ADMINISTRATIVE LAW SECTION
Newsletter
Vol. XLII, No. 4 Jowanna N. Oates and Tiffany Roddenberry, Co-Editors June 2021

Appellate Case Notes

By Tara Price, Melanie Leitman, Robert Walters, Gigi Rollini, and Larry Sellers

Attorneys' Fees – "Substantially Justified" Exception in Proposed Rule Challenge
Dep't of Health v. Louis Del Favero Orchids, Inc., 313 So. 3d 876 (Fla. 1st DCA 2021)

Louis Del Favero Orchids (Del Favero) challenged proposed rules delineating the preference for a company to receive a medical marijuana license based on whether the facility or property to be used does or did process citrus. While the statute contemplated the preference applying to conversion of citrus-related facilities, the rule allowed the preference to be applied to citrus-related property, which Del Favero argued was an invalid and unauthorized expansion of the statutory language. The ALJ agreed with Del Favero, found the rule to be an invalid exercise of legislative authority, and declared it invalid.

Del Favero then sought recovery of attorneys' fees and costs under section 120.595(2), Florida Statutes, which the ALJ awarded, finding that the Department of Health (DOH) had not acted reasonably in substituting "property" for "facility" in its proposed rule. DOH appealed.

The appeals court, finding a dearth of cases analyzing the "substantially justified" standard in section 120.595(2), instead looked to section 57.111, Florida Statutes, which has nearly identical language.

In reversing the fee award, the court found that the ALJ had improp-

See "Appellate Case Notes," page 7

From the Chair

By Bruce D. Lamb

As I prepare this report, we have received word that the CDC has lifted the mask mandate for individuals who have been vaccinated. Regrettably, the progress that has been made in regard to the COVID pandemic has developed too late for sections to hold live meetings at the upcoming annual meeting of The Florida Bar. Therefore, our Executive Council meeting of June 10, 2021 will be held via a virtual platform. The meeting will begin at 12:20 p.m. We hope that you will consider participating. Despite the challenging times that we have faced, your Administrative Law Section has continued to perform its core functions of offering educational opportunities and reports of legal developments to its members. At our Executive Council meeting we will have reports from our standing committees as well as other section and division liaison reports. In addition, the annual election of officers will take place. Our Long Range Planning Committee meeting was delayed so as to allow us the opportunity to have an in person meeting. The Long Range Planning Committee will meet on July 29, 2021.

I hope that most of you are familiar with our new bulletin which is being published to supplement our other reports to members including the newsletter. The bulletin is less formal

See "From the Chair," next page

INSIDE:

FROM THE CHAIR
from page 1

than the newsletter and we welcome your contributions. Contributions to the bulletin can include all types of fun information, photos, trivia, jokes, and recipes. Of course, more serious content is also welcomed. If you have content for the bulletin please contact Tabitha Jackson at tjackson@insurancedefense.net. I would again like to thank Maria Pecoraro-McCorkle, Tabitha Jackson, and Judge Gar Chisenhall for their dedication and devotion of time to this project.

Our CLE committee is actively planning for a webinar series and the return to live CLE events. In addition, we are in the planning stages for a networking event in Tallahassee. This is tentatively scheduled for June 5, 2021, beginning at 3:00 p.m. at Proof Brewing Company. We are planning to have live music and great comradery. We hope that you can attend. Further announcements will be made as the date approaches. Inasmuch as this may be my final From the Chair, I would like to take this opportunity to thank Calbrail Banner, our section administrator, for her assistance to me and the members of the Executive Council. Calbrail is a great resource and has performed with precision during this difficult year.

Correction: The article "DEP and 404 Program Assumption" published in the March 2021 Administrative Law Section Newsletter, Vol XLII, No. 3, expressed the individual views of the author, and not those of the Department of Environmental Protection. Florida's application for assumption of the 404 program was approved on December 17, 2020, and became effective on December 22, 2020, upon publication in the Federal Register. For more information on Florida's 404 program please go to https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/state-404-program.

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

DOAH Case Notes

By Gar Chisenhall, Matthew Knoll, Dustin Metz, Paul Rendleman, Tiffany Roddenberry, and Katie Sabo

Substantial Interest Proceedings

Lane v. Patio Casual, LLC, Case No. 20-5354 (Recommended Order March 29, 2021). https://www.doah.state.fl.us/ROS/2020/20005354.pdf

FACTS: Mr. Lane filed a complaint with the Pinellas County Office of Human Rights against his former employer, Patio Casual, asserting disability discrimination when the employer, among other things, required only him to wear a mask and then terminated him over fears for his health when he refused to do so.

Mr. Lane began working for the employer as a sales and marketing administrator on April 25, 2020—that is, during the early stage of the COVID-19 pandemic. Mr. Lane has a liver condition, which he disclosed to the employer during his interview. On May 14, 2020, the co-owner texted Mr. Lane, asking him if he would be willing to wear a mask in the store: "[b]ecause of your medical condition we think you should always wear a mask at work." Mr. Lane agreed. At the time, health agencies issued guidance that masks helped prevent the spread of the coronavirus, but no national, state, or local mask mandate was in effect. When Mr. Lane arrived to work that day, he noticed that other employees were not wearing masks. At that point he took off his own mask. The co-owner again told Mr. Lane that she would like him to wear the mask. Fifteen minutes after he refused to wear the mask, the co-owner terminated him.

OUTCOME: The ALJ found the co-owner's text message was direct evidence of unlawful discrimination. The ALJ acknowledged that the employer undoubtedly had genuine concern for Mr. Lane and believed his liver condition made him more prone to the potentially deadly effects of the coronavirus. The ALJ however concluded the "direct threat" defense under the Americans with Disabilities Act was inapplicable under the facts of the case. 29 C.F.R. § 1630.2(r) (differential treatment for a disabled employee is justified where there is a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation …this assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence"). Here, the ALJ found the defense inapplicable because the employer offered no medical evidence that would justify requiring Mr. Lane to wear a mask, but not the other employees.

Lifestream Behavioral Ctr., Inc. v. Dep't of Child. & Families, Case No. 20-4322 (Recommended Order Feb. 1, 2021, *adopted in toto by* DCF Final Order Mar. 3, 2021). https://www.doah.state.fl.us/ROS/2020/20004322.pdf

FACTS: Methadone Medication-Assisted Treatment ("MAT") is substance abuse treatment utilizing medications, counseling, and behavioral therapies. The Department of Children and Families ("Department") regulates MAT providers, and a new MAT provider may not be established without the Department determining that there is a need for one. If the number of prospective MAT providers seeking licensure in a particular county exceeds the Department's determination of how many providers are needed in that county, then Florida Administrative Code Rule 65D-30.0141 requires the Department to have a team of industry experts evaluate the applicants in order to determine which ones should be licensed. On June 20, 2020, the Department announced in the Florida Administrative Register that Lake County needed one new MAT clinic. Six prospective providers applied for licensure in Lake County, and the Lake County evaluation team gave Lifestream Behavioral Center, Incorporated ("Lifestream") a score of 633.5 and Metro Treatment of Florida, L.P. ("Metro") a score of 619. However, a member of the evaluation team inexplicably gave Metro no points for a particular category and gave a nonsensical response when asked about the anomaly. The Department determined that the aforementioned score could not be justified, and the Department adjusted Metro's score on that particular factor to a level coinciding with a score that substantively identical responses had received. This adjustment raised Metro's overall score to 639, and the Department published notice on July 10, 2020, of its intent to award the new MAT license in Lake County to Metro. Lifestream petitioned for a formal administrative hearing and argued that the Department deviated from its own rule by overriding the Lake County evaluation team's scoring of Metro's application.

OUTCOME: The ALJ rejected Lifestream's argument by concluding that the Department followed its promulgated process by hiring outside evaluators and allowing then to submit their scores without interference. "When the Department reviewed those scores and found ones that facially violated the promulgated instructions in the Scoring Form, it took the only reasonable step and overrode those scores. It was more than reasonable for the Department to conclude that this was the most equitable and legally appropriate action."

Dep't of Agric. & Consumer Servs. v. Tampa Maid Foods, LLC, Case No. 20-5566 (Recommended Order April 12, 2021). https://www.doah.state.fl.us/ROS/2020/20005566.pdf

continued...

DOAH CASE NOTES
from page 10

FACTS: The Department of Agriculture and Consumer Services ("Department") regulates food establishments in Florida pursuant to Chapter 500, Florida Statutes ("the Food Safety Act"), and Florida Administrative Code Chapter 5K-4. The Department contracts with the federal Food and Drug Administration to perform various types of inspections including Hazard Analysis Critical Control Points ("HAACP") inspections. At all relevant times, Tampa Maid operated a shrimp and shellfish processing plant in Lakeland, Florida. On March 9, 2020, two Department inspectors arrived at the processing plant in order to conduct HAACP and FDA contract inspections. However, no inspection occurred because Tampa Maid's Director of Food Safety and Quality Assurance would not allow the inspectors to enter the plant with their Department-issued cell phones/cameras. On November 5, 2020, the Department issued an administrative complaint seeking to impose a $5,000 fine on Tampa Maid for violating section 500.04(6), Florida Statutes, by denying inspectors entry into a food establishment.

OUTCOME: The ALJ recommended that the Department issue a final order imposing a $1,000 fine and suspending Tampa Maid's food permit until the Department has free access to the processing plant. In the course of doing so, the ALJ rejected Tampa Maid's argument that the Department's inspectors had no authority to utilize cameras during their inspection. While acknowledging that the Food Safety Act does not expressly mention the use of photography during inspections, the ALJ cited *Dow Chemical. Co. v. United States*, 476 U.S. 227 (1996), for the proposition that "it was unnecessary for the Florida Legislature to explicitly include the use of cameras, a thermometer, flashlight, pen, or paper in chapter 500 for the Department to utilize such equipment in conducting its inspections." The ALJ also concluded that precluding the Department's inspectors from using any tools not specifically mentioned in the Food Safety Act would lead to an absurd result.

Corcoran v. Leger, DOAH Case No. 20-2987PL (Recommended Order Feb. 10, 2021). https://www.doah.state.fl.us/ROS/2020/20002987.pdf

FACTS: Richard Corcoran, as Commissioner of Education ("Petitioner"), filed an administrative complaint against Ruth S. Gaillard Leger ("Respondent") on July 1, 2020, alleging that Respondent left a student unsupervised and alone in her classroom while Respondent took her other students to P.E. During the course of the ensuing formal administrative hearing, the Petitioner attempted to introduce evidence of other alleged misdeeds of Respondent and prior incidents in which Respondent allegedly left students unsupervised.

OUTCOME: The ALJ found that the Petitioner failed to prove by clear and convincing evidence that Respondent committed the alleged violation and recommended that the administrative complaint be dismissed. In the course of doing so, the ALJ noted that section 120.57(1)(d), Florida Statutes, prohibits the admission of evidence that is only intended to prove bad character or propensity. The statute allows admission of evidence regarding other violations or wrongs when relevant to prove motive, opportunity, intent, preparation, plan, knowledge, identify, or absence of mistake. However, a party intending to offer evidence for one of the aforementioned purposes must furnish to the party in question a written description, 10 days prior to the administrative hearing, of the acts or offenses it intends to offer into evidence. With regard to the instant case, the ALJ noted that no such statement was submitted by the Petitioner. Moreover, the ALJ concluded that the prior acts of offenses in question were only being offered to demonstrate propensity or bad character.

Attorney's Fees

Still v. Suwannee River Water Mgmt. Dist., SRWMD No. ERP-0070233697-2 (Final Order Feb. 9, 2021). https://www.doah.state.fl.us/ROS/2020/20000091_282_02242021_13273823_e.pdf

FACTS: 101st Avenue ("Road") is a dirt road in Bradford County, Florida ("County"). After a series of storm events and Hurricane Irma damaged the Road in August and September 2017, the County, pursuant to emergency authority, began repairing the Road in December 2017. On December 10, 2019, the Suwannee River Water Management District ("District") entered a notice granting an after-the-fact application and determined that the repairs met Florida Administrative Code Rule 62-330.051(4)(e)'s criteria for an exempt activity. Dr. Paul Still resides at an address abutting the aforementioned repair work. On approximately December 23, 2019, Dr. Still petitioned for a hearing to challenge the exemption. In DOAH Case No. 20-91, the ALJ entered an order recommending that the District approve the application and impose attorney's fees against Dr. Still pursuant to section 120.595(1)(d), Florida Statutes. In recommending that fees be awarded, the ALJ stated that "[t]he only conclusion that can be objectively drawn, given the facts of this case, is that the action challenging the Exemption was taken primarily to harass the County and the District, for frivolous purpose,

continued...

APPELLATE CASE NOTES
from page 4

or to needlessly increase the cost of securing the Exemption."

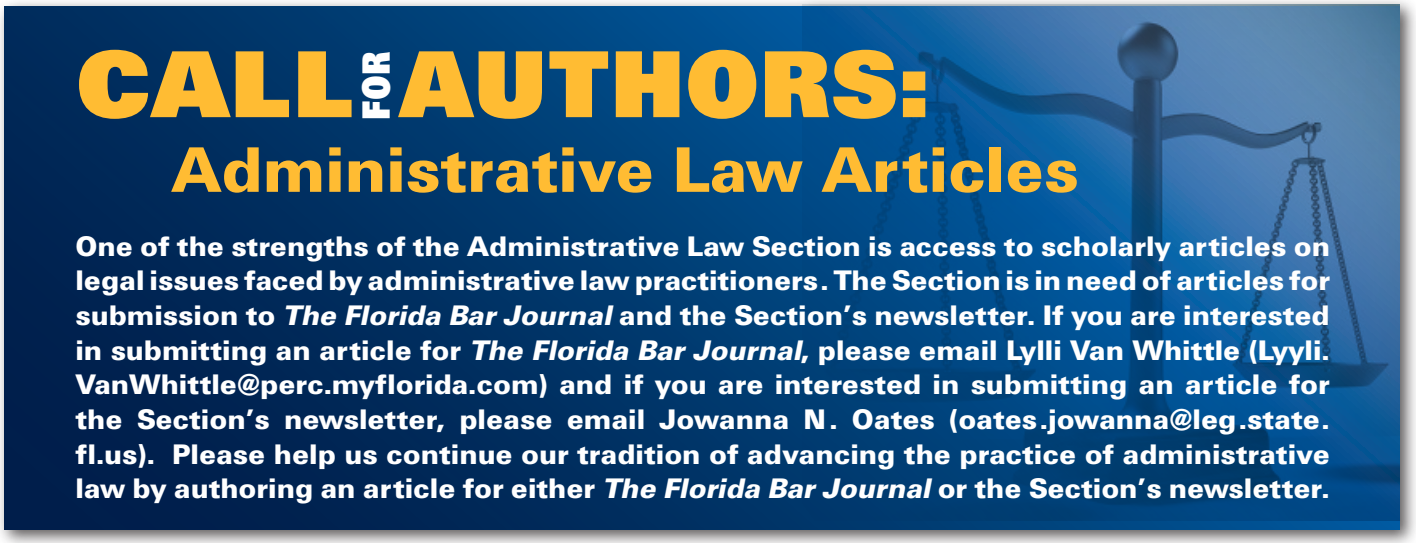
OUTCOME: The District issued a final order adopting the ALJ's recommendation. With regard to an award of attorney's fees, the District stated that it and the County were each owed $30,000 in fees. However, the final order stated that neither the County nor the District would seek to enforce their awards unless one of the following events occurred: (1) Dr. Still and/or his wife petitioned for a hearing of any kind with the District, the St. Johns River Water Management District ("SJRWMD"), the Florida Department of Environmental Protection ("DEP"), or DOAH; (2) Dr. Still or his wife appear as a party or amicus in an administrative proceeding of any kind in which the District, the SJRWMD, DEP, and/or the County is a party; (3) Dr. Still and/or his wife appear as a qualified representative in any administrative proceeding in which the District, the SJRWMD, DEP, and/or the County is a party; (4) Dr. Still and/or his wife file a complaint or petition of any kind with any court or tribunal against the District, the SJRWMD, DEP, and/or the County; or (5) Dr. Still and/or his wife participate as a party or amicus in any proceeding before any court or tribunal in which the District, the SJRWMD, DEP, and/or the County is a party. The final event listed in the District's final order stated that the fee awards would be enforced if Dr. Still or his wife were used to establish the associational standing of a group in any administrative or judicial proceeding in which the District, the SJRWMD, DEP, and/or the County is a party.

Rule Challenges—Unadopted Rule

Brooks v. Dep't of Health, Bd. of Physical Therapy, Case No. 21-76RU (Final Order of Dismissal). https://www.doah.state.fl.us/ROS/2021/21000076.pdf

FACTS: Patricia Brooks is a Florida-licensed physical therapist who entered the Department of Health's ("Department") impaired practitioner's program in January 2015. In April 2015, Ms. Brooks agreed to have her aftercare monitored for five years by the Professional Resource Network ("PRN"). Ms. Brooks also agreed to have her blood tested for alcohol consumption on a regular basis. On June 17, 2020, the Department filed an administrative complaint alleging that Ms. Brooks stopped submitting to the aforementioned testing and did not submit to an evaluation required of those seeking an early termination of their monitoring agreement. The Department further alleged that Ms. Brooks violated: (a) section 456.072(1)(x), Florida Statutes, by failing to timely report a guilty plea to DUI; and (b) section 456.072(1)(hh), by being terminated from an impaired practitioner program without good cause. On January 8, 2021, Ms. Brooks filed a petition with DOAH alleging that PRN's monitoring contract contains unadopted rules of the Department and the Board of Physical Therapy ("Board") requiring licensees with a previously diagnosed illness to: (1) incur substantial costs associated by agreeing to be monitored for five years; and (2) obtain a non-treating professional's opinion as to whether the licensee is fit to end his or her monitoring agreement.

OUTCOME: The ALJ determined that the Board was not a proper party to the rule challenge proceeding because the Department "has the responsibility to contract with PRN or other consultants to implement an impaired practitioners program. The Board has no role in that aspect of the statutory scheme." In addition, "[t]he Board has not caused [Ms. Brooks'] injury and cannot provide her any relief from the requirements of her contract." The ALJ further concluded that the statements at issue are not unadopted rules because they are not statements of an "agency" as defined in section 120.52, Florida Statutes. The statements at issue are those of PRN, and PRN is a private entity rather than a state agency.



Law School Liaison

Florida State University College of Law Spring 2021 Update

by Erin Ryan, Associate Dean for Environmental Programs

Remembering Dave Markell

It is with enormous sadness that I announce the loss of FSU Professor Emeritus David Markell, who passed away on March 22, 2021, surrounded by family, after a heroic battle with cancer.

Markell retired from teaching in 2020 after 18 years at FSU. He served as the FSU College of Law Associate Dean for Academic Affairs (2007-2008), Associate Dean for Environmental Programs (2012-2015), and Associate Dean for Research (2016-2018). He was a recipient of the FSU University Graduate Teaching Award (2016-2017). Over the course of his career, Markell served as the David Sive Visiting Scholar at Columbia Law School, and as a visiting professor at the University of Virginia School of Law, Lewis and Clarke College of Law, Melbourne Law School (Australia), and IDC Herzliva Radzyner Law School (Israel).

Markell published six books and more than 50 articles and book chapters on topics including climate change, compliance and enforcement, and North American environmental law and policy. One of his books was cited as "the most outstanding work of legal scholarship in the field" of administrative law and earned the annual ABA Section of Administrative Law and Regulatory Practice Award for Scholarship. Since 2000, four of his articles have been selected by peers as among the best law review articles in the field of environmental law. Three other articles have been selected as finalists for this honor.

Markell's extensive government experience included service with the NAFTA Environmental Commission, the U.S. Department of Justice's Environmental Enforcement Section, U.S. EPA Region 1, and the New York State Department of Environmental Conservation (as acting Deputy Commissioner of the Office of Environmental Remediation and as Director of the Division of Environmental Enforcement). Markell also served as a member of the U.S. EPA National Advisory Committee, as an external advisor to the Government of Canada's Office of the Auditor General, and as a mediator and expert witness.

"Dave was beloved here for his kindness, his generosity, his hard work, and his impressive teaching, scholarly productivity, and service to the law school and broader community," said FSU College of Law Dean Erin O'Connor. "We will all miss him terribly."

From the beginning until the very end, Dave was a remarkable friend, colleague, family member, and fellow citizen. He devoted himself professionally to the highest aspirations of the environmental field and succeeded in a career marked by both academic and real-world accomplishments. Yet despite his many professional accomplishments, Dave was even more devoted to the people in his life—loving his family, nurturing his students, and bettering his community at every opportunity. Everyone who knew him was quietly awestruck by his simple and straightforward goodness. I know I join everyone in the wider FSU and environmental community in feelings of profound loss and grief at his passing.

Updates on the FSU Environmental Law Certificate Program

The U.S. News and World Report (2022) has ranked the Florida State University College of Law as the nation's 18th best Environmental Law Program, tied with Tulane University. FSU College of Law ranked 48th overall.

Below highlights the activities and events of the FSU Environmental Law Certificate Program. It also lists recent faculty scholarship.

Recent Student Achievements and Activities

- The following students participated in environmental law externships this spring:
  - Katherine Hupp – Division of Administrative Hearings
  - Richard Adetutu – Public Employees Relation Commission
  - Alessandra Norat Mousinho – Department of Business & Professional Regulation Office of General Counsel
  - Jaelee Edmond – Department of Business & Professional Regulation Division of Alcoholic Beverages and Tobacco
  - Tanner Kelsey – Department of Environmental Protection
  - Keirsey Carns – Florida Fish and Wildlife Conservation Commission
  - Megan Clouden – Florida Fish and Wildlife Conservation Commission
  - Kevin Kane – NextEra Juno Beach
  - Kamilla Yamatova – NextEra Tallahassee
  - Kevin Harris – Tallahassee City Attorney's Office, Land Use Division

continued...

LAW SCHOOL LIAISON

from page 6

- Jonathan McGowan authored a chapter in *Impact Investing*, edited by Robert Brown and Alan Gutterman, which will be published by the American Bar Association in late 2021.
- Katherine Hupp and Catherine Bauman participated in the National Energy and Sustainability Moot Court Competition hosted by the West Virginia University College of Law on March 10-13, 2021.

Alumni Accomplishments

- Travis Voyles (FSU Law '17) is the Oversight Counsel in the U.S. Senate Committee on Environment and Public Works.
- Ashley Joan Englund (FSU Law '20) co-authored an article with Kelsey Beirne in The Florida Bar Journal entitled *Courtroom Canines Are Leading Courtroom Accommodations for Children*.

Environmental Law Lectures

The FSU Environmental, Energy, and Land Use Law Program hosted a full slate of impressive environmental and administrative law events and activities via Zoom this spring. To access the recordings, please email us at jroxas@law.fsu.edu.

APPELLATE CASE NOTES

from page 1

erly narrowed its analysis to whether the substitution of the word "facility" for "property" was substantially justified, when the proper inquiry should have looked at DOH's decision to initiate rulemaking in the first place. The court held that when determining whether invalidated proposed rules were "substantially justified" for the purposes of determining entitlement to attorney fees, courts should examine the decision to initiate rulemaking and not only the defect which caused the proposed rule to be invalidated. The court found that DOH met its burden to establish that its actions were substantially justified, as the text of the proposed rule reasonably tracked the pertinent statute and DOH sought guidance from the Department of Citrus in drafting the rule.

Judge Makar dissented from the majority opinion, finding that DOH failed to meet its burden to show the "substantially justified" exception applied. The dissent found that the majority improperly substituted its judgment for that of the agency rather than applying the deferential standard the order was due, and that the result of the case was to excuse DOH "substituting its will for the Legislature's as to who was eligible for the citrus preference." Judge Makar emphasized textualist principles in his disagreement with the majority that the nuance between "property" and "facility" was inconsequential, and agreed with the ALJ that it was "impossible to reconcile" DOH's interpretation.

Due Process – General Assertions of Disputed Fact Insufficient to Require Formal Hearing
Burnett Int'l Coll. v. Fla. Bd. of Nursing, 46 Fla. L. Weekly D869a (Fla. 1st DCA Apr. 14, 2021)

Burnett International College (Burnett) appealed an order of the Florida Board of Nursing (Board) terminating its nursing program. Burnett claimed that the Board denied it due process by failing to conduct a formal hearing prior to terminating its program and by not providing the necessary notice.

The Board took action against Burnett after its program failed to meet the statutorily required passage rates on a national licensing exam. Pursuant to statute, the passing rate of a nursing program's graduates taking the exam for the first time must meet or exceed the minimum passing rate, which the statute specifies is ten points lower than the average passing rate of graduates taking the exam nationally for the first time.

The Board served Burnett with a Notice of Intent to Terminate Nursing Education Program. In response, Burnett filed a petition requesting a formal hearing at the Division of Administrative Hearings pursuant to sections 120.569(1) and 120.57(1), Florida Statutes. In its petition, Burnett contested the passage rates used by the Board, claiming that they were unproven and false, and that the Board failed to provide Burnett proper notice of the hearing. The Board denied Burnett's petition for a formal hearing after determining that the petition failed to identify a disputed issue of material fact.

Following an informal hearing pursuant to section 120.57(2), the Board issued a final order terminating Burnett's nursing program.

On appeal, Burnett argued that the passage rates submitted by the Board created a disputed issue of material fact. The court rejected this argument, noting that generalized assertions that disputed issues of material fact exist, do not create disputed issues of material fact.

Burnett also argued that its due process rights were violated when it was not afforded the opportunity to amend its petition for formal hearing. The court also rejected this argument, finding there was no amendment that could identify any disputed issue of material fact because the necessary passage rates were set by law, and the rates disclosed by the Board reflected that the Board was statutorily required to terminate the program.

continued...

APPELLATE CASE NOTES
from page 7

Finally, while Burnett argued that its due process rights were further violated for failure to receive proper notice, the court found that Burnett received the required notice in the form of the Notice of Intent to Terminate Nursing Education Program and the Notice of Hearing.

Accordingly, the court affirmed the Board's order terminating Burnett's nursing program.

Exhaustion of Administrative Remedies
Fla. Carry, Inc. v. Thrasher, 46 Fla. L. Weekly D550a (Fla. 1st DCA Mar. 11, 2021)

Florida Carry, Inc. appealed from a trial court order dismissing its challenges to administrative regulations and policies regarding possession of firearms on Florida State University's campus. The trial court dismissed the action because Florida Carry had not exhausted the administrative remedies available pursuant to the process established by FSU under the authority of section 1001.706(2)(c), Florida Statutes, which requires notice, public comment, and a "process for a substantially affected person to challenge a statement of general applicability that has not been properly adopted as a regulation" or "an unlawful regulation."

The court rejected Florida Carry's assertion that it could file a lawsuit directly in circuit court rather than be required to pursue available administrative remedies before doing so. The court recognized that Florida Carry has the right to challenge the lawfulness of restrictions on firearms, as provided by section 790.33, Florida Statutes, which creates enforceable rights against state agencies that adopt unlawful enactments that conflict with state firearms laws. However, the court also recognized that, as a general rule, a litigant must exhaust available administrative remedies, absent a recognized exception. In this case, the court concluded that no exception applies, and that Florida Carry is required to exhaust its available administrative remedies before resorting to a judicial forum. Accordingly, the appellate court affirmed the trial court's order of dismissal.

Legislative Preemption – Statutory Penalties Against Local Governments
State v. City of Weston, 46 Fla. L. Weekly D813a (Fla. 1st DCA Apr. 9, 2021)

After the Legislature enacted laws in 2011 that imposed statutory penalties against governmental entities for violating Florida's preemption statute regarding firearms and ammunition, a group of cities sought to enact local firearm-safety measures they believed were not preempted. The group challenged the law imposing the penalties in circuit court, and were successful in striking the law. The State of Florida appealed.

Appellees, which included thirty cities, three counties, and more than seventy elected officials of those entities, sought declaratory judgments invalidating sections 790.33(3)(f) and 790.335(4)(3), Florida Statutes, for violating government function immunity. The statutes created penalties against governmental entities that violated the Legislature's preemption of firearm and ammunition regulations. Appellees argued they had legislative immunity against the imposition of these fines. The trial court agreed with Appellees, and invalidated the statutes.

The First District disagreed with the trial court in two primary ways: (1) that government function immunity does not shield entities that act contrary to or more restrictively than state law in the completely preempted field of firearm and ammunition regulation; and (2) that legislative immunity does not shield individuals who knowingly and willfully act contrary to or beyond the limits of Florida law.

Accordingly, the court reversed, finding the statutes imposing such penalties against local government officials constitutional.

License Revocation – Burden for Stay of License Revocation Pending Review
Freeman v. Dep't of Health, 312 So. 3d 1068 (Fla. 1st DCA 2021)

After the Alabama Medical Licensure Commission denied Dr. Freeman's application for a medical license in that state, the Florida Board of Medicine (Board) revoked his license in Florida. Dr. Freeman appealed the final order of revocation and sought a stay pending appellate disposition.

Dr. Freeman, a Florida licensed medical doctor, was rebuffed in his effort to become a licensed medical practitioner in Alabama when that state's licensing board determined not only that he had committed fraud in his application, but also that he lacked the "basic medical knowledge or clinical competency" necessary for him to practice "with reasonable skill and safety to patients."

Upon learning of this, the Florida Department of Health (DOH) filed an administrative complaint with the Board seeking disciplinary action against Dr. Freeman's Florida license based solely upon section 458.331(1)(b), Florida Statutes, which permits disciplinary action if a licensee is denied licensure in another state. DOH provided no additional basis for discipline and relied exclusively upon the Alabama board's conclusions. The Board approved and adopted DOH's allegations and recommendation, and issued a final order revoking his license. The final order, similar to the administrative complaint, contained no details about Dr. Freeman's conduct, nor did it explain how his conduct posed a danger to the public.

When Dr. Freeman appealed the revocation, he also sought a stay. DOH opposed the stay. Pursuant to section 120.68(3), Florida Statutes, for DOH to overcome a licensee's statutory entitlement to an interim stay of a license revocation pending appeal, it must establish that a stay "would constitute a probable danger to the health, safety, or welfare of the state." In its opposition, however, DOH merely rehashed the same basic facts alleged in the administrative complaint, offered

continued...

APPELLATE CASE NOTES
from page 8

no details to support the Alabama board's decision to deny licensure, and did not point to any evidence that it had conducted its own investigation into the danger of appellant continuing to practice.

Accordingly, the court found that "[t]he department's conclusory assertion that there is a probable danger—based on the department's unelaborated reference to a licensing decision by an agency of another state—does not suffice," and granted Dr. Freeman's stay pending appeal.

Medicaid Benefits -- Timeliness of Motion for New Hearing
C.B. v. Dep't of Child. & Families, 310 So. 3d 1282 (Fla. 5th DCA 2021)

C.B. timely appealed the denial by the Department of Children and Families (DCF) of her application for Medicaid benefits. An administrative hearing was scheduled for October 22, 2019. C.B.'s counsel filed a motion for continuance, which the hearing officer granted, stating that "[a]ll parties will be notified in the future of the new hearing date." On the same day, a separate notice was issued by a different hearing officer setting the rescheduled hearing for November 5, 2019. Although this notice indicated that copies were furnished to C.B. and her counsel, no address was listed for either person.

C.B. and her counsel did not attend the rescheduled hearing and the case was closed as abandoned as a result. No notice of closing the case was sent to C.B. or her counsel, and the hearing officer did not issue a final order. Subsequently, C.B.'s counsel contacted DCF's Office of Appeal Hearings to determine the status of the case and learned that the case was closed as abandoned on November 13, 2019, due to the failure to appear at the administrative hearing.

C.B.'s counsel filed a motion (supported by affidavits) for a new hearing alleging, among other things, that she never received notice of the rescheduled hearing. On March 5, 2020, the hearing officer issued an Order Denying the Motion for a New Hearing and a Final Order of Abandonment. The Order relied exclusively on Florida Administrative Code Rule 65-2.061, which provides in pertinent part, "[w]ritten explanation for failure to appear must be received by the Office of Appeal Hearings within 60 calendar days from the date of the hearing when the appellant alleges nonreceipt of the notice of hearing[.]" The hearing officer concluded that C.B.'s motion was untimely because it was filed more than 60 days after the November 5, 2019 hearing date.

On appeal from the order denying her motion for new hearing and the final order of abandonment, the court noted that procedural due process requires both fair notice and an opportunity to be heard, and that section 120.68(7)(c), Florida Statutes, authorizes the court to set aside agency action when it finds that "[t]he fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure." The court determined that the mechanical application of the rule would contravene due process principles in this case. As a result, the court reversed, concluding that C.B. was entitled to have her motion for a new hearing considered on the merits.

Public Records – Marsy's Law Protections for Law Enforcement Officers
Fla. Police Benevolent Ass'n v. City of Tallahassee, 46 Fla. L. Weekly D755a (Fla. 1st DCA Apr. 6, 2021)

Two Tallahassee Police Department officers were involved in fatal shootings with suspects in two separate incidents. In both incidents, the officers' lives were threatened by the suspects, and both officers fatally shot the suspects. After initially denying a request to reveal the identities of the officers, the City of Tallahassee (City) changed course. The officers sued the City seeking to prevent their identities being revealed, citing protections under Marsy's Law.

The circuit court determined that the protections afforded to crime victims pursuant to Marsy's Law did not extend to law enforcement officers, even when suspects threatened their lives. The court also suggested that to receive the protections under Marsy's Law, criminal proceedings must begin and, because both suspects were deceased, no prosecution could commence. Finally, the court determined that even if they were crime victims, their names were not entitled to confidential treatment because of the conflict between Marsy's Law and the Sunshine Law.

On appeal, the First District Court of Appeal reversed the circuit court's order directing the City to reveal the identities of the appellants. The court found that Marsy's Law and the Sunshine Law do not conflict, and that the two articles of the Florida Constitution can be read in harmony. The Sunshine Law, by its express terms, does not provide that all public records are subject to disclosure, and Marsy's Law's express purpose is "to preserve and protect" certain rights of crime victims. Thus, because of the plain language of the two articles, even when law enforcement officers are acting in their official duty, they can still become crime victims and are thus afforded the protections of Marsy's Law. The court found regardless of whether criminal proceedings will begin, the protections of Marsy's Law start when victims are victimized, and are afforded confidential treatment from that point forward.

The City of Tallahassee has invoked the Florida Supreme Court's discretionary jurisdiction to review the decision, *see* SC21-651.

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

Tara Price and Larry Sellers *practice in the Tallahassee office of Holland & Knight LLP.*

Administrative Law Section

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

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

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

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

NAME _____ ATTORNEY NO. _____

MAILING ADDRESS _____

CITY _____ STATE _____ ZIP _____

EMAIL ADDRESS _____

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

For additional information about the Administrative Law Section, please visit our website:
http://www.flaadminlaw.org/