livingstone, ALJ)

FACTS: The Department of Revenue ("Department") administers Florida's sales tax statutes and performs audits to ensure compliance with sales tax laws. Beginning on March 21, 2019, the Department conducted a sales tax audit of WKDR II, Inc. ("WKDR"), a Ford franchise car dealership in LaBelle, Florida. The Department issued a Notice of Proposed Assessment ("NOPA") on January 13, 2020, stating that WKDR owed unpaid sales taxes of $801,967.01, a $200,491.75 penalty, and $166,431.12 of interest. The NOPA specified that May 12, 2020, was the deadline for requesting a formal administrative hearing to challenge the NOPA. A Department employee sent WKDR and its accountant copies of the NOPA by USPS first-class mail on January 14, 2020. That Department employee faxed a copy of the NOPA to WKDR's accountant on January 16, 2020, and received a fax transmission report stating "Results OK." The Department employee also e-mailed a copy of the NOPA to WKDR's accountant on January 16, 2020, requesting a "delivery receipt" and "read receipt" for that e-mail. She received both confirmations shortly after transmitting the NOPA e-mail. On February 19, 2021, WKDR filed a petition seeking to challenge the NOPA. The parties agreed that the ALJ had to initially resolve the jurisdictional issue as to whether WKDR had timely requested a hearing.



OUTCOME: The ALJ found that the testimony of WKDR's accountant that he did not receive the NOPA was not credible. According to the ALJ, "[t]he Department provided notice of the NOPA in a manner reasonably calculated to inform WKDR and its representative of WKDR's rights and of the deadlines to take action to protect those rights." WKDR also argued that the Department had failed to comply with section 72.011, Florida Statutes, by neglecting to adopt a rule setting forth procedures by which a taxpayer had to be notified of an assessment. The ALJ rejected that argument by concluding that "the absence of a rule that promulgates the 'procedures' by which taxpayers are to be notified of assessments does not overcome the fact that WKDR was actually notified of the NOPA." "While the absence of a promulgated procedural rule might foreclose the Department from relying on constructive notice in a given case, the absence of a rule cannot overcome the fact of actual notice as found here."

Florida State University College of Law Spring 2022 Update

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

The U.S. News and World Report (2021) has ranked Florida State University as the nation's 18th best Environmental Law Program, tied with Tulane University, and ranked 7th among environmental law programs at all public universities nationwide. Below highlights the activities and events of FSU Environmental Law Certificate Program, and list recent faculty scholarships.

New Faculty Book: Capitalism and the Environment

D'Alemberte Professor Shi-Ling Hsu published his new book, *Capitalism and the Environment: A Proposal to Save the Planet* (with Cambridge University Press), which he launched in December 2021 at the University of Notre Dame's Global Gateway in London.

In the book, Hsu argues that capitalism is a form of economic governance, steered by political choices, and that rescuing the Earth from human-caused pollution and climate change requires harnessing the power of capitalism, not rejecting or idolizing it:

"Capitalism is the most powerful economic engine for transformation, and if only it can be directed toward protection and repair of the environment, it holds out the best hope for saving humankind from its own errant political choices."--Shi-Ling Hsu

Hsu is an expert in the areas of environmental law, natural resource law, climate change, law and economics, and property. He has published in a wide variety of legal journals and co-authored a casebook, *Ocean and Coastal Resources Law* (Wolters Kluwer 2019). Prior to entering academia, Hsu was a senior attorney and economist for the Environmental Law Institute in Washington, D.C. He also practiced law in California, both for the City and County of San Francisco and the law firm of Fenwick & West in Palo Alto.

Student Spotlight

Rylie Slaybaugh is from the small town of Navarre, Florida, and is expected to graduate in April 2022. She just accepted a remote position with the Environment and Natural Resources Division of the Department of Justice in Washington, D.C., for her final semester of law school. After taking the bar, she plans on moving to Colorado, pursuing a career in environmental and land use law—and hiking a lot!

"In the Summer of 2021, I had the opportunity to extern with the Florida Department of Environmental Protection. During my externship, I was named as a qualified representative on a case in which I cross examined the petitioner at a Division of Administrative Hearings (DOAH) proceeding. Additionally, I was able to submit my own motions to DOAH, help in the discovery process of an active case, and conduct legal research for attorneys in the office.

Soon after, in the Fall of 2021, I externed at the City of Tallahassee as the land use extern for the City's Attorney's Office. There, I conducted legal research pertaining to land use issues concerning the municipality, met with employees from several departments within the City, and analyzed ordinance provisions in Tallahassee's Code.

I have been very lucky to have wonderful supervisors at both of my externship placements. They allowed me the freedom to learn on my own while always being there to answer any questions I had."

Alumni Highlight

Colin W. Bennett ('08) is a supervising attorney with the Ohio Environmental Protection Agency for the Division of Drinking and Ground Waters and the Division of Environmental and Financial Assistance. His primary work focuses on the state safe drinking water program, underground injection control, drinking water and wastewater revolving loan funds, and the agency's compliance assistance program. He believes that the varied coursework on traditional administrative law and emerging areas of law in the Environmental Law Certificate Program prepared him well for the daily work in a regulatory agency.

CALL FOR AUTHORS:

ADMINISTRATIVE LAW ARTICLES

One of the strengths of the Administrative Law Section is access to scholarly articles on legal issues faced by administrative law practitioners. The Section is in need of articles for submission to the *Florida Bar Journal* and the Section's newsletter. If you are interested in submitting an article for the *Florida Bar Journal*, please email **Lylli Van Whittle** and if you are interested in submitting an article for the Section's newsletter, please email **Jowanna N. Oates**. Please help us continue our tradition of advancing the practice of administrative law by authoring an article for either the *Florida Bar Journal* or the Section's newsletter.

Faculty Achievements

Professor Shi-Ling Hsu published a new book, Capitalism and the Environment: A Proposal to Save the Plant. Professor Hsu was also interviewed on Marketplace's "Make Me Smart" in October 2021 with Kai Ryssdal and Molly Wood, discussing the case for a carbon tax.

Associate Dean Erin Ryan published *Environmental Rights for the 21st Century: Comparing the Public Trust Doctrine and the Rights of Nature Movement,* in 43 Cardozo L. Rev. __ (2021) with Holly Curry & Hayes Rules, and *The Twin Environmental Law Problems of Preemption* and *Political Scale, in Environmental Law, Disrupted* (Keith Hirokawa & Jessica Owley, eds., 2021). Professor Ryan also did a telephone interview with reporter Steven Contorno in November 2021 about state legislation impacting academic freedom and freedom of speech in Florida's public universities and higher education generally.

Professor Mark Seidenfeld published a book review entitled *The Limits of Deliberation about the Public's Values: Reviewing Blake Emerson, The Public's Law: Origins and Architecture of Progressive Democracy*, in 199 Mich. L. Rev. 1111 (2021).

Assistant Professor Sarah Swan published an article entitled *Constitutional Off-loading at the City Limits,* in 135 Harv. L. Rev. (2021).

Dean Emeritus Donald Weidner has a forthcoming publication in Spring 2022, *The Unfortunate Role of Special Litigation Committees in LLCs,* in *The Business Lawyer.*

Spring 2022 Events and Programs

The FSU Environmental, Energy, and Land Use Law Program is hosting an impressive slate of environmental events and activities, both in person and via Zoom. Information on upcoming events will be available at https://rb.gy/jyvrzd, or reach out to Sam Gowen for more information (sgowen@law.fsu.edu). We hope Section members will join us for one or more of these events.

Spring 2022 Distinguished Environmental Lecture

Michael Vandenbergh, David Daniels Allen Distinguished Chair in Law of the Vanderbilt Law School, presented the Spring 2022 Distinguished Environmental Lecture entitled "Environmental Law in a Polarized Era" on February 2, 2022. This lecture took a critical look at the social license pressures that firms are facing on climate change. Scholars have long noted that organizations need a social license to operate as well as a legal license, and the response to social license pressures may explain much of the recent environmental, social and governance activity in the private sector.

Professor Vandenbergh is the Director of the Climate Change Research Network, and Co-Director of the Energy, Environment, and Land Use Program at Vanderbilt Law School. CLE credit was provided for attending the lecture.

Carbon Tax Panel: The Political Case For (and Against) Carbon Taxation

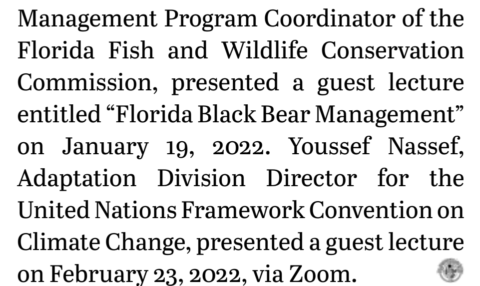
Placing a price on greenhouse gas emissions provides an economic signal to emitters to either lower their emissions or pay for the harm resulting from their emissions. "Carbon pricing" in this manner incentivizes the reduction of emissions and innovation in technologies and techniques that would create an infrastructure for clean, sustainable growth.

"The Political Case For (and Against) Carbon Taxation," was a panel discussion on whether or not to continue advocacy for an economy-wide carbon tax to reduce greenhouse gas emissions in the United States. Two panelists argued for continuing to press for a carbon tax, while two panelists expressed skepticism about the merits and the political feasibility of a carbon tax. All panelists addressed the economics, politics, and environmental justice implications of carbon taxation.

The panelists included Danny Cullenward, Policy Director at CarbonPlan, Marc Hafstead, Director of Carbon Pricing Initiative, Alice Kaswan, Professor at the University of San Francisco School of Law, and Catrina Rorke, Vice President for Policy at the Climate Leadership Council. The panel was moderated by Professor Shi-Ling Hsu of Florida State University College of Law. The event will be held on March 7, 2022, and CLE credit will be provided in attending the lecture.

Enrichment Lectures

The Program has already had two enrichment lectures during the spring semester. David Telesco, the Bear Management Program Coordinator of the Florida Fish and Wildlife Conservation Commission, presented a guest lecture entitled "Florida Black Bear Management" on January 19, 2022. Youssef Nassef, Adaptation Division Director for the United Nations Framework Convention on Climate Change, presented a guest lecture on February 23, 2022, via Zoom.



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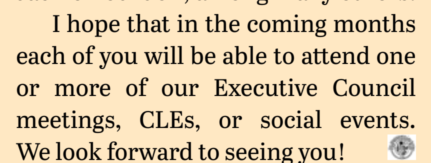
webinars, please let us know.

As you may know, the Division of Administrative Hearings (DOAH) is undergoing several transitions. Among them is the conversion to a new portal for filing exhibits, which will complement the increasing use of video formats for DOAH hearings. Also, Administrative Law Judges Diane Cleavinger and Robert Meale recently retired, and we wish them the best in the next chapters of their lives.

The vibrancy of our Section is due in no small part to the many members who are very active and work to create interesting, beneficial and fun events for us all. They include not only our other officers (Tabitha Jackson, Judge Suzanne Van Wyk and Marc Ito), former Section Chairs (Judge Gar Chisenhall, Richard Shoop, and Jowanna Oates), Gigi Rollini, Tiffany Roddenberry, Larry Sellers, Gregg Morton, Brittany Damby, Brittany Griffith, Louise St. Laurent, Doug Dolan, and FSU 2L Jackie Bourdon, among many others.

I hope that in the coming months each of you will be able to attend one or more of our Executive Council meetings, CLEs, or social events. We look forward to seeing you!



Administrative Law Section

ADMINISTRATIVE LAW SECTION MEMBERSHIP APPLICATION (ATTORNEY) (Item # 8011001)

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

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

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

For additional information about the Administrative Law Section, please visit our website.