ADMINISTRATIVE LAW SECTION

Newsletter

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Practical Implications of Amendment 6 in Administrative Law Disputes

by Brittany Adams Long, Donna Blanton, and Travis Miller

On November 6, 2018, Florida voters approved an amendment to the Florida Constitution changing the standard of review applied in judicial review of administrative agencies' decisions. Amendment 6 established the following as section 21 in Article V of the Florida Constitution relating to the judiciary:

> Judicial interpretation of statutes and rules.—In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo.

The amendment did not have a specific effective date. Therefore, it became effective on the first Tuesday after the first Monday in January following the election, which was January 8, 2019.[1] The amendment is self-executing and does not require legislation to implement it. Questions now arise as to how exactly the amendment will be applied and how (or if) it will change the landscape of Florida administrative law.

Judicial Deference and Potential Concerns

Judicial deference in the context of the constitutional amendment refers to a principle, or standard of review, that favors an agency's interpretation of a statute it administers or a

See "Amendment 6," page 14

From the Chair

By Judge Gar Chisenhall

My initial thought several months ago was that my final chair column would be devoted to describing the Section's activities over the past year and thanking everyone whose time and energy contributed to the Section's efforts. However, I already accomplished both of those goals via the Section's Annual Report that I submitted for the May/June issue of *The Florida Bar Journal*. Therefore, I will refer you to the *Journal* for that information and take this opportunity to provide an update on the Section's most recent activities and offer a preview of what is to come during the 2019-20 Bar year.

On April 18, 2019, the Section held a networking event at Happy Motoring in Tallahassee. In addition to providing our younger members with an opportunity to mingle with experienced attorneys and administrative law judges, the event collected donations for a local food bank, the Second Harvest of the Big Bend. We ultimately collected $700 in monetary donations (enough to provide 2,800

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FROM THE CHAIR
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meals!) and 327 pounds of food. The Section is very grateful to Tabitha Harnage, Alexandra Lozada, Taylor Anderson, and Mattie Birster for doing an outstanding job organizing this event.

The Section's executive council met on April 5, 2019, and conducted its annual long-range planning meeting. When one takes a step back and examines all of the activities the Section has implemented in the past year and those it plans to implement in the coming year, it is clear that we are focusing on helping our newer members get "from graduation to certification." As I have mentioned before, the Section has implemented a monthly speaker series at the Florida State University College of Law in order to build awareness of the Section and administrative law among future practitioners. In the fall, Brian Newman, the incoming chair, will kick off the inaugural DOAH Trial Academy, a week-long program designed to teach litigation skills to young Section members. Brian is also looking to continue offering customized CLE courses to state agencies. Those customized programs will have ALJs and experienced practitioners teach litigation skills and discuss topics of interest specific to particular agencies. We are also planning to have a comprehensive administrative law CLE course that will assist young attorneys with satisfying their basic skills course requirement. In addition to helping young attorneys obtain skills necessary to be successful practitioners, the Section will continue to provide networking opportunities in Tallahassee and South Florida. In particular, Christina Shideler will be bringing back the Tables of 8 that were so successful a few years ago. Finally, now that the State and Federal Government Administrative Practice Exam has been re-engineered to focus exclusively on state and federal administrative law, it should be much more appealing to Section members and open the door to more attorneys becoming board certified in administrative law. Therefore, the Section will be doing everything it can over the next few years to make attorneys aware of this change and to assist them with preparing to take the exam. This will be a multi-year effort because one must satisfy several requirements before being eligible to sit for the exam.

The executive council's next meeting will be held on June 28, 2019, in Boca Raton, Florida, in conjunction with The Florida Bar Convention. I am looking forward to that meeting because the Honorable Robert S. Cohen will receive the S. Curtis Kiser Administrative Lawyer of the Year Award, and Jowanna N. Oates will receive the Administrative Law Section's Outstanding Service Award. We could not have found two more deserving recipients. Judge Cohen was responsible for creating the first paperless judicial system in Florida and has been repeatedly recognized for his skill, judgment, management, and administration of the Division of Administrative Hearings. Judge Cohen currently serves as vice chair-elect of the National Conference of the Administrative Law Judiciary, is a past president of the National Association of Administrative Law Judiciary, and is treasurer of the National Association of Workers' Compensation Judiciary. He serves on the Second Judicial Circuit Professionalism Committee, is an alumni member of the William Stafford Inn of Court, a past president of the Tallahassee Bar Association, a two-time past President of the Legal Aid Foundation, and has held or holds leadership roles in numerous community organizations. He is a Fellow of The Florida Bar Foundation, the American Bar Foundation, and a Charter Life Mentor of the National Administrative Law Judiciary Foundation. He is also a past recipient of The Florida Bar's Pro Bono Service Award for the Second Judicial Circuit and the Tallahassee Bar Association's Lifetime Professionalism Award. In addition, Judge Cohen has been a great friend to the Section by allowing us to use DOAH's facilities for numerous CLEs over the years, and he actively encourages ALJs to participate in Section activities and leadership.

For as long as I can remember, Jowanna has served as a co-editor for the Section's quarterly newsletter. The newsletter may be the Section's most popular service, and Jowanna is substantially responsible for the newsletter's success. Also, Jowanna was one of the Section's more successful chairs, and she has been very generous with advising her successors (especially me) on how to make the most of their tenures as chair. Jowanna has written articles for the Section, served on numerous steering committees, and recently co-chaired the highly successful 2018-19 edition of the Pat Dore Conference. In fact, the 2018-19 edition of the Pat Dore Conference was the most successful one in recent memory. I have no doubt that Jowanna has devoted several hundred hours of service to the Section.

During the course of my term, we have worked hard to make nonmembers aware of what the Section does and what it can do for them. Despite the existence of email and social media, I have seen firsthand how the best tool for accomplishing those goals is still word-of-mouth advertising. Over the last year, I have seen several people become involved with the Section and make substantial contributions simply because an acquaintance invited them to an executive council meeting or a Section event. If you are a member in Tallahassee or South Florida, please take advantage of the new activities being offered by the Section and bring a friend or coworker. Take every opportunity to get the word out about the Section's networking events, the DOAH Trial Academy, the customized CLE courses for state agencies, the comprehensive administrative law CLE course for young attorneys, and the re-engineered SFGAP exam.

Even though I used the Section's Annual Report to thank everyone

who contributed to the Section's efforts this past year, I would like to recognize the continued, outstanding work of the Section's administrator, Calbrail Banner. Calbrail never hesitates to go the proverbial "extra mile" for the Section, and she has received countless emails and telephone calls from me since I began as the Section's treasurer. I would also like to thank Chase Early who did a wonderful job filling in for Calbrail while she was on maternity leave.

I am very proud of what we have accomplished over the past year, and I am very grateful to everyone who contributed to the Section's success. I hope that the Section's leadership continues to be willing to try new things and "think outside-the-box." I have been working very closely with Brian over the last several months, and he is ready to hit the ground running once his term begins. I have no doubt that his term will be tremendously successful.

Do You Have a Suggested Change to the Uniform Rules?

Do you have a suggested change to the Uniform Rules of Procedure? If so, please pass it along to Larry Sellers or one of the members of the Section's ad hoc committee that will be considering recommended updates to these rules: Paul Drake, Seann Frazier, Shaw Stiller, Judge Yolonda Green, Judge Elizabeth McArthur, Judge Li Nelson, or Judge Dave Watkins. Larry's e-mail address is: **larry.sellers@hklaw.com**.

The Uniform Rules were last updated in 2013 based on recommendations from the Section. For a summary of these changes, see the April 2013 issue of this newsletter. As in 2013, any amendments to the Uniform Rules must be formally proposed and adopted by the Administration Commission before they may become effective.

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

Garnett W. Chisenhall, Jr. (gar.chisenhall@doah.state.fl.us) ..... Chair
Brian A. Newman (brian@penningtonlaw.com) ..... Chair-elect
Bruce D. Lamb (blamb@gunster.com) ..... Secretary
Stephen C. Emmanuel (semmanuel@ausley.com) ..... Treasurer
Tiffany Roddenberry (Tiffany.Roddenberry@hklaw.com) ..... Co-Editor
Jowanna N. Oates (oates.jowanna@leg.state.fl.us) ..... Co-Editor
Calbrail L. Banner, Tallahassee (cbanner@flabar.org) ..... Program Administrator
Colleen P. Bellia, Tallahassee ..... Layout

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ALJ Q&A

By Richard J. Shoop

This edition of ALJ Q&A features the Honorable Cathy M. Sellers. Judge Sellers is an administrative law judge with the Division of Administrative Hearings. Prior to being appointed as an administrative law judge in 2011, she practiced law in the private sector for 23 years, focusing on environmental, land use, and administrative law. Judge Sellers is Florida Bar board-certified in State and Federal Government and Administrative Practice, and is a past chair of the Administrative Law Section. She also serves as an adjunct professor at the University of Florida Frederic G. Levin College of Law, where she has taught Florida administrative law since 1999.

I first met Judge Sellers several years ago through my service to the Administrative Law Section, and I have always found her to be a highly professional, thoughtful, and caring person who truly enjoys serving others. I hope that her character and personality is reflected in the conversation that appears below.

RS: How did you become involved in the practice of administrative law?

CS: I went to law school to practice environmental law, and I took Professor Pat Dore's Florida Administrative Practice Course, which I loved. And of course, in Florida, if you practice environmental law, you practice administrative law. So, in my years of practicing environmental law, I used the Florida Administrative Procedure Act literally every day. As I branched out my practice into other kinds of regulated areas, I continued to use the APA in different contexts. At a certain point, I decided that I loved administrative law as a field even more than I loved specific substantive areas, such as environmental law.

RS: So what made you decide to make the leap from practitioner to ALJ?

CS: I always aspired to be an administrative law judge once I felt comfortable enough with the practice of law, and particularly the regulated areas of law. I really love the APA. I think it is an elegant, logical statute. I applaud the goals of the APA to make agencies' decision-making processes more accountable and more transparent to the regulated public. So, I decided that, at the appropriate time, if I had the opportunity, I would apply to become an administrative law judge. Fortunately, that opportunity came along, and I was extremely honored and happy to be appointed an ALJ. It is the culmination of my career.

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

CS: As I said before, I really love the APA. It is a well-structured statute that functions as a logical system governing agency action and challenges to that action. I enjoy applying this elegant statute across a broad range of regulatory and fact contexts. And the cases are very interesting! They involve important issues for citizens and for the State of Florida. Whether the parties are individuals representing themselves on personal issues, such as whether they will be able to keep a license that provides their livelihood, or are corporations involved in multimillion dollar cases, they are all important. It is very important for us as ALJs to take every one of them very seriously and do our best in deciding the case.

RS: What is the most common mistake you see attorneys who practice in front of you make?

CS: There are two mistakes that I commonly see. One is that many attorneys do not understand that if they intend to rely on hearsay evidence, they have to provide a foundation for the use of that evidence in the record. The other one, which more often occurs in complicated cases, such as environmental cases, is where a party has extensive documentary evidence consisting of technical studies or scientific studies that may not be widely accepted, that they want to get into evidence, and they attempt to invoke official recognition to have the documents admitted for the facts asserted in them. Official recognition is not appropriate under our evidence code for the admission of those types of documents into evidence for the truth of the matters asserted in the documents. So, when that arises, I tell them, "No, I will not take official recognition of these. You're welcome to try to get them into evidence the regular way."

RS: Describe what a typical day looks like for you, if there is such a thing.

CS: I have two types of typical days: hearing days and writing days. On hearing days, I will get in very early. I will have prepared a trial notebook that contains all of the applicable or important pleadings, motions, orders, rules, statutes, any recommended orders or appellate cases that are relevant, my exhibits lists, my script to start the hearing, things of that nature. I will have prepared that ahead of time. So I come in, get settled, get to the hearing room ahead of time, and get all my stuff laid out on my bench, so that at 9:00 a.m., I am ready to go. Writing days are luxuries. Those consist of coming in and closing my door so that I can conduct research and write all day. One of the things that we at DOAH take for granted is how insulated we are from the outside world in terms of phone calls and emails. That was quite a shock for me when I transitioned from private practice to DOAH. I do not get a lot of email, and I do not get phone calls. So, on my writing days, I do not have many interruptions, and that makes for productive days to knock out orders.

RS: How do you use technology in your work?

CS: One important way in which we use technology at DOAH is through the use of video teleconference to

conduct our final hearings. This is particularly useful when the hearing is only going to last one day and does not involve particularly complicated issues; it saves a great deal of time and state money to conduct the final hearing by video teleconference rather than traveling to remote parts of the state for the hearing. Of course, we do conduct many of our hearings in person all over the state, but it is a tremendous help, in terms of efficiency, to be able to conduct some of our hearings by video teleconferencing. Also, I use my computer constantly. I have a desktop computer, which has various programs on it to manage our cases and issue template-type orders, and word processing. I have email. I use a laptop with our case management system and my email on it when I travel. And, of course, I constantly use the internet to research statutes, rules, and case law. When I started practicing law in 1988, law firms were just starting to use email and word processing, and online legal research was very expensive, so much of the legal research was done using the books. Technology has made the practice of law much more efficient, which I love.

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

CS: I started practicing during the era of *McDonald*[1] and progeny, when agencies would not necessarily have to codify their statements of general applicability, and all they had to do was prove up their generally applicable policies in the adjudicatory process. Subsequently, section 120.535, Florida Statutes, was enacted, and then in 1996, section 120.54(1), Florida Statutes, was enacted, mandating that agencies engage in rulemaking to codify their statements of general applicability when practicable or feasible. The emphasis on rulemaking to ensure that the regulated public has access and input in the development of the rules that will regulate them is a very significant positive development in administrative law since I started practicing,

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

CS: Be confident in your ability to do anything you want to do. I was told early in my career that I wasn't a litigator. Consequently, I was afraid of litigation. A bit later in my career, I had the opportunity to get involved in administrative litigation, and I loved it. I wished that I had had the opportunity to do more of it earlier in my career. If you want to do something, put yourself in circumstances that enable you to do that. It will make you a better lawyer, and it will make you a happier lawyer. The other piece of advice I would give to young lawyers is to be courteous, respectful, and honest in dealing with all people you come into contact with as part of your legal practice. It is not necessary to stoop to the level of an uncooperative, rude, or verbally abusive adversary. Hold yourself above that, and remember that your reputation precedes you.

RS: What do you like to do for fun?

CS: I like to read, exercise, travel, go outdoors, and enjoy nature. I am really into birding and I love wildflowers. I love to go to Gator sports events. I also am an adjunct professor at the University of Florida College of Law, where I teach a Florida administrative law course. I have done it for twenty years now. It is huge fun for me. I never get tired of it.

RS: How do you manage to balance your work and your personal life?

CS: I am very fortunate to have an extremely supportive spouse. He has always been my biggest supporter and cheerleader. He is extremely accommodating, and always has been throughout my career. The fact is, he works a lot, and so do I, so we have managed to make it work for a long time.

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

CS: I would like to be remembered as someone who was fair, respectful, prepared, diligent, and hard-working—someone who treated everyone with respect and fairness, who carefully considered the evidence that was provided in the record, and made an earnest effort to correctly apply the law to the facts and arrive at the correct decision under the law.

Endnote

1 *McDonald v. Dep't of Banking & Fin.*, 346 So. 2d 569 (Fla. 1st DCA 1977).

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DOAH CASE NOTES

By Gar Chisenhall, Matthew Knoll, Dustin Metz, Virginia Ponder, Christina Shideler, Paul Rendleman, and Tiffany Roddenberry

Unadopted Rule Challenges

All Seasons Landscape Contractors, Inc. v. Dep't of Transp., Case No. 19-499RU (Final Order Mar. 18, 2019).

FACTS: The Department of Transportation ("DOT") contracts for the maintenance of roads within the state highway system. DOT has standard specifications for its contracts, and one of those specifications governs how liquidated damages will be assessed against a contractor that fails to timely complete its work. DOT's standard specifications have not been adopted as rules. DOT awarded a contract to All Seasons Landscaping Contractors, Inc. ("All Seasons") to maintain certain roads, bridges, sidewalks, and curbs at designated locations in Gadsden and Leon counties. All Seasons filed a petition alleging that the liquidated damages clause is an unadopted rule.

OUTCOME: The ALJ concluded that the liquidated damages clause was not an unadopted rule because it was not generally applicable. The ALJ opined that "while the [liquidated damages] clause is incorporated into each construction and maintenance contract, it applies after the parties enter a contract. Once the parties enter the agreement, the liquidated damages clause has no effect beyond the four corners of that contract. Thus, outside of the respective contract, [the liquidated damages clause] does not have its own effect to create rights, or to require compliance, or otherwise have the direct and consistent effect of law."

Renaissance Charter Sch., Inc. v. Sch. Bd. of Palm Beach Cty., Case No. 18-6195RU (Final Order Mar. 12, 2019).

FACTS: During the 2018 legislative session, the Florida Legislature enacted the Marjory Stoneman Douglas High School Public Safety Act ("the Safety Act"). Among other things, the legislation required the stationing of "safe-school officers" ("SSOs") at all public school facilities. The Renaissance Charter School, Inc. ("RCS"), a nonprofit corporation that operates six charter schools in Palm Beach County, requested that the School Board of Palm Beach County ("the Board") provide a full-time SSO to each of RCS's charter schools. The Board interpreted the Safety Act as requiring each charter school to arrange for its own protection and that any charter school failing to do so would be in violation of the Safety Act. However, the Board did not adopt any rules to implement the Safety Act.

OUTCOME: The ALJ concluded that the Safety Act's plain language "clearly and unambiguously requires school boards and superintendents . . . to assign SSOs . . . to every public school within their respective jurisdictions, including charter schools." The ALJ also concluded that the Board's interpretation of the Safety Act amounted to an unadopted rule because that interpretation gave the statute a meaning not readily apparent from its literal meaning. In other words, the Board's interpretation did not fall within the "simple reiteration exception" to rulemaking.

The Board has appealed the final order to the First District Court of Appeal, Case No. 1D19-1053.

Proposed Rule Challenges

Fla. State Oriental Med. Ass'n v. Dep't of Health, Bd. of Physical Therapy Practice, Case No. 18-2508RP (Final Order Jan. 28, 2019).

FACTS: The Department of Health, Board of Physical Therapy Practice ("the Board") published proposed Florida Administrative Code Rule 64B17-6.008, which would establish minimum standards of practice for dry needling by physical therapists. The proposed rule defines "dry needling" in part as "using apparatus or equipment of filiform needles to penetrate the skin." The Florida State Oriental Medical Association ("the FSOMA") asserted that the proposed rule is an invalid exercise of delegated legislative authority because section 486.021(11), Florida Statutes, provides that physical therapists may perform acupuncture only "when no penetration of the skin occurs." The FSOMA further asserted that the statutory definition for the "practice of physical therapy" prohibits physical therapists from utilizing acupuncture techniques that penetrate the skin.

OUTCOME: The ALJ concluded that the proposed rule exceeded the Board's grant of rulemaking authority. Section 486.025, Florida Statutes, authorizes the Board to establish minimum standards for physical therapy practice. However, the proposed rule would exceed that authority by expanding the scope of physical therapy practice to include penetration of the skin. The ALJ also concluded that the proposed rule contravened the law being implemented because section 486.021(11) only enables physical therapists to perform acupuncture when no penetration of the skin occurs.

Bid Protests

Cady Studios, LLC v. Seminole Cty. Sch. Bd., Case No. 18-134BID (Recommended Order Jan. 23, 2019).

FACTS: The Seminole County School

Board ("the Board") issued a request for proposal ("RFP") seeking qualified vendors to provide photography services to Seminole County public schools. On September 28, 2017, the Board announced its intent to offer photography contracts to the seven vendors with the highest scores. Cady Studios, LLC was ranked eighth. At that point, any entity adversely affected by the Board's intended decision had 72 hours to file a notice of protest. Cady Studios did not file a notice of protest until November 9, 2017. Cady Studios argued that its untimeliness should be excused because it did not learn about how its proposal was scored until an October 5, 2017, meeting with the Board's purchasing agent. Because that meeting was scheduled two days after the deadline for protesting the Board's decision, Cady Studies argued that equitable tolling should apply.

OUTCOME: In addition to ruling that Cady Studios had sufficient written notice of the 72-hour filing deadline, the ALJ rejected the equitable tolling argument because "Cady Studios' failure to timely file its notice of protest was due to its own unfamiliarity with section 120.57(3), and lack of due diligence to determine its requirements. Neither Florida statutes nor case law place the onus on the agency to calculate a filing deadline for a vendor."

Social Sentinel, Inc. v. Dep't of Educ., Case No. 19-754BID (Recommended Order Apr. 17, 2019).

FACTS: The Marjory Stoneman Douglas High School Public Safety Act authorized the Department of Education ("the Department") to procure by December 1, 2018, a web-based social media monitoring tool to examine social media posts. In August 2018, the Department issued an invitation to negotiate ("ITN") to procure that tool. The portion of the ITN regarding pricing contained an ambiguity making it impossible for prospective vendors to discern whether they were required to provide a per district price or an all-inclusive price. Nevertheless, eight prospective vendors replied to the ITN, and the Department selected three for negotiations. At some point prior to November 13, 2018, the Department learned of the ambiguity in the ITN but elected on December 10, 2018, to award the contract to Abacode, LLC. After Social Sentinel, Inc. protested the Department's proposed action, the Department rejected all of the replies to the ITN. Social Sentinel filed a second protest arguing in part that the Department's failure to procure the monitoring tool by the statutory deadline of December 1, 2018, rendered the procurement illegal under section 120.57(3)(f), Florida Statutes.

OUTCOME: The ALJ concluded that the Department's failure to satisfy the statutory deadline did "not constitute illegality within the meaning of section 120.57(3)(f)." The ALJ reasoned that the Department's "violation of the statutory deadline is not a departure from the essential requirements of law, in part, because the legislature imposed no penalty on [the Department]'s violation of the statutory deadline, notwithstanding its materiality. As noted above, the Governor and Commissioner of Education have inferred that the procurement may continue – implicitly recognizing that it is illogical, when a statutory deadline is violated, to impose draconian consequences, not specified by statute, so as to defeat the objective of the statutory deadline in the first place – here, to secure the Monitoring Tool, sooner rather than later. A literal definition of illegality in section 120.57(3)(f) would write into the Act a draconian penalty for [the Department]'s violation of the statutory deadline in defiance of common sense." Accordingly, the ALJ recommended that the Department dismiss Social Sentinel's protest.

Certificate of Need

Marion Cmty. Hosp., Inc. v. AHCA, Case Nos. 18-0068CON & 18-0075CON (Recommended Order Feb. 6, 2019).

FACTS: The Agency for Health Care Administration ("AHCA") publishes a projected number of comprehensive medical rehabilitation ("CMR") beds needed in each health care planning district using a formula. AHCA determined that District 3 needed 12 new CMR beds for the January 2023 planning horizon. Marion Community Hospital, Inc. ("West Marion") and Florida Hospital Waterman, Inc. ("Waterman") each applied to add 12 new CMR beds to their facilities in District 3. AHCA approved Waterman's application and denied West Marion's.

OUTCOME: At the formal administrative hearing, both West Marion and Waterman agreed that "not normal circumstances" establish a need for at least 24 new CMR beds in District 3, despite the 12 generated under AHCA's numeric need formula. Under a "not normal circumstances" theory, AHCA may approve beds in excess of the identified need when warranted by special circumstances. AHCA argued that neither application should be approved on the basis of "not normal circumstances," because each application only sought to fill the 12 needed beds as established by AHCA's formula. AHCA also argued that West Marion and Waterman impermissibly amended their applications by making the "not normal circumstances" argument. The ALJ rejected AHCA's theory by distinguishing the case from previous decisions in which providers were held to have impermissibly amended their applications by making material changes. Here, the ALJ concluded that "[t]here are no material differences between the information and arguments that West Marion and Waterman made in their applications and those presented in the hearing." Further, the ALJ agreed that there were special circumstances warranting approval of both applications and recommended that AHCA approve both.

APPELLATE CASE NOTES

by Gigi Rollini, Tara Price, and Larry Sellers

Agency Deference—Final Order Denying Permit
Kanter Real Estate, LLC v. Dep't of Envtl. Prot., 267 So. 3d 483 (Fla. 1st DCA 2019).

Kanter Real Estate, LLC (Kanter) applied to the Department of Environmental Protection (DEP) seeking a permit to drill an exploratory oil well on a 20,000-acre parcel of land on which Kanter owned the surface rights and subsurface mineral rights. After responding to numerous information requests from DEP, Kanter requested that DEP process its application for an oil and gas permit. DEP issued a Notice of Denial.

Kanter filed a petition for administrative hearing. The parties stipulated that Kanter's application met the minimum design standards for a permit and did not violate statutory setback requirements. Thus, the only issue for the administrative law judge to determine was whether the statutory criteria of section 377.241, Florida Statutes, weighed in favor of or against issuance of an oil and gas permit.

The ALJ weighed the three statutory factors and found that none weighed against issuance. The ALJ recommended granting Kanter's permit request. However, the Secretary of DEP entered a Final Order denying Kanter's request for an oil and gas permit. Kantor appealed to the First District Court of Appeal.

On appeal, the court noted that before passage of Amendment 6 to the Florida Constitution, courts afforded considerable deference to agency interpretations of statutes and rules, affirming such interpretations unless clearly erroneous. Amendment 6, however, declared that appellate courts may no longer defer to an agency's statutory interpretation and must instead apply a de novo review.

On that de novo review, the court concluded that DEP: did not correctly apply the statutorily-required balancing test; substituted its own fact findings for fact findings of the ALJ that were supported by competent, substantial evidence; relied on evidence outside the record; and impermissibly relied on an unadopted rule.

The court also found that DEP misconstrued the purpose of the statute pertaining to delaying in the exercise of drilling right insofar as it pertained to a landowner who owned both surface and mineral rights. The court explained that a statute must be "construed in light of the evil to be remedied and the remedy conceived by the Legislature to cure that evil." The court concluded that there is no rational reason to be concerned about an applicant sitting on his drilling rights when there is no competing surface interest because he owns both the surface and mineral rights.

The court reversed the Final Order and remanded for entry of one consistent with the ALJ's Recommended Order.

Final Order—Remand Necessary Where Disputed Facts Exist About Service of Notice
Barakat v. Office of Fin. Regulation, 263 So. 3d 293 (Fla. 1st DCA 2019).

Hadi Barakat is the proprietor of a convenience store that the Office of Financial Regulation (OFR) alleged engaged in transactions that violated check-cashing statutes. OFR served an administrative complaint against Mr. Barakat by leaving a copy with an employee and at his parents' home, which was listed as an official address. Mr. Barakat did not respond, and OFR entered a Final Order against him. Mr. Barakat requested to contest OFR's Final Order, claiming through an affidavit that he was out of the country when OFR served the administrative complaint. OFR denied Mr. Barakat's request, and he appealed.

On appeal, the court observed that while OFR appeared to have properly served the administrative complaint in a facially valid manner, Mr. Barakat raised disputed facts about whether service was proper. Thus, the court remanded the case to OFR to refer it to an administrative law judge to resolve the factual dispute surrounding OFR's service of the administrative complaint.

License Revocation—Board Lacked Evidence to Depart from Recommended Range of Sanctions
Brewer v. Dep't of Health, Bd. of Nursing, 44 Fla. L. Weekly D821 (Fla. 1st DCA Mar. 28, 2019).

The Department of Health, Board of Nursing (Board) issued a two-count administrative complaint against Donna Brewer, alleging that she violated section 464.018, Florida Statutes, when she entered a plea of nolo contendere to a charge of burglary of an unoccupied dwelling and failed to report her plea to the Board. The complaint included an investigative report, the court judgment against Ms. Brewer, and the sentencing documents. The documents did not include any information about the nature of the crime but revealed that the court withheld adjudication and sentenced Ms. Brewer to 90 days in the county jail.

Due to the seriousness of the crime, counsel advised the Board to accept the Department of Health's recommended penalty of revocation, which exceeded the penalties prescribed under rule 64B9-8.006, Florida Administrative Code. The penalties outlined in the rule ranged from a reprimand to a $10,000 fine and suspension. The Board opined that Ms. Brewer's crime was egregious and revocation would serve as a deterrent. Ms. Brewer subsequently appealed the Board's Final Order revoking her license.

The court found that there was no record evidence and the Board cited no information explaining why Ms. Brewer's particular crime was more serious and warranted a more severe penalty than that contemplated under the rule. The Board also did not explain how license revocation would provide more of a deterrent to keep Ms. Brewer from committing additional burglaries than the $10,000 fine and license suspension. Thus, the court concluded that the Board lacked the clear and convincing evidence necessary to warrant the departure from the rule's recommended sanctions. With no competent, substantial evidence in the record to support the Board's imposed penalty, the court ruled that the Board abused its discretion and reversed the Final Order.

Medicaid—Agency Lacked Authority to Order Reimbursement for Pre-authorized and Paid Services

Lee Mem'l Health Sys. Gulf Coast Med. Ctr. v. Agency for Health Care Admin., 44 Fla. L. Weekly D568 (Fla. 1st DCA Feb. 27, 2019).

Lee Memorial Health System Gulf Coast Medical Center (Gulf Coast) had a Medicaid Provider Agreement with the Agency for Health Care Administration (AHCA) that allowed Gulf Coast to bill Medicaid for emergency in-patient services provided to undocumented aliens. Gulf Coast followed the necessary statutory and regulatory procedures, including receiving pre-authorization from the Department of Children and Families (DCF) that each undocumented alien who received treatment was Medicaid eligible and qualified, suffered from an emergency condition, and had an approved estimated duration of care.

The Centers for Medicare and Medicaid Services (CMS) subsequently reviewed Florida's Medicaid expense reports and determined that Florida was seeking federal funding for emergency services that did not fall within the more narrow definition of an "emergency medical condition" under federal law. CMS recommended that AHCA review its claims for the 2005 through 2007 years and revise its prior expense reports accordingly. AHCA determined that Gulf Coast owed the agency more than $46,000 in overpayments for emergency services provided to Medicaid-eligible undocumented aliens.

Gulf Coast filed a petition for formal administrative hearing to challenge AHCA's findings. The Administrative law judge concluded that AHCA had exceeded its authority to order the reimbursement. Chapter 409, Florida Statutes, granted the authority to determine whether a recipient had an emergency medical condition to DCF, not AHCA. AHCA rejected the ALJ's Recommended Order and concluded that its authority to order the reimbursement came from its Coverage and Limitations Handbook, which limited an emergency's duration until the emergency was "alleviated." Gulf Coast appealed AHCA's Final Order.

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APPELLATE CASE NOTES
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On appeal, the court noted that section 409.905, Florida Statutes, required AHCA to discontinue its prior practices of retroactively reviewing claims previously paid. The court agreed with the ALJ's conclusion that AHCA lacked authority to conduct a retrospective review on Gulf Coast's 2007 claims based on a plain reading of the statute. In addition, section 409.913, Florida Statutes, did not authorize AHCA to conduct the retrospective reviews where it did not suspect provider fraud or abuse.

The court rejected Gulf Coast's argument that AHCA's reimbursement order was time barred. The court held that no federal or state statute requires that Medicaid overpayments be audited within a certain period. Thus, the court reversed AHCA's Final Order.

Public Records Exemptions—Trade Secrets
Managed Care of N. Am., Inc. v. Fla. Healthy Kids Corp., 44 Fla. L. Weekly D735 (Fla. 1st DCA Mar. 20, 2019).

Florida Healthy Kids Corporation (Healthy Kids) issued an Invitation to Negotiate (ITN) to solicit proposals from medical care administrators for the provision of dental care to children. Four dental program administrators submitted proposals for consideration, including Managed Care of North America, Inc. (MCNA) and Delta Dental Insurance Company (Delta). MCNA's proposal included documents designated as protected trade secrets, including Excel spreadsheets and geoaccess maps. These documents were marked as confidential in accordance with section 624.4213, Florida Statutes, and Healthy Kids' ITN.

After evaluating the proposals, Healthy Kids awarded contracts to all the bidders except for Delta. Delta made a public records request for all the documents related to MCNA's response, including those documents marked as trade secret or confidential. After MCNA became aware of Delta's public records request, it filed a complaint in the circuit court seeking a declaratory judgment as to whether the requested records were exempt from disclosure as trade secrets. Delta intervened and the trial court held an evidentiary hearing, ultimately entering an order that found that MCNA's documents were not protected trade secrets. The trial court also ruled that Delta was entitled to attorney's fees and costs as the "prevailing party" and retained jurisdiction to determine the amount. MCNA appealed the trial court's order.

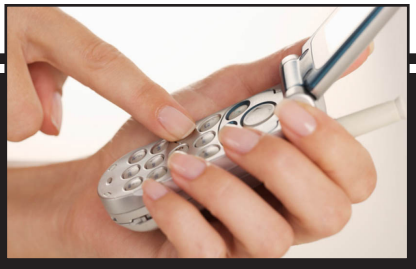
The court noted that although the trial court's interpretation of the statutory definition of trade secret was subject to de novo review, it had a limited role of reviewing the record to determine whether competent, substantial evidence supported the trial court's factual determination that the documents did not contain trade secrets. The court first reviewed the Excel spreadsheets, which contained providers affiliated with MCNA and "prospective providers" who had not yet contracted with MCNA. The court affirmed the trial court's ruling that the providers affiliated with MCNA were not protected trade secrets because the information was available to, or readily accessible by, the public.

The court, however, reversed the trial court's ruling that the prospective providers did not constitute protected trade secret information. The trial court had erroneously required MCNA to provide proof of the "value" of the prospective provider list. Notably, section 812.081(1)(c), Florida Statutes, does not require a business to provide proof of value. Once the business has proven that (1) the information is used in business operations; (2) the information provides an advantage or opportunity for advantage; and (3) the business has taken steps to prevent the information's disclosure, the trade secrets are considered to be of value as a matter of law.

Additionally, the court reversed the trial court's ruling that the geoaccess maps were not protected trade secrets. The court determined that the trial court erred when it concluded that information available to the public could never be deemed trade secrets. Rather, public information could be considered trade secrets depending on the time and effort spent on compiling and presenting the information. Moreover, the court noted that although the maps were created using public information, MCNA had used proprietary software to create them and as such, the maps could not be replicated based upon public information alone.

Finally, the court directed the trial court to reconsider the ruling on attorney's fees and costs on

Ethics Questions?



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remand. The appellate court noted that because the action originated from MCNA's filing of a declaratory judgment action, as opposed to Delta initiating an action under the Public Records Act, the fees provision under section 119.12, Florida Statutes, was not applicable. As such, there did not appear to be a basis for an award of attorney's fees and costs for Delta.

Accordingly, the court affirmed in part, and reversed in part, the trial court's order.

Rule Challenge—Agency Unauthorized to Deviate from Statutory Provisions

Dep't of Bus. & Prof'l Regulation v. Fla. Horsemen's Benevolent & Protective Ass'n, Inc., 264 So. 3d 1191 (Fla. 1st DCA 2019).

The Department of Business and Professional Regulation, Division of Pari-Mutual Wagering (Division) appealed a partial Final Order finding that rule 61D-6.011, Florida Administrative Code, was an invalid exercise of delegated legislative authority.

The statute cited as rulemaking authority provided that "[t]he division rules must include a classification system for drugs and substances and a corresponding penalty schedule for violations which incorporates the Uniform Classification Guidelines for Foreign Substances." The Division, however, simply adopted its own penalty schedule to carry out the statutory directive. The court concluded that this exceeded the Division's delegated legislative authority. The court therefore affirmed the ruling.

The court, citing *Dep't of Health v. Shands Jacksonville Med. Ctr.*, 259 So. 3d 247, 251 (Fla. 1st DCA 2018), also rejected the argument that the case became moot once the rule had been revised to include the required penalty schedule because disciplinary actions were still pending below based on alleged violations of the invalid rule.

Sunshine Law—Full and Open Public Meeting Cures Prior Deficiencies

Jackson v. City of Tallahassee, 265 So. 3d 736 (Fla. 1st DCA 2019).

Dr. Erwin Jackson filed a lawsuit alleging that the City of Tallahassee violated the Sunshine Law in considering applicants for a vacant commission seat. The circuit court granted the City's motion for summary judgment and an appeal followed.

On appeal, the court agreed with the circuit court that "the December 31, 2018 meeting was not [a] perfunctory or ceremonial acceptance of a prior decision made outside the Sunshine." The court explained that even where Sunshine Law violations occur, they can be cured by "independent, final action in the sunshine."

In this instance, the City held a public meeting to consider the appointment to fill the temporary vacancy on the city commission, during which there was more than an hour of public comment, 30 public speakers, 9 candidate presentations, a question and response period, and no limit on the number of speakers or topics. As such, there was a full discussion of the appointment and rounds of nominations before a candidate was selected to ensure the decision was made in the sunshine.

The court therefore affirmed the ruling that the City did not violate the Sunshine Law because any violation alleged to have occurred was cured by a full, independent and final action in the sunshine.

Writ of Prohibition—Unavailable Where Jurisdiction and Adequate Legal Remedy Exist

Dep't of Health v. TropiFlora, LLC, 265 So. 3d 673 (Fla. 1st DCA 2019).

The Department of Health (DOH) notified TropiFlora that it had failed to submit certified financial statements required by section 381.986(5)(b)5., Florida Statutes, with its application to be the exclusive low-THC cannabis dispensing organization for the Southwest Florida region. TropiFlora never submitted additional documentation, and DOH notified TropiFlora that its application was denied. TropiFlora filed a petition for hearing. However, just prior to final hearing, TropiFlora voluntarily dismissed its administrative petition.

TropiFlora then filed a complaint for declaratory judgment in circuit court seeking an order stating its entitlement to a license. DOH filed a motion to dismiss, alleging TropiFlora failed to exhaust administrative remedies. Later, DOH filed a motion for summary judgment on the same grounds.

In the interim, the Legislature passed Senate Bill 8-A during a special session, which directed DOH to license as "medical marijuana treatment centers" ten applicants who meet certain requirements. TropiFlora filed a motion for temporary injunction seeking to be issued a license under this new law. Unable to obtain a ruling on its motions and facing ongoing discovery, DOH filed a petition for writ of prohibition.

The court held that prohibition relief was not available. The court explained that the claims TropiFlora asserted against DOH—for declaratory judgment and a writ of mandamus—are not within a class of cases a trial court is forbidden to consider. Moreover, a writ of prohibition "is very narrow in scope and operation and must be employed with caution and utilized only in emergency cases to prevent an impending injury where there is no other appropriate and adequate legal remedy."

Noting that exhaustion of administrative remedies is an affirmative defense, not a matter that divests the court of jurisdiction, and that there are legal remedies to seek review from a dismissal denial or injunction, the court denied the petition for writ of prohibition.

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

Gigi Rollini *is a shareholder with Stearns Weaver Miller P.A. in Tallahassee and leads the firm's Administrative Law Group.*

Agency Snapshot: Space Florida[1]

by Suzanne Van Wyk

In May 2006, the Florida Legislature passed the Space Florida Act, consolidating Florida's three existing space entities (Florida Space Authority, Florida Space Research Institute, and Florida Aerospace Finance Corporation) into a single new organization. Space Florida was established by the legislature on September 1, 2006, as an independent special district created by chapter 331, Florida Statutes. Like Enterprise Florida, it is not a state agency subject to chapter 120, Florida Statutes.

Space Florida is Florida's "aerospace economic development organization," committed to attracting and expanding the next generation of space industry businesses. Space Florida was created for the purpose of fostering the growth and economic development of the space industry in Florida. As such, Space Florida fosters economic development activities and projects to expand and diversify domestic and international opportunities related to the space industry. Towards that end, Space Florida supports, assists, facilitates, and/or consults on space-industry-related needs with governments and private businesses that work toward developing specific projects or components of the space industry, including the development of a space tourism industry. Space Florida's assistance and support includes monetary support, through grants or loans, for space-related development.

Past Project Highlights:

Northrup Grumman Expansion – In October 2015, the U.S. Air Force selected Northrup Grumman to build the nation's next long-range strike bomber, now known as the B-21 Raider. Northrup Grumman chose to locate the project at Orlando Melbourne International Airport, where it constructed a 220,000 square foot facility and hired some 425 employees.

OneWeb Satellites Manufacturing – In 2016, OneWeb Satellites, a joint venture of OneWeb and Airbus Defence and Space, unveiled its decision to build a state-of-the-art manufacturing facility in Exploration Park, a Space Florida facility just outside of Kennedy Space Center. OneWeb is mass-producing satellites at the facility at a rate of two per day. OneWeb plans to deploy an innovative constellation of 900 satellites which will allow it to offer high speed internet access anywhere in the world. OneWeb successfully launched its first six broadband satellites in February 2019, and in March raised $1.25 billion to continue mass production of the satellites, bringing it closer to its goal of "bridging the global divide." The current plan is to allow customer demos in 2020 and provide full global commercial coverage by 2021.

Governance:

Space Florida is governed by a 13-member Board of Directors (the "Board"), 12 of whom are the private sector members of the Enterprise Florida Board of Directors appointed by the Governor, the President of the Senate, and the Speaker of the House of Representatives. The Governor serves as chair of the Board.

The governing policies are adopted by resolution of the Board, the most recent update of which was adopted September 12, 2012. The Board meets regularly (at least once a month).

Executives:

President and CEO – Frank DiBello

VP, Treasurer, & Chief Investment Officer – Howard Haug

CFO & VP of Administration – Denise Swanson

Senior VP & General Manager – Jim Kuzma

Senior VP Business Development & Marketing – Bernie McShea

VP Government & External Affairs – Dale Ketcham

VP Special Projects & Strategic Initiatives – Kevin Williams

VP Spaceport Operations – Mark Bontrager

VP Government Relations – Sharon Spratt

VP Commercial Space – Todd Romberger

VP Research & Innovation – Tony Gannon

Corporate Office/Physical Location:

505 Odyssey Way, Suite 300
Exploration Park, FL 32953
Main Number: 321-730-5301
Fax: 321-730-5307
Email: info@spaceflorida.gov

South Campus Office (Cape Canaveral)

100 Space Port Way
Cape Canaveral, FL 32920
Fax: 321-323-5070

Endnote

1 Information for this article was obtained from www.spaceflorida.gov and www.oneweb.world.

A Tribute to Stephen T. Maher

by Gillian Haber

Stephen (Steve) Trivett Maher, past chair of the Administrative Law Section of The Florida Bar, passed away on Saturday, December 15, 2018, in Miami, his adopted hometown of 46 years.

Steve was a lawyer's lawyer. He had a deep and abiding respect for the law, for legal procedure, and for the good that well-crafted law and policy could contribute to the population at large. Among his greatest passions as an attorney were training and mentoring the next generation, cultivating their analytical skills and improving their legal minds. Steve's personality was not to seek out the limelight; rather, his satisfaction came from taking on challenges and helping others.

Steve's interest in administrative law was piqued as a law student. Despite never quite being able to explain to his father what administrative law was (although he should be credited with trying very hard to explain the work he did), Steve knew that involvement in administrative law would improve the lives of the people of the State of Florida. To that end, he started working as a staff attorney with Legal Services of Greater Miami directly out of law school in 1975. And was thrown into a trial in his first week.

After leaving Legal Services, Steve went into private practice for a short time. However, with a natural instinct to teach and mentor others combined with a passion for the law, Steve left private practice to become the director of the clinical program and thereafter an associate law professor at the University of Miami Law School from 1984-1992. He then moved to Shutts & Bowen LLP, serving as chair of the firm's administrative and appellate practice groups.

Steve never lost his desire to help the indigent of our community and felt that community service, pro bono legal service and working to improve the skills of other attorneys were not just laudable goals, but were a lawyer's duty to the legal profession and the greater community at large.

In addition to serving as chair of the Administrative Law Section in the early 1990's, Steve also served as chair of the Council of Sections and as a director and member of the executive committee of The Florida Bar Foundation, where he was a Life Member. He was a member of The Florida Bar/Florida Bar Foundation Joint Commission on Delivery Legal Services to the Indigent, and wrote articles on clinical legal education, lawyers and lawyering, Florida administrative law and other Florida law topics. Steve also lectured at law schools and law firms to train attorneys on various subjects, and appeared before various bar associations, the International Legislative Drafting Institute at Tulane Law School, the National Association of Secretaries of State, Price Waterhouse Legal Tech, and the Practicing Law Institute.

As part of the International Legislative Drafting Institute, Steve taught participants from developing countries how to draft legislation. He was particularly proud to be part of a delegation to South Africa at the end of apartheid, where he consulted on proposed changes to South African law as the country worked to create its first administrative procedure act. Steve found such work to be deeply rewarding.

Recognized as a Martindale-Hubbell AV® rated attorney and a "Super Lawyer" in appellate law, Steve handled cases that set significant precedents in Florida. With decades of appellate experience, Steve handled cases in every Florida district court of appeal, the Supreme Court of Florida, the United States Court of Appeals for the Fifth, Eighth, and Eleventh Circuits, and the United States Supreme Court.

Steve was pre-deceased by his wife, Sharon Wolfe Maher, and is survived by his daughters and granddaughters. He will be deeply missed.

Gillian Haber *is the Chief Financial Officer of Haber Law, P.A. in Miami and was Steve's life companion for 17 years.*

AMENDMENT 6
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rule it has adopted. The doctrine in Florida dates back to a 1952 Florida Supreme Court case finding that an agency's interpretation of a statute it administers is due "great weight" by the court and will not be overturned unless "clearly erroneous."[2]

In practical effect, judicial deference means a court will uphold an agency's interpretation in a judicial dispute as long as the agency puts forth *any* reasonable interpretation of the underlying statute or rule.[3] An agency benefitting from judicial deference is not required to put forth the *best* or *most reasonable* interpretation, but instead will prevail as long as a court finds the agency's interpretation to be within the *reasonable range* of interpretations.

Prior to Amendment 6, the doctrine of judicial deference applied only when a statute or rule was ambiguous or susceptible to more than one interpretation. A court did not need to apply the doctrine when a statute or rule was clear and could not reasonably be interpreted in more than one way.[4] In addition, a court would not apply deference in a dispute involving a statute or rule that was outside the agency's substantive area.[5] In that situation, the agency was not deemed to have the expertise or unique knowledge that historically has been used to justify deferring to agency interpretations.

History of the Amendment

The amendment was put on the November ballot as part of the Constitutional Revision Commission's (CRC) proposals for consideration in the 2018 general election. What ultimately became part[6] of Amendment 6 was proposed by Commissioner Roberto Martinez, a litigation attorney from Coral Gables. A former judge from the Third District Court of Appeal, the Honorable Frank A. Shepherd, presented the proposal to the CRC committees.[7]

Proponents of Amendment 6 took issue with deference to agencies for several reasons. Supporters urged that judicial deference undermines the constitutionally-required separation of powers between branches of government. The Florida Constitution addresses the separation of powers among branches of government as follows:

> No person belonging to one branch [of government] shall exercise any powers appertaining to either of the other branches unless expressly provided herein.[8]

This provision ensures that the Florida judiciary is a coequal branch of Florida's government. This in turn suggests the judicial branch must retain the sole authority to exercise judicial power, which includes the independent review of legislative branch enactments and executive branch enforcements. Supporters of Amendment 6 argued that judicial deference to agency interpretations improperly elevated the executive branch over the judicial branch. In other words, if an executive branch agency has the power to interpret and enforce a law and its interpretation must be upheld unless clearly erroneous, then Florida's courts are not truly serving as an independent check on the executive branch.[9] This was perceived as especially problematic when the party benefitting from the courts' deference was the government, which acts with the weight of authority and against which the judiciary is supposed to provide checks and balances.[10]

In defense of the deference doctrine, its proponents argued that agencies have subject matter expertise regarding statutes they substantively administer and rules they adopt.[11] Therefore, it is reasonable to rely on this expertise. In addition, proponents of the doctrine argue that the doctrine fosters consistency in agency actions, which is best accomplished by having the agencies administer the statutes and rules in accordance with their substantive knowledge of them.

The proposed amendment was considered at the full meeting of the CRC on March 19, 2018.[12] During the CRC's deliberations, one commissioner asked the sponsor how the agency's expertise would be considered and what the process would look like if no deference was given. The amendment's sponsor explained:

> The judge would still be entitled to listen to the opinion of the agency, obviously, certain agencies of expertise with regards to their area of expertise, but what this deals with is an interpretation of a statute. It is a matter of law.
>
> So although the Department of Education, the Department of Environmental Protection and other departments may have certain subject matter expertise, with regards to an issue of law, it is really the legislature who passed the statute, and they are the ones who establish the law. And it's really not up to the administrative agency to tell—to determine what the law is. It is really for the judiciary to do so.
>
> So the court can still listen to the opinion of the agency, it can still give it great weight if it believes that it's persuasive, but what this does is that it prevents the judge from deferring to it reflexively and creating a presumption in its favor that could only be overturned if clearly erroneous.[13]

In sum, Amendment 6 eliminates all deference to an agency's interpretation of all statutes and administrative rules. Instead, a state court or officer must interpret statutes and rules de novo. In the CRC's Executive Committee Proposal Analysis, the effect of the proposed change was described as follows: "Deference shown to agency interpretations of state statute or rule would no longer apply in any situation."[14] A court may consider the agency's opinion, but it is not obligated to accept it and there is no longer a presumption that the agency is correct.

Practical Effect of Eliminating Deference Generally

On the surface, Amendment 6 will allow a party to challenge an agency action on a level playing field without having to overcome an assumption that the agency's superior knowledge or expertise entitles it to prevail by putting forth *any* reasonable interpretation. However, it is important to remember that just because an

agency is owed no deference does not mean the agency is wrong. With Amendment 6, an agency's interpretation of a statute or rule will not have any advantage in a court proceeding or hearing, but likewise a court is not required to view the agency's position skeptically. Ideally, the amendment's impact will be as simple as allowing the agency to prevail when it has the better position and allowing an opposing party to prevail when its position is better.

The amendment applies to "a state court or an officer hearing an administrative action." Thus, the CRC drafted the amendment broadly enough to apply to state court judges and administrative law judges (ALJs) even though ALJs are not members of the judicial branch. The inclusion of ALJs is significant because it ensures ALJs do not apply principles of deference to cases they hear involving state agencies. Strictly speaking, however, the inclusion of ALJs in the amendment should not have been necessary because most Division of Administrative Hearings (DOAH) proceedings are de novo.[15] Still, including ALJs within the scope of the amendment avoids ambiguity and helps ensure principles of deference do not improperly influence the manner in which ALJs decide cases.

It is likely that the primary place Amendment 6 will be relevant in an administrative law context will be in the district courts of appeal, which review most state administrative agency decisions. Appellate judges no longer can give automatic deference to an agency's interpretation of a statute or rule within the agency's jurisdiction.

Even at the appellate stage, however, some judges may continue to be more deferential to agencies than others. Whereas under prior law a judge might have reached a decision based on deference to the agency, the same judge under current law might simply find that the agency's position is more persuasive or simply correct. For example, the few appellate cases that have addressed Amendment 6 have not ruled any differently than they would have before Amendment 6. The Florida Supreme Court, while declining to address the applicability of Amendment 6 to the pending case, still found that it would not change the result in the case because the Court would not apply a deference standard as the statute being construed was unambiguous.[16] The First District Court of Appeal likewise has acknowledged the passage of Amendment 6, but found that whether the court applied deference to the agency's statutory interpretation (as they had done in a previous case), or applied a de novo review, the result was the same.[17]

The amendment likely will predominantly address a subset of disputes in which a party might have advanced the *better* position and yet still lost because the agency put forth a position that, while inferior, was deemed reasonable.[18] The size of this subset of disputes, in which courts reached their decisions only because of judicial deference and otherwise would have reached contrary results, is unclear at this time.

Limiting Deference in Particular Contexts

Agency Rulemaking

When an agency interprets a statute in a manner that generally applies to all similarly situated parties, the interpretation is considered to be a rule. In Florida, rulemaking is not discretionary—an agency must adopt statements of general applicability as rules.[19] Any substantially affected party may challenge a proposed rule, an existing rule, or an agency statement that should have been adopted as a rule.[20] Rule challenges are heard at DOAH. Unlike with agency deci-

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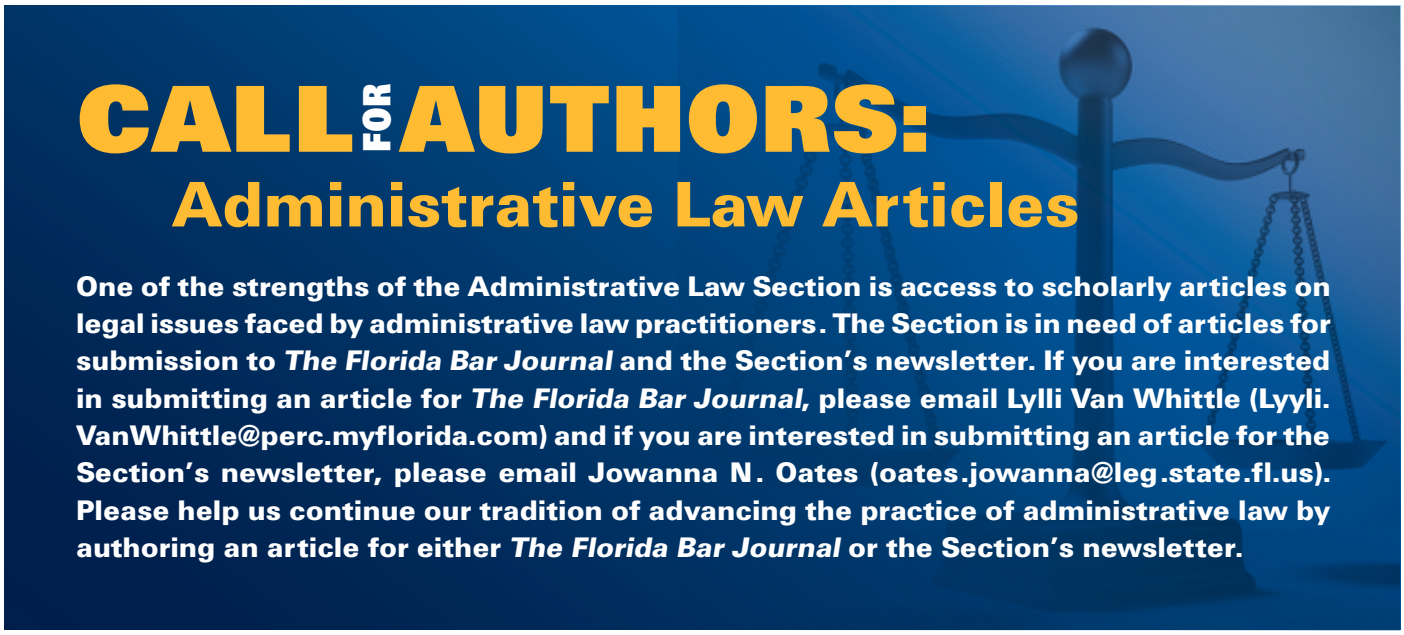

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sions affecting substantial interests, ALJs have final order authority in rule challenges.[21] Appeals are taken to a district court of appeal.

Again, agency deference isn't a significant consideration at DOAH because rule challenges are de novo proceedings.[22] Further, the standard of proof in a rule hearing is a preponderance of the evidence. When a party challenges a proposed rule, the party bears the burden of providing by a preponderance of the evidence that it would be substantially affected by a proposed rule. Upon doing so, the burden shifts to the agency to prove that the rule is not an invalid exercise of the legislative authority delegated to it.[23] By statute, a proposed rule is not presumed to be valid or invalid. A party challenging an existing rule has the burden of proving by a preponderance of the evidence that the existing rule is an invalid exercise of delegated legislative authority.[24] By statute, the ALJs are neutral arbiters of the validity of the rules so eliminating deference to the agencies isn't relevant to rule challenge proceedings at DOAH. Eliminating agency deference, however, may be helpful in any ensuing appeals to the district court.

Bid Protests

A "de novo" proceeding in the bid protest context is slightly different from "de novo" proceedings in other substantial interest proceedings. The First District Court of Appeal has described the standard of review in section 120.57(3) as a "form of intra-agency review. The judge may receive evidence as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency."[25] That language is sometimes interpreted as allowing more deference to an agency than in other "de novo" proceedings.[26] It remains to be seen whether the modified de novo standard of review for bid protests will be deemed inconsistent with the constitutional directive in Amendment 6. This most likely could occur in a proceeding that is centered on an agency's interpretation of its governing statutes or rules, which are no longer entitled to deference. Interpretation of a provision in a competitive solicitation document does not involve the interpretation of a statute or rule and would, therefore, be outside the scope of Amendment 6.

Declaratory Statements

Amendment 6 may have a more dramatic impact in declaratory statement proceedings. Any affected person may seek a declaratory statement regarding the agency's opinion as to the applicability of an agency's statute or rule as it applies to a particular set of circumstances.[27] Under prior law, an appellate court could reverse an agency's declaratory statement only if the agency's interpretation of law was clearly erroneous.[28] Now, however, the appellate court must not give deference to the agency's interpretation of the statute or rule. This may result in more parties utilizing declaratory statements who may have been concerned about an agency's interpretation. Because the appellate court cannot give deference to the agency's interpretation, in many ways, the declaratory statement itself will simply be a perfunctory step to get an issue of an interpretation of a rule or statute before the appellate court. It is possible this could lead to an increase in the use of declaratory statements by parties who would prefer an appellate court's interpretation to the agency's interpretation.

Potentially Unresolved Questions

As noted above, it is unclear whether the primary impact of Amendment 6 will be to change outcomes of disputes between agencies and parties or only to change the reasoning courts cite in reaching decisions they might have reached anyway. There are also some questions as to how the amendment will be applied. For example, the amendment took effect January 8, 2019. There still could be a question of whether the amendment applies to preexisting disputes[29] because the amendment is merely procedural and does not alter parties' substantive rights or whether it should only be applied retroactively.[30] Thus far, courts have not directly decided the issue as the cases that reference Amendment 6 could be decided the same way whether the review was de novo or whether the case was afforded deference.[31]

Another issue that is likely to arise is what deference a court will give a prior opinion that deferred to an agency's interpretation of a statute or rule. In this regard, existing case law can fall into two categories. In some decisions, courts will have expressly referred to the doctrine of judicial deference as their rationale for agreeing with the agencies. In other cases, the courts might have been silent on this subject and the extent to which deference played a role in the decisions might not be clear. It may be argued that some case law is no longer valid because it was based on a standard of review that no longer applies. This does not conclusively establish that the prior cases were wrongly decided, but the elimination of judicial deference might justify revisiting and potentially reversing prior decisions. The same may be true for existing cases that do not explicitly refer to judicial deference. In some cases, however, a court may still agree with the agency's interpretation and the prior court's ruling.[32]

In addition, the language of the amendment itself raises some questions as to its applicability. Interestingly, the original text of the language, the one that was passed by the CRC committees and the full CRC, read as follows:

> In interpreting a state statute or rule, a state court or an administrative law judge may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo.[33]

Notably, the language was changed from "administrative law judge" to "an officer hearing an administrative action pursuant to general law." The language was changed in the CRC's drafting and style committee, and the CRC website does not

include analysis or explanation of the change.[34] It appears, however, that it is an attempt for the amendment to be more broadly applicable to any "officer" hearing an administrative action. This language change raises several questions. First, who counts as an "officer"? Second, what constitutes an "administrative action pursuant to general law"? Finally, what type of agency constitutes an "administrative agency"?

It seems clear that an administrative law judge at DOAH would qualify as an officer hearing an administrative action. It seems likely that this language was also intended to include other "hearing officers" that exist within state agencies that hear cases, such as hearing officers hearing cases pursuant to section 120.57(2) (hearings not involving disputed issues of fact), and hearing officers specifically designated to hear certain types of cases, such as a hearing officer in the Department of Children and Families who hears appeals from denials of public assistance.[35] What is not as clear is how far reaching this amendment will be to hearing officers generally.

For instance, the amendment specifies that it relates to officers hearing an administrative action "pursuant to general law." A general law is one that "operates universally throughout the state, or uniformly within a permissible classification."[36] It seems likely that there may be some debate over when an officer is hearing an administrative action that is pursuant to general law.

Relatedly, another series of questions is likely to arise regarding what constitutes an "administrative agency" for purposes of Amendment 6. The amendment relates to administrative agencies' interpretations of state statutes or rules. The most common types of regulatory disputes are with entities that undoubtedly are state administrative agencies under Florida law. However, disputes could arise involving governmental or quasi-governmental entities, public corporations, municipalities, or other types of organizations that may or may not be outside the amendment's scope.

Conclusion

Amendment 6 may not have a huge change on many decisions, given that they could be resolved the same whether deference is given or not. However, some issues regarding the application of Amendment 6 may not be resolved for months or even years. In the meantime, administrative practitioners should keep a close watch on the appellate courts and DOAH to keep up with changes the amendment brings.

***Brittany Adams Long**, **Donna Blanton**, and **Travis Miller** are all shareholders at the Radey Law Firm in Tallahassee and are all Board-certified in State and Federal Government and Administrative Practice.*

Endnotes

1 Art. XI, § 5(e), Fla. Const.

2 *Gay v. Canada Dry Bottling Co. of Fla., Inc.*, 59 So. 2d 788, 790 (Fla. 1952); *see also Miles v. Fla. A&M Univ.*, 813 So. 2d 242, 245 (Fla. 1st DCA 2002) ("The Florida Supreme Court has 'long recognized that the administrative construction of a statute by an agency or body responsible for the statute's administration is entitled to great weight and should not be overturned unless clearly erroneous.'" (quoting *Pan Am. World Airways v. Fla. Pub. Serv. Comm'n*, 427 So. 2d 716, 719 (Fla. 1983))).

3 *Sullivan v. Fla. Dep't of Envtl. Prot.*, 890 So. 2d 417, 420 (Fla. 1st DCA 2004) ("If the agency's interpretation is within the range of possible and reasonable interpretations, it is not clearly erroneous and should be affirmed." (quoting *Dep't of Educ. v. Cooper*, 858 So. 2d 394, 396 (Fla. 1st DCA 2003))).

4 *Halifax Hosp. Med. Ctr. v. State*, No. SC18-683, 2019 WL 1716374, *1 n.2 (Fla. Apr. 18, 2019) (declining to apply Amendment 6 because "[e]ven before this new constitutional provision we did not apply the deference principle to unambiguous statutes.") (motion for rehearing pending when this article was submitted for publication); *see also Whynes v. Am. Sec. Ins. Co.*, 240 So. 3d 867, 870 (Fla. 4th DCA 2018) ("Because the language is clear, there is no reason to and therefore we will not defer to administrative construction.").

5 *And Justice for All, Inc. v. Dep't of Ins.*, 799 So. 2d 1076, 1078 (Fla. 1st DCA 2001) ("Additionally, a court need not defer to an agency's construction or application of a statute if special agency expertise is not required.").

6 Amendment 6 included Proposal 96 (related to victim's rights, also known as "Marsy's Law"), Proposal 41 (raises the age limit of judges) and Proposal 6 (removing deference to agencies). CRC Commissioner Proposals Placed on Ballot for the 2018 Election, *available at* http://flcrc.gov/PublishedContent/ADMINISTRATIVEPUBLICATIONS/CRCProposalsRevisions.pdf. This bundling was not without controversy, and it was debated in the CRC. *See* Transcript of Full CRC Meeting of April 16, 2018, Volume I. It was also argued to be illegal, but ultimately the Florida Supreme Court determined that the CRC was not required to comply with the single-subject requirement. *Dep't of State v. Hollander*, 256 So. 3d 1300, 1311 (Fla. 2018). Given the controversy, the legislature considered several bills to curtail this process and even to potentially eliminate the CRC. *See, e.g.*, House Joint Resolution 53 (2019) (adding requirement that any revision or amendment proposed by the CRC embrace only one subject); House Joint Resolution 249 (2019) (eliminating the CRC). Both bills died on the calendar.

7 *See* Agenda & Meeting Packet for Const. Rev. Comm'n, Executive Committee, meeting on Feb. 2, 2018, pp. 6-41, *available at* http://flcrc.gov/Committees/EX/index.html. The CRC operates like the legislature in that the proposed constitutional amendments go through committees before being voted on by the full CRC. *See generally* http://flcrc.gov/index.html.

8 Art. II, § 3, Fla. Const.

9 *See* Agenda & Meeting Packet for Const. Rev. Comm'n, Executive Committee, meeting on Feb. 2, 2018, pp. 17-18, 25-30; *see also Pedraza v. Reemployment Assistance Appeals Comm'n*, 208 So. 3d 1253, 1256-57 (Fla. 3d DCA 2017) (Shepherd, J., concurring in the result).

10 *See supra* note 9.

11 *See Island Harbor Beach Club, Ltd. v. Dep't of Natural Res.*, 495 So. 2d 209, 217 (Fla. 1st DCA 1986) ("We conclude that the choice of a particular scientific technique or methodology to explain these statutory terms and establish the control line was intended to lie, by legislative design, with the expertise of the agency. The selection and use of new scientific methodology was a matter of agency discretion that should not be set aside . . . .").

12 *See* Transcript of CRC Meeting on Mar. 19, 2018, pp. 58-85, *available at* http://flcrc.gov/Meetings/Transcripts.html.

13 *Id.* at 67-68.

14 Judicial Committee Proposal Analysis for P 6, p. 2 available at http://flcrc.gov/Proposals/Commissioner/2017/0006/Analyses/2017p0006.pre.ju.pdf.

15 § 120.57(1)(k), Fla. Stat. ("All proceedings conducted under this subsection shall be de novo.").

16 *Halifax*, 2019 WL 1716374, at *1 n.2; *see also Citizens of the State v. Fla. Pub. Serv. Comm'n*, No. 1D17-4425, 2019 WL 1142626, at *3 (Fla. 1st DCA Mar. 13, 2019) ("The Commission's discretion is limited, however, by the language of statutory text and now by the constitutional amendment that prohibits courts from deferring to an agency's interpretation of a statute. Art. V, § 21, Fla. Const. . . . In either case, review of the legal meaning of a statute is de novo; it is our responsibility to say what the applicable law is.").

17 *Kantor Real Estate, LLC v. Dep't of Envtl.*

continued...

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Prot., No. 1D17-5096, 2019 WL 1250533, at *4 (Fla. 1st DCA Mar. 19, 2019) ("Whether we afford deference to the Department's interpretation, as we did when *Coastal Petroleum* was decided, or apply a *de novo* review, we hold that the Department and this Court were correct . . . .").

18 This is in contrast to previous law where the courts gave deference to an agency's interpretation as long as it was reasonable and permissible "even though another interpretation may be possible or even, in the view of some, preferable." *Fla. Audubon Soc'y v. Sugar Cane Growers Coop. of Fla.*, 171 So. 3d 790, 797 (Fla. 2d DCA 2015).

19 § 120.54(1)(a), Fla. Stat.

20 § 120.56, Fla. Stat.

21 § 120.56(1)(e), Fla. Stat.

22 *Id.* ("Hearings held under this section are de novo in nature.").

23 § 120.56(2)(a), Fla. Stat.

24 § 120.56(3)(a), Fla. Stat.

25 *State Contracting & Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

26 *See Tallahassee Corp. Ctr., LLC v. Dep't of Health*, Case No. 18-1574BID (DOAH May 31, 2018) ("Agencies enjoy wide discretion when it comes to soliciting and accepting proposals, and an agency's decision, when based upon an honest exercise of such discretion, will not be set aside even where it may appear erroneous or if reasonable persons may disagree.").

27 § 120.565(1), Fla. Stat.

28 *Thrivent Fin. for Lutherans v. Dep't of Fin. Servs.*, 145 So. 3d 178, 180 (Fla. 1st DCA 2014).

29 *See Int'l Acad. of Design, Inc. v. Dep't of Revenue*, 265 So. 3d 651 (Fla. 1st DCA 2019) (applying deference to the agency, but noting that the Amendment 6 would change this), *on review*, SC19-435 (jurisdictional briefs filed on the issue of whether Amendment 6 applies).

30 *See Life Care Ctrs. of Am., Inc. v. Sawgrass Care Ctr., Inc.*, 683 So. 2d 609, 613 (Fla. 1st DCA 1996) ("The general rule [of statutory construction] is that a substantive statute will not operate retrospectively absent clear legislative intent to the contrary, but that a procedural or remedial statute is to operate retrospectively.").

31 *See Kantor*, 2019 WL 1250533, at *4; *Halifax*, 2019 WL 1716374, at *1 n.2 ("The parties disagree over the applicability of . . . amendment [6] to this case. However, we need not resolve that dispute for purposes of this case because the statute at issue is unambiguous.").

32 *Kantor*, 2019 WL 1250533, at *4 ("[W]e hold that the Department and this Court were correct that the statute states a list of factors to be weighed, as opposed to a checklist of minimum requirements.").

33 *See* Proposal 6, *available at* http://flcrc.gov/Proposals/Commissioner/2017/0006/ProposalText/Filed/PDF.pdf.

34 After the CRC approved Proposal 6 on March 19, 2018, it was amended in the Style and Drafting Committee on April 3, 2018. *See* Proposal History, *available at* http://flcrc.gov/Proposals/Commissioner/2017/0006.html.

35 *See* § 409.285(1)(a), Fla. Stat. (permitting an applicant to appeal to the Department of Children and Families when its application for public assistance has not been acted upon or denied and stating that the case may be heard by the Secretary, a panel of Department officials, "or a hearing officer appointed for that purpose," and that the result is a final administrative decision).

36 *Ocala Breeder's Sales Co.. v. Fla. Gaming Ctrs., Inc.*, 731 So. 2d 21, 25 (Fla. 1st DCA 1999).

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