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NEWSLETTER

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APPELLATE CASE NOTES

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

Attorney's Fees -- Section 120.569(2)(e) Lacks a Time Requirement

Palafox, LLC v. Diaz, 334 So. 3d 353 (Fla. 1st DCA 2022) (Roberts, J.; Ray and Bilbrey, JJ., concur).

Palafox, LLC is the developer of a multi-family residential development. Ms. Diaz is a homeowner in an adjacent subdivision. Ms. Diaz is represented by an attorney, Mr. Braswell, who has filed prior challenges in an attempt to halt or alter the scope of the development.

Mr. Braswell filed a petition on behalf of Ms. Diaz to challenge Palafox's application for an environmental resource permit for the development. After the administrative hearing, and approximately six months after the petition was filed, Palafox filed its proposed recommended order along with a motion seeking attorney's fees and sanctions against Ms. Diaz and Mr. Braswell under sections 120.595 and 120.569(2)(e), Florida Statutes.

The ALJ held a hearing on the motion for sanctions and entered a final order pursuant to section 120.569(2)(e).[1] The ALJ ruled that Mr. Braswell filed a petition for an improper purpose, but declined to impose any sanctions upon him for doing so. Relying on *Mercedes Lighting and Electrical Supply, Inc. v. State*, 560 So. 2d 276 (Fla. 1st DCA 1990), the ALJ determined that the purpose of sanctions was to deter a party from filing improper pleadings and not to compensate prevailing parties. She interpreted Mercedes to require parties seeking sanctions under section 120.569(2)(e) "to take action to mitigate the amount of resources expended by the party in defense of the pleading that the party claims is filed for an improper purpose." She found Palafox knew or should have known immediately that the administrative petition was filed for an improper purpose but waited six months—after the final hearing—to seek sanctions. The ALJ concluded Palafox's delay militated against granting an award of attorney's fees under section 120.569(2)(e). Palafox sought review of the final order.

On appeal, Palafox argued that the ALJ erred because the plain language of the statute does not include a timeliness requirement. The court agreed, noting that once the ALJ found the petition was filed for an improper purpose, she was required to impose a sanction.

The court observed that the plain language of section 120.569(2)(e) does not include a time requirement for

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1 The ALJ also entered a supplemental *recommended* order granting the motion for attorney's fees pursuant to section 120.595, Florida Statutes, because Ms. Diaz participated in the proceeding for an improper purpose. The agency entered a final order adopting the recommended order, and Ms. Diaz has appealed that order. *Diaz v. Nw. Fla. Water Mgmt. Dist.*, Case No. 1D21-2699 (appeal filed Sept. 8, 2021).

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From the Chair

BY STEPHEN C. EMMANUEL

As my year of serving as the Section's Chair nears its end, I would like to mention a few of the Section's most recent activities and thank some of the numerous individuals who have contributed to our Section's success over the past year.

The Section's Executive Council met in person at the First District Court of Appeal on March 11, 2022. At our meeting, the Executive Council voted to adopt a new Section logo, and we are working on merchandise to show it off. Judge Nelson updated the Council on the Division of Administrative Hearings' new live exhibit portal and the requirement

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FEATURE

Practice Pointer: Requests for Admissions

BY BRUCE CULPEPPER
ADMINISTRATIVE LAW JUDGE,
DIVISION OF ADMINISTRATIVE HEARINGS

I'll admit, in my past administrative practice, I never saw the benefit of Requests for Admissions. I never put much value in receiving a list of "Admit" or "Deny" answers to a series of admit or deny questions.

But after several years on this side of the bench, I've seen Requests for Admissions used to great effect. When included in your discovery arsenal, Requests for Admissions can further three productive objectives.

FIRST: Requests for Admissions secure the undisputed facts. If certain facts are not contested, confirm them through Admissions. One technique is to track the allegations of the administrative complaint. That way, the litigator will learn which statements the opposing party actually disputes, which will help the litigator determine the facts for which no evidence need be presented, and reduce the documents or witnesses needed during the final hearing. Another strategy is to project the facts which will be incorporated into the proposed recommended order. Examples of information that may not be controverted include an agency's regulatory purpose, the preliminary activity in an agency investigation, and a licensee's work history. No need for a litigator to spend unnecessary energy eliciting testimony on facts to which everyone agrees.

Admissions also help the parties craft pre-hearing stipulations. Most administrative proceedings require the parties to submit a joint pre-hearing stipulation. These stipulations should include a statement of those facts which are admitted and require no proof at hearing. Instead of interrupting hearing preparation to compose the stipulated facts (which will inevitably entail numerous back-and-forths between opposing counsel to craft the wording just right), simply insert the "Admitted" facts.

SECOND: Use Admissions for their traditional purpose—discovery. Section 120.569(2)(f), Florida Statutes, and Rule 28-106.206, Florida Administrative Code, allow parties in administrative proceedings to utilize discovery "in the manner provided in the Florida Rules of Civil Procedure." Florida Rule of Civil Procedure 1.370 authorizes Requests for Admissions. So, use them. Use Admissions to streamline the facts that need to be proven at the final hearing, discern the other side's primary defenses, or learn where to seek relevant information. Admissions served early will help a litigator determine how deep to dig during depositions, and which witnesses are necessary to prove the complaint.

THIRD: Occasionally, Admissions will win the case. Under rule 1.370(a), Admission requests must be answered within 30 days after service. Unanswered requests are deemed admitted. If crafted artfully, these technical admissions will support a ruling that no genuine issue of material facts remains to be determined in an evidentiary hearing. If so, then pursuant to section 120.57(1)(i), Florida Statutes, the litigator should move the ALJ to relinquish jurisdiction back to the agency. At that point, the facts in the record will be established, and the agency may proceed to formulate final agency action under section 120.57(2). This third example frequently involves petitioners who hastily submit requests for formal hearings, then later decide not to challenge the charges. Admissions offer an efficient and practical route to terminate the formal administrative proceeding.

A word about technical admissions: anticipate a three-step process. First, the requesting party should move the ALJ to compel responses from the delinquent party. Should responses still not be forthcoming, the requesting party should then move for an order deeming the Admission requests admitted. Once the requests are deemed admitted (typically following an Order to Show Cause to the nonresponsive party), the requesting party should seek to have the ALJ relinquish jurisdiction back to the agency based on the fact that no disputed issues of material fact remain to be determined.

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

Parting Thoughts: First, remember that all motions must include a statement that the movant has conferred with the other side, as well as notify the ALJ of any objections to the motion. Fla. Admin. Code R. 28-106.204(c). The ALJ will quite likely reject any motion that fails to adhere to this requirement. Second, recognize that the primary purpose of a formal administrative hearing is to build a factual record from which an agency may formulate final action. Accordingly, during the hearing, litigators should focus on maneuvering their evidence and testimony into that record. If the pertinent facts may be introduced through Admissions, so much the easier. Finally, don't forget to alert the ALJ during the hearing as to the admitted evidence or statements that may be accepted as fact. A litigator may do so through either the pre-hearing stipulation or by referencing the facts during opening statements. You've earned the Admissions, so use them!

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 US 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.*

DOAH CASE NOTES

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

Bid Protests

Conduent State & Loc. Solutions, Inc. v. Fla. Dep't of Transp., Case No. 22-0172 BID (nonfinal order Feb. 4, 2022) (Van Laningham, ALJ).

Facts: Conduent State & Local Solutions, Inc. ("Conduent") filed a petition on January 18, 2022, challenging the Florida Department of Transportation's ("Department") decision to award a contract to Emovis US, Inc. ("Emovis") for the provision of customer relations and quality management services in support of the Department's toll operations. The final hearing was scheduled for February 14-17, 2022. On January 28, 2022, Shimmick Construction Company, Inc. ("Shimmick"), another party challenging the Department's proposed award to Emovis, filed a motion to continue the final hearing. In support, Shimmick argued that: (a) the Department delayed in referring Shimmick's protest to DOAH; (b) its lead counsel would be unavailable from February 4, 2022 through March 11, 2022; (c) more preparation time is needed due to the complexity of the case; and (d) multiple witnesses were not immediately available for depositions. Emovis opposed Shimmick's motion by citing section 120.57(3)(e), Florida Statutes, and arguing that there was no good cause exception to the requirement that a final hearing for a bid protest shall be commenced within 30 days after DOAH receives the written bid protest. The aforementioned statute provides, in pertinent part, that "[u]pon receipt of a formal written protest referred pursuant to this subsection, the director of [DOAH] shall expedite the hearing and assign an [ALJ] who shall commence a hearing within 30 days after receipt of the formal written protest by [DOAH] . . . The provisions of this paragraph may be waived upon stipulation by all parties."

OUTCOME: The ALJ found that the motion was supported by good cause and granted it. In doing so, he relied on Florida Administrative Code Rule 28-106.210 which provides in relevant part that the "presiding officer may grant a continuance of a hearing for good cause shown." The ALJ noted that section 120.57(3)(e) does not prohibit continuances and was thus hesitant "to infer an unstated nullification of the ALJ's authority to grant continuances, especially when such an interpretation could lead to manifestly unjust results in some cases." Nevertheless, the ALJ observed that continuances in bid protests should be the exception rather than the rule: "[t]hat continuances may be granted does not mean that they should be as a routine matter. The legislative intent to put bid protests on a fast track must be factored in when evaluating whether the cause shown for a continuance in a given case is good cause for postponing a hearing that the statute says should be taken up in a hurry."

CTS Eng'g, Inc. v. Fla. Dep't of Transp., Case No. 21-3573BID (Recommended Order Feb. 21, 2022; FDOT Final Order Mar. 14, 2022) (Schwartz, ALJ).

FACTS: The Department of Transportation ("Department") issued a request for proposals ("RFP") for services to support the management and promotion of a Regional Commuter Assistance Program named Commute Connector. The Department received three responsive proposals that were referred to its five-member Technical Review Committee ("TRC"). The TRC members independently evaluated and scored the bidders' technical proposals and submitted their scores to the Department's procurement office. Ultimately, the Department posted the technical proposals' scores and its intent to award the contract to CTS Engineering, Inc. ("CTS"). TranSystems Corporation, d/b/a TranSystems Corporation Consultants ("Transystems") filed a protest, arguing in part that a

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Florida State University College of Law Summer 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 (2023) has ranked Florida State University as the nation's 21st best Environmental Law Program, tied with the University of Florida, University of California-Hastings, University of Denver, and University of Houston. Below highlights the activities and events of the FSU Environmental Law Certificate Program, and lists recent faculty scholarships.

Tribute to Professor Dave Markell

The FSU Law community gathered on January 12, 2022, to honor and celebrate the life of Professor David Markell. Those who joined us to share wonderful memories and stories about Professor Markell included Jack Markell, his brother and former Governor of the State of Delaware; Steve Turner, a close friend and local Tallahassee attorney; FSU Law Professors Erin Ryan and Shi-Ling Hsu; and Professor Hannah Wiseman, formerly of FSU Law who now teaches at Penn State Law.

At the gathering, FSU Law Dean and McKenzie Professor Erin O'Hara O'Connor announced the establishment of the Professor David L. Markell Memorial Scholarship, which will provide support to FSU Law students who have demonstrated a commitment to environmental law. The scholarship is supported by private donors and administered by the FSU Law Student Advancement Office. The inaugural recipients are FSU Law students Katherine Hupp and Taylor Greenan.

The recording of the memorial is available through this link.

Faculty Achievements

Professor Shi-Ling Hsu guested on Free Range with Professor Michael Livermore of the University of Virginia School of Law threshing out the link between capitalism and climate change. Professor Hsu has two forthcoming publications in 2022, *Whither, Rationality?* in 120 Mich. L. Rev. __ (forthcoming, 2022), and Carbon Taxation and Economic Inequality, in 15 Harv. L. & Pol'y Rev. 201 (forthcoming, 2022).

Associate Dean Erin Ryan's forthcoming publications include an article examining the use of property rights to entrench environmental deregulation entitled *Privatization, Public Commons, and Takingsification in Environmental Law, in U. Penn. L. Rev.* (forthcoming, 2022), and a book chapter reviewing the origins and development of public trust entitled *The Public Trust Doctrine, Property, and Society, in Property, Law, and Society* (Nicole Graham, et al., eds., forthcoming, 2022).

Recent Student Achievements and Activities

The following students participated in environmental law externships this spring:

- Megan Clouden – U.S. Department of Justice Environment and Natural Resources Division
- Jenna Thompson – Florida Fish and Wildlife Conservation Commission
- Salome Garcia – Florida Fish and Wildlife Conservation Commission
- Brian Camili – Tallahassee City Attorney's Office, Land Use Division
- Macie Codina – Pets Ad Litem
- Barclay Mitchell – Earthjustice
- Andrew Herman – NextEra
- Amanda Lowe – Green Street Power Partners
- Six students also completed pro bono work in the area of environmental law.
- `Pets Ad Litem – Catherine Awasthi (51 hours), Macie Codina (20.55 hours)
- Florida Fish and Wildlife Conservation Commission - Megan Clouden (60 hours), Keirsey Carns (20 hours), and Jenna Thompson (20 hours)
- Apalachicola Riverkeeper – Anne Marie Macia (2 hours)

Katie Bauman ('22) got accepted as an Environmental Law and Justice Fellow at Emory University's Turner Environmental Law Clinic in Atlanta, Georgia. Originally from Jacksonville, Florida, Katie received her Bachelor of Arts in Anthropology from Princeton University.

Alumni Spotlight

Ahjond Garmestani ('01), research scientist at the U.S. Environmental Protection Agency's Office of Research and Development in Gulf Breeze, Florida, has co-authored a new book, *Applied Panarchy: Applications and Diffusion across Disciplines* (Island Press, 2022). The book shows how panarchy theory intersects with other disciplines and documents the extraordinary advances in panarchy scholarship and applications over the past two decades.

Environmental Law Lectures

The FSU Environmental, Energy, and Land Use Law Program hosted a full slate of environmental and administrative law events, with grant support from the Florida Bar Section on Environmental and Land Use Law. To access the recordings, please email us at jroxas@law.fsu.edu.

Environmental Field Trip: Wakulla Springs State Park

On March 30, the FSU Environmental Law Program hosted an educational field trip to the Wakulla Springs State Park. Led by Associate Dean Erin Ryan, the students were guided by Dr. Bob Deyle of the FSU Marine and Coastal Research Institute, and Ranger Maria Wilhelmy, park services specialist at Wakulla Springs. After the boat tour, students engaged in small group discussions about water, environmental governance, and public lands management issues in Florida.

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that parties file proposed exhibits through the portal. The portal will serve as the official record of exhibits admitted during the hearing, and will complement the increasing use of video formats for DOAH hearings. The ad hoc Bylaws Committee, chaired by Richard Shoop, gave us an update on possible changes to our bylaws. His committee will present its recommendations to the Executive Council at the June meeting.

The Executive Council's next meeting will be on Friday afternoon, June 24, 2022, in Orlando, in conjunction with The Florida Bar Convention. I want to thank Senator Fred Dudley, Matt Bryant, Paul Drake, James Ross and Patricia Nelson, whose terms on the Executive Council will be ending in June. The Section will be co-sponsoring a reception with the Environmental and Land Use Law Section on Thursday, June 23, 2022, from 6:00 p.m. to 7:30 p.m. in the Bay Meeting Room. Please join us for the reception and our meeting if you are able.

Thanks to the efforts of our Chair-Elect Tabitha Jackson, we have maintained a continuing law school outreach program for building awareness of the Section among law students at every law school in Florida. The Section considers its monthly luncheons at the law schools to be long-term investments toward increasing membership by building awareness of the Section among future administrative law practitioners. The Section is also making a concerted effort to increase awareness among attorneys employed by administrative agencies.

Members of the Section's Technology Committee continue to do an outstanding job maintaining and updating the Section's website and social media platforms, Facebook, Twitter, and LinkedIn. Thank you to Gregg Morton, who has played a significant role in this area, to Brittany Dambly, who has been helpful in updating the website, and to Maria Pecoraro-McCorkle, who has been assisting with social media posts.

I also want to thank Jowanna Oates and Tiffany Roddenberry, the co-editors of the Section's Newsletter, who continue to do an outstanding job producing this first-rate publication. The Newsletter features "Appellate Case Notes," in which Melanie Leitman, Tara Price, Gigi Rollini, Larry Sellers, and Robert Walters provide concise descriptions of every significant administrative law case decided by Florida's appellate courts during the previous quarter. The Newsletter's other recurring column, "DOAH Case Notes," edited by Gar Chisenhall, Matthew Knoll, Dustin Metz, Paul Rendleman, Tiffany Roddenberry and Katie Sabo, concisely describes noteworthy administrative decisions from the preceding quarter.

In addition to the Section's Newsletter, the Section's Bulletin shares more informal information about our members and social events. Special thanks to the following for their contributions to the Bulletin: Maria Pecoraro McCorkle; Judge Gar Chisenhall; Tabitha Jackson; Brittany Dambly; Brittany Griffith; Judge Kilbride; Richard Shoop; and Jowanna Oates.

I would also like to recognize the commitment and hard work of our officers: Chair-Elect Tabitha Jackson; Secretary Suzanne Van Wyk; Treasurer Marc Ito; and Board of Governors Liaison Larry Sellers. Because of the guidance and work of our officers and other members of the Executive Council, the Section stands on a solid foundation, and we look forward to continued innovation and success in the coming years.

Finally, I would like to recognize the continued, outstanding work of the Section's administrator, Calbrail Banner -- We could not have had another successful year without her support.

I am honored to have served as your Chair this past year, proud of our accomplishments, and grateful to everyone who contributed to the Section's success. That being said, I am excited about the year ahead under incoming Chair Tabitha Jackson, and know the Section will continue to flourish under her leadership. Stay tuned!

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seeking sanctions, and it noted that the Legislature has included time limits in other statutory fee provisions, citing by way of example sections 57.105(4) and 768.79, Florida Statutes.

The court also found that the ALJ erred in applying the court's decision in Mercedes, based on a perception of Palafox's delay. The court noted that the basis for reversal in Mercedes was the court's determination that the bid protest was not filed for an improper purpose and that sanctions should not have been imposed. As such, the court said any discussion in Mercedes about timeliness of the motion for sanctions is dicta. In addition, the court found that the discussion in Mercedes of the purpose behind sanctions and the need for a movant to mitigate expenses cannot be interpreted to prohibit a sanction when a violation of section 120.569(2)(e) has been found.

Accordingly, the court reversed the final order and remanded with instructions for the ALJ to determine an appropriate sanction against Mr. Braswell.

Bid Protests - Notice of Protest Required Post-Bid Reopening to Preserve Appeal Rights

Marsh USA, Inc. v. Arthur J. Gallagher Risk Mgmt. Servs., Inc., 47 Fla. L. Weekly D425 (Fla. 3d DCA Feb. 16, 2022) (per curiam Logue, Miller, and Bokor, JJ.).

The School Board of Miami-Dade County (School Board) issued a request for proposal (RFP) seeking bids for risk management and insurance broker services. The School Board awarded the contract arising from the RFP to Marsh USA, Inc. (Marsh). Arthur J. Gallagher Risk Management Service, Inc. protested the award, claiming Marsh's original bid was nonresponsive.

The matter was referred to the Division of Administrative Hearings. Marsh intervened. After final hearing, the ALJ recommended that the School Board uphold the award of the contract to Marsh.

The School Board adopted exceptions to the ALJ's recommended order and rejected the recommendation to uphold the contract award to Marsh. After the School Board issued its final order, it reopened the bidding process. Marsh did not file a notice of protest or formal written protest regarding the School Board's decision to reopen bidding, and instead, Marsh appealed the School Board's final order rejecting the ALJ's recommendation.

The Third District Court of Appeal held that because Marsh failed to file a notice of protest in writing within 72 hours of the bid reopening, and further failed to file a formal written protest, Marsh had waived its right to pursue the appeal of the School Board's final order.

Emergency Suspension Order – No Actual Harm Required

Wright v Dep't of Health, 336 So. 3d 433 (Fla. 1st DCA 2022) (per curiam Bilbrey and Winokur, JJ.; B.L. Thomas, J., dissents with opinion).

Dr. Wright, a licensed pharmacist, sought review of an emergency order by the Department of Health (Department) restricting his license to practice pharmacy, disputing certain facts in the emergency order. The court concluded that, when evaluating the sufficiency of an emergency suspension order, an appellate court is limited to examining the face of the order itself to determine if the elements were alleged in sufficient detail.

The court found the allegations against Dr. Wright were sufficiently detailed to show an "immediate serious danger to the public health, safety, or welfare" to allow the Department to issue an emergency order. The court also rejected Dr. Wright's contention that any actual harm was required to be alleged, concluding that the language of the statute does not require actual harm to have occurred before an emergency order may be issued; it is sufficient for the agency to allege "possible harm" creating an immediate serious danger, so long as the other requirements of the statute are satisfied. Accordingly, the court denied the petition for review.

Judge B.L. Thomas dissented, stating that he would reverse the order because the Department failed to establish that the suspension was the least restrictive means to protect the public.

In a footnote, the majority noted that this issue was not raised in Dr. Wright's petition.

Licensure – Continuances – Hearings Must be Held at a Convenient Time and Place

March v. Dep't of Bus. & Pro. Regul., 4338 So.3d 261 (Fla. 4th DCA Feb. 9, 2022) (Artau, J.; Warner and Gerber, JJ., concur).

Ladi Anita March appealed an adverse decision against her license by the Construction Industry Licensing Board (CILB).

The CILB initiated action against March's license after the resolution of a civil suit against her company resulted in payment to the consumer claimant from the Florida Homeowner's Construction Recovery Fund (Recovery Fund). The CILB held an initial hearing at which it suspended March's license and ordered her to reimburse the Recovery Fund, but this decision stemming from the initial hearing was vacated because the CILB had not provided adequate notice to March.

The CILB then rescheduled the hearing on short notice for a day when her attorney had a preexisting commitment due to his role on the Fifteenth Judicial Circuit Judicial Nominating Commission, which was convening on the day of the rescheduled hearing. March's counsel immediately sought a continuance of the hearing; the CILB did not rule on the request in advance of the hearing, denied the request at the outset of the hearing itself, and entered the same adverse action that had been previously vacated. March therefore had no opportunity to present evidence or argument on the claims.

The Fourth District Court of Appeal held that the CILB abused its discretion in denying the request for continuance. March's attorney made a reasonable and timely request for continuance, neither the CILB nor the consumer claimant would have been prejudiced by

a continuance, and the denial failed to comply with section 120.57(2)(a)2., Florida Statutes, which directs that hearings are to be held "at a convenient time and place."

The court therefore reversed and remanded for further proceedings to be scheduled at a time when March's counsel is able to attend.

Licensure - Free Speech Rights Not Violated By State License Requirements

Del Castillo v. Dep't of Health, 26 F.4th 1214 (11th Cir. 2022) (Luck, J.; Branch and Ed Carnes, JJ., concur).

Florida law requires dieticians and nutritionists to obtain a license from the Floria Department of Health. Del Castillo offered individualized dietary and nutrition advice to Floridians without a license, and she lacked the requisite education and professional experience to obtain one. After receiving a complaint about Del Castillo's practices, DOH opened an investigation and concluded that Del Castillo was in violation of Florida law. DOH sent Del Castillo a citation and cease-and-desist order, and she paid the required fees and fines. Del Castillo then filed a claim under 42 U.S.C. § 1983 in the federal district court against DOH, claiming that Florida's requirement that she could not offer individualized advice about diet and nutrition without a license violated her free speech rights.

On summary judgment, DOH argued that Florida lawfully regulates the dietetics and nutritionist profession. DOH claimed that any regulation of Del Castillo's speech was merely incidental to DOH's regulation of the profession, and argued that the district court was bound by the court's decision in *Locke v. Shore*, 634 F.3d 1185 (11th Cir. 2011), which involved similar First Amendment issues regarding commercial interior designers. Del Castillo argued that Locke was abrogated by the U.S. Supreme Court in *National Institute of Family & Life Advocates v. Becerra,* 138 S. Ct. 2361 (2018). The federal district court ruled that it was bound by *Locke* and ruled in favor of DOH, dismissing Del Castillo's case. Del Castillo appealed.

On appeal, the Eleventh Circuit rejected Del Castillo's arguments and concluded that Locke was still good law. The Eleventh Circuit noted that the *Locke* Court had given two independent bases supporting its ultimate holding: (1) statutes governing the practice of an occupation do not abridge speech where any restriction is merely an incidental effect to the regulation; and (2) the law regulated only the direct and personalized speech to a professional's clients, and not the profession's speech to the public at large (i.e., the professional speech doctrine). In *Becerra,* the U.S. Supreme Court declined to recognize "professional speech" as a separate category of speech. The Becerra Court held that the government could not avoid the Court's rulings on content-based restrictions simply because the speech being restricted involved the regulation of professions.

The *Becerra* Court, however, also noted that states were free to regulate professional conduct where the conduct only incidentally restricted speech. Because *Becerra* impacted only one of the two justifications in *Locke,* the other justification that states could regulate professional conduct that has an incidental impact on speech remained good law. Because Locke was good law, the prior panel rule applied, and both the district court and Eleventh Circuit were bound by its holding. And because Locke controlled, DOH was able to regulate the nutritionist profession where doing so had only an incidental impact on Del Castillo's speech. Thus, the Eleventh Circuit affirmed the district court's order.

Florida Retirement System – Member Benefit Selection

Demichael v. Dep't of Mgmt. Servs., 334 So. 3d 691 (Fla. 1st DCA 2022) (Nordby, J.; Bilbrey and Long, JJ., concur).

On appeal of the rejection of a spousal benefits claim by a spouse of a retired Florida Retirement System (FRS) member, the First District Court of Appeal found that the ALJ's decision was supported by competent, substantial evidence and relevant law.

Mr. Demichael, an employee of the Broward County Sheriff's Office (BCSO) and an FRS member, struggled with alcohol abuse, to the point of checking himself into a rehabilitation facility while on temporary leave from his BCSO position. Very shortly after release from the facility upon being deemed "medically stable for discharge," he completed his FRS retirement paperwork. That paperwork included selecting the first of four options codified in section 121.091(6)(a), Florida Statutes, which provided him with the maximum benefit payable during his lifetime and left no benefits payable to his spouse after his death. This selection requires spousal acknowledgment pursuant to rule, which Mrs. Demichael did sign.

Mr. Demichael passed away approximately two years after he retired. In accordance with his selection, his FRS benefit payments ceased upon his death. Mrs. Demichael brought a challenge to the termination of benefits, claiming that Mr. Demichael lacked competence when he made the selection, she was effectively coerced when she executed the spousal acknowledgement form, and that improper notarization of the form invalidated it.

The matter went to final hearing before an ALJ. The ALJ found Mrs. Demichael's testimony to be incredible, and found there was competent, substantial evidence to support the termination of payments pursuant to Mr. Demichael's FRS selection.

The court affirmed. In addition to rejecting her evidentiary arguments as an effort to have the court reweigh the evidence, the court noted that Mrs. Demichael failed to present any evidence to warrant overlooking section 121.06(6)(h), Florida Statutes, which makes an FRS benefit designation "final and irrevocable" once the first benefits payment is deposited. The court also noted that she failed to establish that a defective spousal acknowledgement would act as a veto of the FRS member's designation or afford an opportunity to re-designate the member's benefit selection.

Presumptive Stay - Not Triggered by Administrative Withdrawal of Renewal Application

Agency for Health Care Admin. v. Ybor Med. Injury & Accident Clinic, Inc., 334 So. 3d 596 (Fla. 2022) (Muniz, J.; Canady, C.J., and Polston, Labarga, Lawson, Couriel, and Grosshans, JJ., concur)

The Agency for Health Care Administration (AHCA) appealed the Second District Court of Appeal's granting of a presumptive stay pursuant to section 120.68(3), Florida Statutes, to Ybor Medical Injury and Accident Clinic, Inc. (Ybor) on appeal from AHCA's decision to administratively withdraw Ybor's incomplete renewal application. Recognizing the conflict with *Beach Club Adult Center, LLC v. Agency Health Care Administration,* 3030 So. 3d 582 (Fla. 1st DCA 2018), the Second District Court of Appeal certified conflict.

The Florida Supreme Court granted review and reversed the lower court, holding that section 120.68(3), Florida Statutes, does not allow for a presumptive stay when challenging an agency's decision to administratively withdraw an incomplete renewal application.

Ybor had been a licensed health care clinic for 19 years when it submitted the renewal application that AHCA deemed incomplete. AHCA provided notice to Ybor of the incomplete status of the application as required by statute, and administratively withdrew the renewal application after Ybor's statutory timeframe to complete the application lapsed.

Ybor then challenged AHCA's decision and sought a presumptive stay of AHCA's decision pursuant to section 120.68(3), Florida Statutes, which mandates a presumptive stay upon request where the agency decision has the effect of suspending or revoking a license. AHCA refused the stay, arguing that an administrative withdrawal did not have the effect of suspending or revoking a license. The Second DCA granted the stay.

The Florida Supreme Court found that the expiring license and the license seeking to be renewed were two distinct licenses. Administratively withdrawing a renewal application therefore cannot have the effect of "suspending or revoking a license" because the licenses are separate. As a result, the Court held that section 120.68(3), does not apply to require a stay as a matter of right regarding agency decisions that administratively withdraw an incomplete licensure application.

Public Records—Personal Text Messages Exchanged During Public Meeting Not Public Record

City of Sunny Isles Beach v. Gatto, 338 sa 3d 1045 (Fla. 3d DCA 2022) (Scales, J.; Lobree and Bokor, JJ., concur).

The City of Sunny Isles Beach (City) and a City Commissioner appealed the trial court's order, which ruled that text messages exchanged between the Commissioner and her husband, sent during a City Commission meeting, were subject to inspection.

After a City Commissioner was texting on her phone during a City Commission meeting, a City resident filed a public records request for copies of the text messages the City Commissioner had sent. The resident filed suit against the City and the City Commissioner after the City did not respond to the resident's public records request. The trial court conducted an in camera review of two sets of text messages from the City Commissioner that were sent during the meeting: messages exchanged with a City resident and messages exchanged with the City Commissioner's husband. The trial court ruled that both sets of text messages were public records. The trial court then emailed both sets of text messages to opposing counsel, without waiting the statutorily required 48 hours pursuant to Section 119.11(2), Florida Statutes.

The City and the City Commissioner moved for an immediate protective order to prevent opposing counsel from sharing the text messages for 48 hours, which the trial court granted. The City and City Commissioner also moved for reconsideration, which the trial court denied. The City and City Commissioner then appealed the trial court's order determining that the text messages exchanged with the husband were public records.

On appeal, the City and City Commissioner argued that the set of texts exchanged with the Commissioner's husband were private and not public records. Opposing counsel, however, argued that the texts were public records because they were sent during a public meeting, touched on City matters, and were similar to the other set of texts the City Commissioner had exchanged with the City resident.

The court noted that in a typical public records case, the trial court would have waited the statutorily-required 48 hours prior to releasing the public records to opposing counsel. In this case, however, due to the trial court's error, opposing counsel had already seen the records that the City resident wished to have deemed public records.

Nevertheless, the ruled that the text messages with the Commissioner's husband were not public records. Notably, the text messages were private and personal in nature. They did not concern City business. The City Commissioner was not acting in her official capacity as a commissioner, and the husband was not acting as a citizen on matters involving City business. The text messages also were not similar to those the City Commissioner had exchanged with the other City resident.

Because the text messages "did not possess the attributes of official business," the court reversed the trial court's order determining that the text messages with the husband were public records.

Standards of Review—Second-Tier Certiorari Review of Circuit Court's Decision

Hayes v. Monroe Cty., 337 So.3d 442 (Fla. 3d DCA 2022) (Miller, J.; Lindsey and Bokor, JJ., concur).

Michael and Debra Hayes (Owners) sought second-tier certiorari review of the circuit court's order affirming a Monroe County (County) special magistrate's code enforcement order finding that the Owners violated the Monroe County Code of Ordinances.

The Owners purchased an elevated home in Cudjoe Key, Florida. Three years later, they applied for a permit to replace the siding on their home. The County issued a permit that authorized replacing the siding but prohibited any work involving the lower part of their home, which included a downstairs enclosure and abutting garage constructed pursuant to permits issued by the County in 1977. The County supervised the Owners' siding work, and the Owners' home passed final inspection.

Seven months later, the County notified the Owners that the downstairs siding was unauthorized, as were the earlier-constructed downstairs enclosure and abutting garage. The County cited the Owners for violating multiple ordinances and ordered the Owners to remove the siding and demolish the downstairs enclosure. Complying with the County's order would have been prohibitively expensive. The Owners requested a hearing before a special magistrate and argued that the County's enforcement efforts were barred by estoppel and laches. The magistrate noted the Owners' case was "unfortunate" and "unfair" but nonetheless entered a "perfunctory order" finding the Owners had violated county ordinances. The magistrate's code enforcement order did not contain any factual or legal findings.

The Owners sought certiorari review of the magistrate's order. The circuit court affirmed the order, issuing a detailed decision, and subsequently denied the Owners' motion for rehearing. The Owners then sought second-tier certiorari review in the Third District Court of Appeal.

The court noted that the standard of review in a second-tier certiorari proceeding "is limited to whether the circuit court afforded procedural due process and whether the circuit court applied the correct law," citing *Custer Medical Center. v. United Automotive Insurance Co.*, 62 So. 3d 1086, 1092 (Fla. 2010). The court explained that the magistrate was required to make findings of fact and conclusions of law. The circuit court, however, had excused the magistrate's failure "to make basic findings supported by evidence," and instead took it upon itself to issue the necessary factual and legal findings.

The court held this was error and a classic departure from the essential requirements of the law because the circuit court failed to follow the statutory, regulatory, and case law framework that required the magistrate to have made these findings. Without those legal findings, a reviewing court could not know whether the magistrate considered and rejected the Owners' defenses or whether the magistrate believed he was unable to consider them. Noting that such an omission "threaten[ed] to compromise the very due process" on which the Owners were entitled, the court granted the Owners' petition for certiorari and quashed the circuit court's decision that affirmed the magistrate's code enforcement order.

Standing—Association Seeking Administrative Hearing

Fla. Auto. Dealers Ass'n v. Hyundai, 337 So.3d 893 (Fla. 1st DCA 2022) (Bilbrey, J.; Makar and Kelsey, JJ., concur)

The Florida Automobile Dealers Association (Association) appealed a final order dismissing its petition for an administrative hearing before the Department of Highway Safety and Motor Vehicles (Department). The petition was dismissed on the ground that the Association lacked standing.

The Association claimed in its petition that certain requirements imposed by Hyundai Motor America Corporation on the sale and marketing of Hyundai's electric vehicles violated section 320.64(22), Florida Statutes. In particular, the Association argued that Hyundai violated the statute by requiring members of the Association to execute "a separate franchise agreement in order to receive a vehicle model of the Hyundai line-make."

The Department concluded that the Association lacked standing to allege a violation of the statute. More specifically, the Department determined that only a "motor vehicle dealer" or "a person with entitlements to or in a motor vehicle dealer," who has been "directly and adversely affected by the action or conduct of an applicant or licensee" is allowed to "seek a declaration and adjudication of its rights with respect to the alleged action and conduct." The Department found that the Association is neither a "motor vehicle dealer" nor a "person with entitlement to or in a motor vehicle dealer," as those terms are defined. The Department then concluded that the Association is not directly and adversely affected by the action or conduct of Hyundai.

On appeal, the Association argued that the Department erred in finding a lack of standing, noting that Florida law recognizes the standing of trade or professional associations to appear in a proceeding under chapter 120, Florida Statutes.

The court rejected this argument, noting that the Association did not seek a hearing under the APA (particularly sections 120.569 or 120.57, Florida Statutes) and observing that the Florida Supreme Court has recognized that associational standing in the chapter 120 context was not a blanket adoption of that doctrine. The court determined that the Association sought a determination from

the Department not under chapter 120, but instead under chapter 320, Florida Statutes. The court then concluded that the specific standing requirements of chapter 320 supersede the broader standards for establishing standing under chapter 120. Accordingly, the court affirmed the Department's final order dismissing the Association's petition.

Standing—Rule Challenges Under the APA

Escambia Cty. Sch. Bd. v. Warren, 337 So. 3d 496 (Fla. 1st DCA 2022) (Nordby, J.; Roberts, J., concurs; and Tanenbaum, J., concurs in result with opinion).

The Escambia County School Board (School Board) appealed a final order of the ALJ that determined Escambia County School Board Rule 2.04 (Rule 2.04) was an invalid exercise of delegated legislative authority.

A custodial worker for the School Board was formally charged with grand theft under sections 812.14(1)(a) and 812.014(2)(b), Florida Statutes. The School Board determined that the crime for which the employee was arrested was a disqualifying offense under section 435.04, Florida Statutes, and Rule 2.04, which was amended during this timeframe and provided that School Board employees who were convicted of certain crimes were disqualified from employment. The School Board suspended the employee without pay. The employee subsequently pled no contest to a felony offense that was not considered a disqualifying offense under Rule 2.04. The School Board reinstated the employee to his position, but did not authorize back pay or benefits for the time he was suspended.

The employee and the collective bargaining unit to which he belonged (the Union) filed a rule challenge petition at DOAH, alleging that both versions of Rule 2.04 were invalid exercises of delegated legislative authority pursuant to section 120.52(8), Florida Statutes. The ALJ held a hearing and issued a final order determining that Rule 2.04 was an invalid exercise of delegated legislative authority.

On appeal, the court found that neither the employee nor the Union had standing to challenge the rule. The employee was not substantially affected by the rule at the time he filed his petition because the School Board had already reinstated the employee when he filed his rule challenge petition and was no longer subject to disqualification. The employee's loss of back pay also did not give the employee standing, as the denial of back pay originated from an unwritten policy of the School Board and not Rule 2.04.

The court also determined that the Union did not have standing to challenge the rule because there was no record evidence showing that a substantial number of Union members were substantially affected by the rule. The majority panel noted that the rule did not facially affect the Union members, and the Union had not demonstrated that a single member—let alone a substantial number of members—had been disqualified or faced the possibility of disqualification as a result of Rule 2.04.

Judge Tanenbaum concurred in result with the majority panel's opinion, but wrote that the School Board had adopted Rule 2.04 under its constitutional authority, not its authority delegated from the Legislature. As a result, Judge Tanenbaum concluded that the employee and the Union could not use an APA rule challenge proceeding as a point of entry to challenge the School Board's exercise of constitutional authority. Because the School Board did not rely on legislative authority to enact the rule, there could be no legislative delegation to exceed.

The majority panel expressly declined to address Judge Tanenbaum's conclusion, writing that the School Board had never asserted that it was relying on its constitutional authority and instead had defended itself during the proceedings pursuant to the APA's framework.

Thus, the court vacated the ALJ's final order and remanded the case for dismissal.

State University System - Student Challenge to In-State Residency Reclassification

Porras v Univ. of Fla., 337 So.3d 471 (Fla. 1st DCA 2022) (per curiam Rowe, C.J., and Lewis and MK Thomas, JJ.).

Porras sought judicial review of a final decision of the University of Florida (UF) denying her request to be reclassified as a Florida resident for tuition purposes.

Porras first argued that UF failed to hold a hearing on her reclassification request. The court rejected this argument because UF was not required to comply with chapter 120 hearing requirements, where the APA expressly does not apply to any proceeding in which the substantial interests of a student are determined by a state university or community college.

Porras next argued that UF failed to explain why it denied her request for residency reclassification. The court rejected this argument because UF and the residency appeal committee did provide the required written explanation when denying her reclassification request. UF explained that it denied the request because she failed to provide documentation to prove she was in Florida to maintain a bona fide domicile, not just to enroll in UF.

Finally, Porras argued that UF failed to ensure that the residency appeal committee consisted of at least three members, as required by law. She claimed that the worksheet reflected only two sets of initials, and thus only two people reviewed her appeal. The court rejected this argument as reliant on facts not contained in the record. Accordingly, the court affirmed the decision to deny Porras' request for residency reclassification.

Larry Sellers *practices in the Tallahassee office of Holland & Knight LLP.*

Tara Price *practices in the Tallahassee office of Shutts & Bowen LLP.*

Gigi Rollini, Melanie R. Leitman, and Robert Walters *practice in the Tallahassee office of Stearns Weaver Miller P.A.*

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member of the TRC used the wrong evaluation sheet to evaluate Transystems' technical proposal. The Department conducted an investigation and verified Transystems' assertion. Rather than rescoring the technical proposals, the Department elected to reject all bids, and CTS protested that decision.

OUTCOME: The ALJ concluded that CTS failed to prove by a preponderance of the evidence that the Department's decision to reject all bids rather than rescore the technical proposals was arbitrary. Because the scores were already made public, the potential existed that in any rescoring, the Department employee who used the wrong evaluation sheet to evaluate Transystems' proposal could have seen how the other TRC members scored the competing proposals. If that had happened, then her ability to independently score the competing proposals would have been in doubt.

Substantial Interest Proceedings—Apex Doctrine

Corcoran v. Velazquez, Case No. 21-2514PL (Nonfinal Order Jan. 13, 2022) (McArthur, ALJ).

FACTS: The Education Practices Commission ("Commission") issued an administrative complaint alleging that Cristina Torres Velazquez, a social sciences teacher at Hernando High School, violated two provisions of the Principles for Professional Conduct for the Education Profession. After the matter was referred to DOAH, Ms. Velazquez filed a notice stating that the petitioner, Richard Corcoran, the Commissioner of Education, would be deposed. The petitioner filed a motion for protective order, citing the recent codification of the apex doctrine in Florida Rule of Civil Procedure 1.280(h). That rule generally provides that a current or former high-level government or corporate officer can file a motion for a protective order from being deposed. The motion must be accompanied by an affidavit or declaration explaining that the officer lacks "unique, personal knowledge of the issues being litigated." The tribunal must then issue a protective order unless the party seeking to depose the official "demonstrates that it has exhausted other discovery, that such discovery is inadequate, and that the officer has unique, personal knowledge of discoverable information." Here, the petitioner's motion for protective order was supported by a declaration from Commissioner Corcoran stating he had no unique knowledge regarding the issues to be litigated.

OUTCOME: The ALJ granted the motion for protective order. Ms. Velasquez attempted to make the case that Commissioner Corcoran "has or may have unique, personal knowledge of facts related to internal Department [of Education] activity preceding the initiation of this proceeding by issuance of the Administrative Complaint"—including how the matters alleged in the administrative complaint came to the Department's attention, why an investigation was initiated, and why probable cause was found. The ALJ concluded that such questions were legally irrelevant, "not identified as a disputed issue of material fact in this proceeding, nor raised as grounds to dismiss the Administrative Complaint in a timely filed motion to dismiss."

Substantial Interest Proceedings—Ethics Complaint

In re: David N. Tolces, Case No. 21-2887EC (Recommended Order April 11, 2022) (Kilbride, ALJ).

FACTS: The Broward County Housing Authority ("BCHA") is a public housing agency governed by a five-member Board of Commissioners ("Board"). Prior to the incident in question, David Tolces had served as the BCHA's general counsel and interim general counsel for approximately 15 years through a contract between the BCHA and the firm of Goren, Cherof, Doody, & Ezrol. Mr. Tolces subsequently left the Goren firm to join the law firm of Weiss Serota as a partner. The Board then unanimously decided that Mr. Tolces would remain as its interim general counsel until a request for proposal for legal services could be issued and finalized. The BCHA later issued a request for proposals ("RFP") seeking applicants to provide general legal services. The RFP contained a "cone of silence" provision restricting communication between applicants and the BCHA. Four law firms, including Weiss Serota, responded to the RFP. Ultimately, an evaluation committee recommended that the legal services contact be awarded to Fox Rothschild, LLP. That recommendation was scheduled to be considered by the Board during a public meeting scheduled for May 19, 2020, via Zoom. Mr. Tolces, who was still serving as the BCHA's attorney at that time, addressed the Board and requested that the members review the proposals themselves and "come to their own determination" based upon his 15 years of experience representing the BCHA and his knowledge of Broward County. After a member of the public rigorously objected to Mr. Tolces's comments as being a "second bite of the apple," the Board voted to cancel the meeting until it could ascertain how to exclude unwanted public comment. The Florida Commission on Ethics subsequently issued an order concluding there was probable cause to conclude that Mr. Tolces violated section 112.313(6), Florida Statutes, by using his official position in an attempt to secure a special privilege or benefit for himself and/or his new law firm.

OUTCOME: The ALJ concluded that Mr. Tolces violated section 112.313(6), which prohibits a public officer from corruptly using his or her official position to secure a special privilege or benefit for himself, herself, or others. In the course of doing so, the ALJ determined that Mr. Tolces's "intent was corrupt in that he sought to completely waylay and undermine the work of the evaluation committee, and restart the procurement process which was nearly completed." "Likewise, it is undeniable from the facts and reasonable inferences that his actions and comments were a last-minute attempt to subvert the valid process the BCHA had in place to promote fairness and integrity in the selection process." Accordingly, the ALJ recommended that Mr. Tolces be fined $2,500. However, he was not of the opinion that a public censure was necessary because "[t]he public nature of this proceeding and the issuance of this Recommended Order serve as a sufficient public censure of his conduct."

Substantial Interest Proceedings—Timeliness

Jimenez v. Rodriguez, Case No. 21-2678 (Recommended Order of Dismissal Feb. 28, 2022; FDEP Final Order Apr. 11, 2022) (Sellers, ALJ).

FACTS: Jose Rodriguez owns property in Key Largo, Florida. In August 2020, the Department of Environmental Protection ("Department") issued an agency action letter to Mr. Rodriguez verifying that the partial removal of a private, residential single-family dock and the installation, on sovereign submerged lands, of a boat lift was exempt from the permitting requirement in part IV of chapter 373, Florida Statutes, and qualified for proprietary approval via a letter of consent pursuant to Florida Administrative Code Rule 18-21.005(1)(c). The agency action letter stated that "[p]etitions filed by any persons other than the applicant, and other than those entitled to written notice under Section 120.60(3), F.S., must be filed within 21 days of publication of the notice or within 21 days of receipt of the written notice, whichever occurs first."

Mary Jo Haybert Jimenez owns property adjoining Mr. Rodriguez's property. In late December 2020, Ms. Jimenez saw a large barge along the shoreline of Mr. Rodriguez's property positioning pilings in a manner that would block the entrance to the front of the pier to her dock. Ms. Jimenez hired attorney Jack Bridges to ascertain how the work became authorized. A few months later, in late April 2021, Mr. Bridges sent a public records request to the Department requesting all records regarding permitted activities on Mr. Rodriguez's property over the previous ten years. Mr. Bridges obtained a copy of the agency action letter to Mr. Rodriguez verifying that his project was exempt from the permitting requirement in part IV of chapter 373. Despite reading the portion of the agency action letter setting forth the 21-day deadline, Mr. Bridges did not file a petition within 21 days of the date he received the agency action letter. He believed that the 21-day provision applied only to Mr. Rodriguez and that he had a reasonable amount of time in which to file a petition challenging the verification. On June 14, 2021, Ms. Jimenez, through her attorney, filed a petition challenging the Department's verification. After the matter was referred to DOAH, the Department filed a motion to dismiss arguing that Ms. Jimenez's petition was untimely.

OUTCOME: The ALJ issued an order recommending that the Department dismiss Ms. Jimenez's petition because it was untimely. The Department had issued a letter of consent for the boat lift, and section 253.115, Florida Statutes, does not require written notice to be personally provided to adjacent property owners in such cases. The ALJ also rejected the argument that equitable tolling excused Ms. Jimenez's untimely petition by ruling that the Department "did not engage in any conduct whatsoever that could reasonably have lulled or misled [Ms.] Jimenez, through her attorney, to miss the 21-day timeframe for filing her Petition. The Department rendered a final order on April 11, 2022, dismissing Ms. Jimenez's petition.

Substantial Interest Proceedings—Standing

Weisser v. McCrory's Sunny Hill Nursery, LLC, Case No. 22-0032 (Recommended Order of Dismissal Feb. 3, 2022) (Nelson, ALJ).

FACTS: McCrory's Sunny Hill Nursery, LLC, d/b/a GrowHealthy ("GrowHealthy") is licensed by the Department of Health ("Department") as a Medical Marijuana Treatment Center pursuant to section 381.986, Florida Statutes. On November 6, 2020, GrowHealthy submitted a variance request seeking the Department's approval of a change in ownership that would facilitate a recapitalization of GrowHealthy's ultimate parent company, iAnthus Capital Holdings, Inc. ("iAnthus"). The proposed recapitalization would enable iAnthus's lenders to acquire 97.25 percent of the company's equity with the existing shareholders' interest being reduced to 2.75 percent. Michael Weisser is an existing shareholder of iAnthus and filed a petition challenging the Department's decision to approve the change in ownership. A number of companies and affiliated funds that stood to gain from the transaction—and which were named in the petition as parties whose substantial interests were to be determined in the proceeding—intervened. After the case was referred to DOAH, the intervenors filed a joint motion to dismiss on January 12, 2022, asserting that Mr. Weisser lacked standing to challenge the Department's decision.

OUTCOME: The ALJ exhaustively analyzed several pertinent cases on standing. She ultimately concluded that Mr. Weisser's alleged injury, the reduction in value of his investment in iAnthus, would not result from the Department granting a variance to GrowHealthy. Instead, his injury "flows from iAnthus's decision to restructure, and that injury will occur whether or not any of the Intervenors has a prohibited interest in another license holder."

Substantial Interest Proceedings — Licensure

Ted Vernon Specialty Autos., Inc. v. Dep't of Highway Safety & Motor Vehicles, Case No. 21-2096 (Recommended Order Jan. 13, 2022) (Creasy, ALJ).

FACTS: Ted Vernon Specialty Automobiles, Inc. ("TVSA") is an independent motor vehicle dealer in Miami, Florida, and is licensed by the Department of Highway Safety and Motor Vehicles ("Department"). Ted Vernon is the sole owner, officer, and license holder for TVSA. In its 2019 application to renew its motor vehicle dealer license, TVSA answered "no" in response to a question asking whether any officer or director had been convicted of a felony since the previous renewal application. In March 2021, TVSA filed another application to renew its motor vehicle dealer license. However, the Department learned that same month from Mr. Vernon's ex-wife that he had been convicted of a felony in 2018. Even though TVSA's 2021 renewal application was regular in form and complied with the provisions of section 320.27, Florida Statutes, the Department issued a notice of intent to deny letter ("NOID"), denying the renewal application. As grounds supporting the denial, the Department pointed to Mr. Vernon's 2018 felony conviction. The Department

also noted that TVSA did not disclose Mr. Vernon's felony conviction on its 2019 renewal application. After this matter was referred to DOAH, the Department admitted that TVSA, and not Mr. Vernon, is the "applicant" and the "licensee" for the 2019 and 2021 renewal applications for purposes of section 320.27(9)(a), Florida Statutes. In addition, TVSA has not been convicted of a felony. Section 320.27(9)(a) provides that the Department may deny, suspend, or revoke a license "upon proof that an applicant or a licensee has [b]een convicted of a felony."

OUTCOME: The ALJ recommended that TVSA's license be renewed. The ALJ noted that section 320.27(9)(a) applies to the Department's ability to discipline a license that has already been issued. "If the Department believes a provision of section 320.27(9)(a) has been implicated, its recourse is to suspend, revoke, or deny a license that has already been issued—not to deny an application. The Legislature crafted the statute in this manner to prevent the Department from putting a dealer out of business without due process. Florida Courts have long recognized that a failure to renew a license is a revocation of the license, and an agency may not, as the Department has done here, refuse to renew a license to avoid the protections afforded a licensee relative to revocation." Moreover, because TVSA was the licensee and applicant and had not been convicted of a felony, the Department's reliance on section 320.27(9)(a)—which applies only to the actions of a licensee—as a basis for denial was misplaced.

Rule Challenges—Existing Rules

NE 32nd St. LLC v. Bd. of Trs. of the Internal Improvement Tr. Fund, Case No. 21-2495RX (Final Order Feb. 3, 2022) (Schwartz, ALJ).

FACTS: Sovereignty submerged lands are lands to which the State of Florida acquired title by becoming a state on March 3, 1845. Florida Administrative Code Chapter 18-21 governs the management of sovereignty submerged lands and the issuance of leases, easements, and other authorizations over them. However, chapter 18-21 does not provide a methodology for determining if submerged lands are sovereignty submerged lands and thus owned by the State.

The Department of Environmental Protection, pursuant to provisions within chapter 18-21, has issued leases, easements, and other authorizations over the petitioners' properties. The petitioners argued that those provisions are an invalid exercise of delegated legislative authority because they fail to provide a methodology for determining if submerged lands are sovereignty submerged lands.

OUTCOME: The ALJ issued a final order dismissing the rule challenge because "there are many factors involved in making a submerged land title determination, each depending upon the facts of the specific case and applicable law. It would be impracticable to require a methodology in the challenged rules for making submerged land title determinations." An appeal is pending before the First District Court of Appeal.

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