



Off to a Great Start: the Administrative Law Section's Inaugural Trial Academy

By Gregg Riley Morton

The Administrative Law Section (ALS) held its first Trial Academy in the fall of 2019. Creating the Academy was one of the goals of the 2019-2020 Chair of the ALS, Administrative Law Judge (ALJ) Brian Newman who thought that attorneys who were unfamiliar with administrative practice could benefit from training and practice that went beyond the normal seminars offered by the ALS. "The ALS was able to offer the program

at no charge to the attendees thanks to generous support from Foley and Lardner, Parker Hudson, Pennington, and DOAH [or the Division of Administrative Hearings]," noted ALJ Newman. "We are going to offer the program again in September 2020 and hope to improve on last year's success."

The week-long academy was held at DOAH and was modeled on other immersive trial preparation training

courses with a focus on skills that attorneys need for practicing in an administrative forum. The first class of students was limited to 20 students to ensure there was enough time for instructors to spend with each participant individually. The students were primarily attorneys that were new to administrative practice with a few more seasoned administrative law attorneys taking part in

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From the Chair

By Judge Brian Newman

When is Pat Dore? Are you going to Pat Dore?

You all know what Pat Dore is; it is a biennial administrative law seminar sponsored by the Administrative Law Section. But before Pat Dore was a program (it used to be called the Administrative Law Conference), Pat Dore was a person. And if you practice administrative law in Florida, you owe her one.

Patricia "Pat" Dore joined the faculty at the Florida State University College of Law in 1970. She taught constitutional law, both federal and

state, administrative law and Florida legislative process. I attended the Florida State University College of Law from 1990 to 1993. I did not know Pat Dore well but I took Florida constitutional law and Florida legislative process from her. She lectured seemingly without referencing notes and spoke like she was reading from an encyclopedia. Pat Dore was brilliant—that was obvious—but she did not act like it. She was the only law professor I visited during office hours. It's not that other professors weren't

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FROM THE CHAIR*from page 1*

accessible—they kept office hours too—she was just more approachable.

Pat Dore is widely credited as a “key advisor” to the Florida Legislature when the Florida Administrative Procedure Act (APA) was adopted in 1974. Here is the best description of the Florida APA I have seen:

As its title suggests, the APA is concerned with a way of doing things, not with the substance of things. Whatever the substantive nature of the issue—preserving the environment, managing the land, chartering banks, conserving soil or permitting dredge and fill operations—the APA controls the procedures by which government acts. Thus, an understanding of the APA is as important for people

regulated by government as it is for those who are doing the regulating.

-Pat Dore

Florida’s APA is widely considered a model for the nation. It was one of the first acts to create an independent central panel to hear disputes (the Division of Administrative Hearings) and provided access to those “substantially affected” by any government action to challenge such action, no extraneous statute needed. It required agencies to adopt policies by rule and to issue written orders and to index them, practices we take for granted today. More than just an advisor, Pat Dore was referred to as the “mother of the APA” and was a faithful defender of the features that made it special.

I did not take administrative law from her—how stupid was that—but I know many others who did. At least one ALJ who took her administrative

law class still consults her class notebook, including case law copied from a book on a copy machine (as the law was intended to be read).

Pat Dore passed away in 1992. She was only 47-years-old. The March 1992 *Administrative Law Section Newsletter* was, essentially, a tribute to Pat Dore. There were also tributes published in the *Florida State University Law Review* and a memorial service was held to honor her at the Florida Supreme Court. In reading these tributes you get the sense there was a genuine fear that Florida’s APA would not hold up without her. Personally, I think it has fared pretty well, so far. But we cannot forget Pat Dore—the person—or the fundamental principles of the APA she championed.

I hope to see you at Pat Dore; it is May 14-15, 2020.



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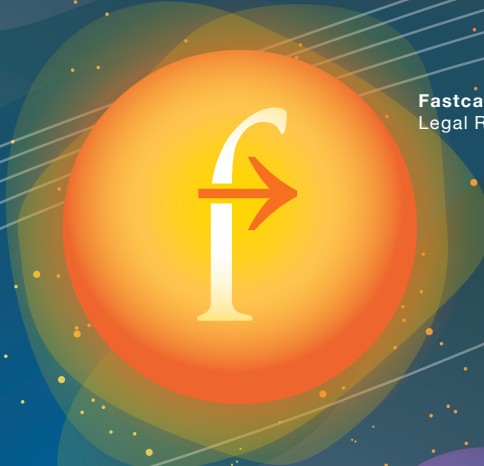
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APPELLATE CASE NOTES

By Gigi Rollini, Tara Price and Larry Sellers

Licensing—Exemptions from Child Care Facility Licensing Requirements

Mid Fla. Cmty. Servs., Inc. v. Dep't of Children & Families, 280 So. 3d 1129 (Fla. 1st DCA 2019).

The Volusia County School District (VCS) entered into a cooperative agreement with Mid Florida Community Services, Inc. (Mid Florida) in 2010 to create Head Start “blended classrooms.” The blended classrooms were established to help VCS meet state standards for serving pre-kindergarten aged students with disabilities in its district.

In response to an inquiry from Mid Florida regarding the need to license one of its relocated Head Start classrooms, the Department of Children and Families (DCF) issued a “Determination Letter” concluding Mid Florida’s five VCS Head Start ESE blended classrooms required licensure as child care facilities.

Through a formal administrative hearing, Mid Florida challenged DCF’s determination that these classrooms required licensure. In a recommended order, the ALJ found that the blended classroom sites are exempt from licensure as child care facilities under section 402.302(2), Florida Statutes, because the five blended classrooms sites are “integral programs” of VCS and are “directly operated and staffed” by VCS.

DCF’s final order granted most of DCF’s exceptions to the recommended order and concluded that the blended classroom sites must be licensed as child care facilities. The final order rejected the ALJ’s determination that the blended classrooms are integral programs of VCS, concluding that the programs are not “operated and staffed directly” by VCS.

The appellate court agreed with Mid Florida that DCF’s interpretation of the statutory exemption’s

phrase “operated and staffed directly by the schools” erroneously limited the exemption to programs operated and staffed exclusively by the schools. The court also found there was competent, substantial evidence to support the ALJ’s findings that the five blended classrooms sites are “integral programs” of VCS and are “directly operated and staffed” by VCS. The court therefore concluded that DCF erred in denying Mid Florida exemption from the child care facility licensing requirements for the five Head Start ESE blended classrooms subject to the VCS cooperative agreement, and reversed the final order.

Licensing—Board’s Failure to Make Certain Findings of Fact Grounds for Reversal of Final Order and Remand for Formal Administrative Hearing

Galvan v. Dep’t of Health, Bd. of Nursing, 285 So. 3d 975 (Fla. 3d DCA 2019).

Maribel Galvan appealed from a final order from the Department of Health, Board of Nursing (Board) that permanently revoked her license to practice nursing.

Galvan started a business operating group homes in 2008 and was later found to have accepted cash from a pharmacy in exchange for its business. She subsequently pled guilty to one count of receiving a kickback from a pharmacy in connection with the Medicaid program, a violation of 42 U.S.C. § 1320(a). The Department of Health (DOH) issued Galvan an Emergency Order of Suspension, followed by a three-count administrative complaint seeking to revoke Galvan’s license as a registered nurse.

Galvan argued in response that her guilty plea was not directly related to the practice of nursing. DOH then

filed a second amended complaint dropping the two charges that alleged Galvan’s plea was directly related to the practice of nursing.

Galvan responded by requesting a formal administrative hearing. Galvan argued that by alleging a violation of section 456.072(1)(ii), Florida Statutes, DOH could not rely on rule 64B9-8.006(3)(c) as the penalty guideline because that regulation applies only to crimes “directly related to the practice of nursing.” Galvan argued that DOH was required to further amend the complaint to remove the request of license revocation.

DOH refused to amend the complaint, denied Galvan’s request for a formal hearing, and concluded that she failed to dispute an issue of material fact, *i.e.*, that she pled guilty to a federal Medicaid kickback crime. Although DOH denied the request for a formal hearing, it revised its complaint to allow for a probable cause panel (PCP) hearing prior to moving forward to revoke her license. After the PCP hearing and an informal hearing, the Board voted to permanently revoke Galvan’s license.

The court reversed and remanded with directions that DOH refer the second amended complaint to DOAH. The court ruled that Galvan was entitled to a formal hearing on the disputed issue of fact of whether Galvan’s plea to accepting a kickback was “directly related to the practice of nursing,” which in turn would determine whether the maximum sanction of license revocation pursuant to rule 64B9-8.006(3)(c) was applicable.

The court reasoned that statutes authorizing sanctions against a person’s professional license are deemed penal in nature and must be strictly construed, with any ambiguity interpreted in favor of the licensee. As a result, any ambiguity as to whether Galvan’s federal kickback offense was “directly related to the practice of

nursing,” such that rule 64B9-8.006 applied, should have been decided in Galvan’s favor by terminating the informal hearing and granting Galvan’s request to have the matter decided by an ALJ at a formal administrative hearing. Thus, the Board abused its discretion by applying rule 64B9-8.006 and imposing the maximum sanction of permanent revocation of Galvan’s license to practice nursing in Florida.

Review of Education Practices Commission’s Suspension of Florida Educator’s Certificate

Castella v. Stewart, 285 So. 3d 980 (Fla. 3d DCA 2019).

Diana Maria Castella appealed the Education Practices Commission’s (EPC) Final Order that suspended her Florida Educator’s Certificate for three years, followed by two years’ probation.

Castella was employed by the Miami-Dade County School District as a part-time interventionist teacher at a middle school. A student at the school, Y.H., informed Castella that her stepfather was coming into her room at night, when her mother was not present, and laying on top of her with his clothes on without touching her in any inappropriate way. Y.H. told Castella that her mother knew

about it but did not believe her.

Castella did not immediately report Y.H.’s accusation that same day to DCF or the Child Abuse Hotline due to delays in tracking down the appropriate school counselor, Ms. Durden.

The next day, Castella made the report telephonically to DCF with Ms. Durden. When Castella was asked why she did not immediately report what Y.H. had told her, she said there was “nothing sexual to report.”

DCF then sent a protective child investigator to the school to begin the investigation. During this investigation, Y.H. reported sexual molestation by her stepfather for the first time. The interview was immediately terminated and the police were called to take over the investigation. The investigation led to the arrest and conviction of Y.H.’s stepfather.

The Commissioner of Education (Commissioner) then issued an Administrative Complaint against Castella’s Florida Educator’s Certificate, alleging a violation of section 1012.795(1)(b), Florida Statutes, for knowingly failing to report actual or suspected child abuse. Castella requested a formal administrative hearing.

After a formal hearing, the ALJ recommended that Castella’s license be placed on a one-year probationary status, during which time she attend

and successfully complete training. The EPC conducted several hearings on the recommended order and exceptions filed by Castella, granted a few of Castella’s exceptions, and adopted the remaining findings of fact and conclusions of law contained in the ALJ’s recommended order.

Castella raised several points on appeal. First, she argued that the EPC erroneously interpreted sections 1012.795(1)(b) and 1006.061, Florida Statutes, by sanctioning her for reporting questionable suspected child abuse within 24 hours of being notified of an incident by a student, rather than immediately. The court, reading the statutes *in para materia*, determined that the Commissioner put Castella on reasonable notice of the conduct which warranted the requested disciplinary action, so that there was no violation of due process by omitting every statute on which the “immediate” reporting requirement could be based.

In addition, Castella claimed there was no competent, substantial evidence in the record that she knowingly failed to report suspected child abuse in violation of sections 1012.795(1)(b) and 1006.061. The court reasoned that the operative question was only whether competent, substantial evidence was present to support the presiding officer’s

continued...

CALL FOR AUTHORS: Administrative Law Articles

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

APPELLATE CASE NOTES*from page 5*

findings. The court found that the evidence supported both the findings and inferences made.

Castella also claimed that the EPC erred in increasing the recommended penalty without conducting a thorough review of the record and without citing to the record in the final order to justify the action. The court disagreed, finding the EPC properly exercised its discretion in imposing the enhanced penalty, and complied with the statutory requirements to do so.

Finally, Castella contended that she was denied due process of law because: 1) the Commissioner's closing argument to enhance the sentence improperly attacked Castella and her theory of defense; 2) the Commissioner injected allegations of abuse that were not charged in the administrative complaint; and 3) the EPC misapprehended the available penalties.

The court rejected all three points. First, Castella's counsel did not object during the arguments made or to the enhancement. Second, the ALJ recommended only probation, so the panel was necessarily aware that probation was an available sanction. There was no confusion on the record regarding the enhancement the Commissioner was seeking. Third, the Commissioner cited cases supporting its position that enhancing the ALJ's recommended penalty was permitted, and the Commissioner explained to the EPC panel members what the options were. Because the imposed penalty was also within the guidelines range for the violations, the court found no error.

Thus, the court affirmed in all respects.

Shade Meetings—Proper to Redact Mediation Communications from Transcript of Shade Meeting Prior to Release

Everglades Law Ctr., Inc. v. S. Fla. Water Mgmt. Dist., 44 Fla. L. Weekly D2356 (Fla. 4th DCA Sept. 18, 2019).

The Everglades Law Center and other individuals (Center) appealed several trial court orders that determined that mediation communications are permanently exempt from disclosure in a transcript of a shade meeting.

Lake Point Phase I, LLC and Lake Point Phase II, LLC (Lake Point), the South Florida Water Management District (District), and Martin County created a partnership for an environmental project. Lake Point sued the District and Martin County after contract disputes arose, and the trial court ordered the parties to attend mediation. During the mediation, Lake Point and the District developed a settlement agreement.

The District held publicly noticed meetings that included both open portions and at least one closed shade meeting, pursuant to section 286.011(8), Florida Statutes, during which the proposed settlement agreement and litigation strategy were discussed. After the shade meeting, the District's Governing Board voted to approve the settlement agreement, and Lake Point and the District dismissed their claims in the lawsuit against each other.

The Center made a public records request for the entire shade meeting transcript after the District was dismissed from the litigation. The District filed an action in the trial court, requesting a declaratory judgment that it did not need to produce the full shade meeting transcript. The Center filed a petition for a writ of mandamus as a counterclaim. The District argued that portions of the shade meeting were exempt from disclosure because section 44.102(3), Florida Statutes, exempts all written communications in mediation proceedings. The Center argued that any statements made during the shade meeting were not written communications and were not made during the mediation proceeding. The parties did not ask the trial court to review the transcript in camera. The trial court denied the Center's petition for writ of mandamus and ruled as a matter of law that the mediation communications in the shade transcript were

permanently exempt from disclosure under the public records law.

On appeal, the court reviewed article I, section 24(b) of the Florida Constitution and section 286.011, and observed that the statute should be construed in such a manner as to protect the public interest and liberally in favor of open government. It then reviewed section 286.011(8), concluding that the shade meeting exemption is confined to settlement negotiations or strategy sessions related to litigation expenditures. The court also reviewed the public records law under chapter 119 and the statutes providing for mediation communication confidentiality, sections 44.102(3) and 44.405(1), noting that section 44.102(3) expressly exempts mediation communications from chapter 119. In addition, the court determined that a transcript is a memorialization of oral communications, and thus, becomes a written communication.

After reviewing all the relevant statutory provisions, the court concluded that the Legislature had intended that mediation communications be exempt from disclosure under public records laws. Additionally, the court ruled that sections 44.102(3) and 44.405(1) were not inconsistent with section 286.011(8) and that the portions of the shade transcript involving mediation communications are permanently exempt from disclosure under the public records laws. The court, however, determined that it was "fundamental error" for the trial court to rule on the issue without first reviewing the shade transcript in camera to determine whether the claimed exemption applied. Thus, the court affirmed in part and reversed in part, remanding the case for the trial court to conduct the in camera review of the full shade transcript.

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 its Government & Administrative Group.



DOAH CASE NOTES

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

Rule Challenges – Unadopted Rule
1701 Collins (Miami) Owner LLC v. Dep’t of Revenue, Case Nos. 19-1879 & 19-3639RU (Recommended Order & Final Order Dec. 17, 2019). <https://www.doah.state.fl.us/ROS/2019/19001879.pdf>; <https://www.doah.state.fl.us/ROS/2019/19003639.pdf>

FACTS: Documentary stamp taxes and surtaxes are due when a deed or other instrument reflecting the transfer of real estate is recorded. Stamp taxes are calculated based on the consideration exchanged for real estate and not for other types of property such as personal property. On February 23, 2015, 1701 Collins (Miami) Owner, LLC (“the Taxpayer”) sold a hotel and conference center in Miami Beach, Florida for \$125 million. The assets sold by the Taxpayer included real estate, tangible personal property, and intangible personal property. The Taxpayer and purchaser did not reach an agreement about how the lump-sum purchase price would be allocated between the real estate, tangible personal property, and the intangible personal property. As a result, the Taxpayer paid stamp tax of approximately \$1.3 million based on the full sales price of \$125 million. In February 2018, the Taxpayer applied for a refund of \$495,013.05 based on the fact that it had paid stamp tax on personal property and real property. In support, the Taxpayer argued that the stamp tax should be based on the pro-rata share of the lump-sum purchase price that could fairly be allocated to the real estate that was sold. The Department of Revenue (“the Department”) denied the refund application based on an interpretation of section 201.02, Florida Statutes, dictating that when real and personal property are sold together without the parties to the transaction itemizing the personal

property, then the sales price is considered to be the consideration paid for the real property. The Taxpayer challenged the denial and asserted that the aforementioned position is an unadopted rule.

OUTCOME: The ALJ ruled that the Department’s interpretation of section 201.02 amounted to an unadopted rule because: (a) the Department had given the statute a meaning that went beyond a literal reading of the statutory text; and (b) the Department’s interpretation had the direct and consistent effect of law. With regard to the latter factor, the ALJ noted that an unadopted rule “need not apply universally to every person or activity within the agency’s jurisdiction. It is sufficient that the [unadopted rule] apply uniformly to a category or class of persons or activities over which the agency may properly exercise authority.” With regard to the Department’s interpretation of section 201.02, the ALJ discussed how Amendment Six to the Florida Constitution had abolished the deference doctrine and thus stopped an agency’s statutory interpretation from being “a sort of quasi rule.” As for the underlying case pertaining to the denial of the refund application, the Taxpayer presented an expert witness who opined that only \$77.8 million of the \$125 million purchase was attributable to real estate and thus subject to stamp tax, and the Department raised a *Daubert* objection. In overruling the *Daubert* objection, the ALJ concluded that the holding in *SDI Quarry v. Gateway Estates Park Condominium Association*, 249 So. 3d 1287, 1293 (Fla. 1st DCA 2018), about *Daubert* applying in administrative proceedings was dictum. The ALJ noted that the aforementioned decision conflicted with *Florida Industrial Power Users Group v. Graham*, 209 So. 3d 1142 (Fla. 2017), in which

the Florida Supreme Court held that the Florida Evidence Code does not apply in administrative proceedings. Accordingly, the ALJ concluded that the *Daubert* standard, as codified in section 90.702, “cannot be enforced [at DOAH], as though it were applicable to administrative proceedings. At the very least, the ALJ has the discretion to refuse to apply the *Daubert* standard.”

Georgina Baxter-Roberts v. Dep’t of Bus. & Prof’l Regulation, Div. of Pari-Mutuel Wagering, Case No. 19-4186RU (Summary Final Order Jan. 17, 2020). <https://www.doah.state.fl.us/ROS/2019/19004186.pdf>

FACTS: The Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (“the Division”) regulates the medication of thoroughbred racing horses. The Florida Legislature amended section 550.2415, Florida Statutes, in 2015 to require the Division to adopt rules with a classification system for drugs and a corresponding penalty schedule for violations that incorporated “the Uniform Classification Guidelines for Foreign Substances, Version 8.0, revised December 2014, by the Association of Racing Commissioners International, Inc” (“the ARCI Document”). The Division ultimately amended Florida Administrative Code Rule 61D-6.011 so that it expressly incorporated by reference the ARCI Document. One part of the ARCI Document’s penalty section addresses “stacking violations,” i.e., those in which permitted non-steroid anti-inflammatory drugs (“NSAIDs”) are found in amounts that exceed permitted levels. That portion states that recommended penalties for stacking violations are “subject to the provisions set forth in ARCI-011-020(E)

continued...

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and ARCI-025-020(E) (“the Model Stacking Rules”). The Model Stacking Rules are part of the ARCI’s Model Rules of Racing, but the text of the Model Stacking Rules is not included in the ARCI Document. In addition, the ARCI Document does not state that it incorporates the Model Stacking Rules by reference, and rule 61D-6.011 does not contain a hyperlink to the Model Stacking Rules. Georgina Baxter-Roberts is a Division-licensed horse trainer who was alleged to have committed a stacking violation. The Division served her with a proposed stipulation and consent order providing for a \$1,000 fine and a 30-day suspension. While the Division’s proposed penalty was consistent with the disciplinary provisions set forth in the ARCI Document, the proposed penalty was lesser than the penalty prescribed by the Model Stacking Rules. In fact, the penalties for stacking violations in the Model Stacking Rules are less severe than the penalties for stacking violations in the ARCI Document. Ms. Baxter asserted that the penalty in the Division’s proposed stipulation was inconsistent with the Model Stacking Rules and thus based on an unadopted rule.

OUTCOME: The ALJ concluded that there was no unadopted rule because the rulemaking requirements of chapter 120 would be violated if the ARCI Document were to be interpreted as incorporating the Model Stacking Rules. “While the ARCI Model Rules are mentioned in the ARCI Document, the indices for incorporating those rules by reference are not present. [The Division]’s assertion that the Model Stacking Rules are not part of [rule 61D-6.011] is correct.”

Rule Challenges – Proposed Rule

Walmart Inc. v. Dep’t of Bus. & Prof’l Regulation, Div. of Alcoholic Beverages & Tobacco, Case Nos. 19-4688RP & 19-4913RP (Final Order Dec. 18,

2019). <https://www.doah.state.fl.us/ROS/2019/19004688.pdf>

FACTS: A “COP” license enables a business to see alcohol for consumption on the premises. Section 565.045, Florida Statutes, prohibits the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (“the Division”) from issuing a COP license to a business that sells items “not customarily sold in a restaurant.” The Division proposed to adopt rule 61A-3.055 (“the Proposed Rule”) in order to explicate the Division’s position on what “customarily sold in a restaurant,” as defined in section 565.045, means. The Proposed Rule provides that items “customarily sold in a restaurant” include: (a) food cooked or prepared on the licensed premises; (b) hot or cold beverages; (c) souvenirs bearing identification of the licensed premises; or (d) gift cards or certificates pertaining to the licensed premises.

OUTCOME: Section 565.045 does not provide a definition for “restaurant,” therefore “[t]he word should be given its plain and ordinary meaning.” The ALJ ruled that the Proposed Rule modified or contravened section 565.045 and was thus invalid. In doing so, he noted that the Proposed Rule diverged from the common definition of “restaurant” by limiting consumable items customarily sold in a restaurant to food cooked or prepared on the licensed premises or hot or cold beverages. The common definitions of restaurant do not mention where the food is cooked or prepared, and they do not mention licensing.

Substantial Interest Proceedings

Agency for Health Care Admin. v. Life Care Ctr. of Punta Gorda, Case No. 19-4056 (Recommended Order Nov. 26, 2019). <https://www.doah.state.fl.us/ROS/2019/19004056.pdf>

FACTS: Section 409.9082(1)(b), Florida Statutes, requires a nursing home to “report monthly to [AHCA] its total

number of resident days . . . and remit an amount equal to the assessment rate times the reported number of days.” This monthly assessment is known as a “Quality Assessment Fee,” and section 409.9082(2) mandates that it must be received by the Agency for Health Care Administration (“AHCA”) by the 20th day of the next succeeding calendar month. If a nursing home fails to timely remit the fee, then section 409.907, Florida Statutes, provides that AHCA may withhold medical assistance reimbursement payments, suspend or revoke the nursing home’s license, or impose a fine up to \$1,000 a day for each delinquent payment. Life Care Center of Punta Gorda’s (“Life Care Center”) Quality Assessment Fee for February 2019 was to be remitted to AHCA by March 20, 2019. AHCA did not receive the Quality Assessment Fee and notified Life Care Center via a letter mailed April 9, 2019, that there was an outstanding balance and that payment was due immediately. Life Care Center paid the Quality Assessment Fee on April 12, 2019. Nevertheless, AHCA sought to impose a fine.

OUTCOME: Rather than disputing that the Quality Assessment Fee was timely, Life Care Center raised two defenses: (a) the United States Postal Service was to blame; and (b) section 409.9082(7) gives AHCA discretion whether to assess a penalty against a nursing home. With regard to the first defense, the ALJ ruled that Life Care Center failed to establish that the Quality Assessment Fee was actually mailed to AHCA. As for the second defense, section 409.9082 does not allow for exceptions to the timely remittance requirement. The ALJ concluded that section 409.9082(7), gives AHCA some discretion as to what penalty to impose, but AHCA must impose one of the enumerated penalties. Accordingly, the ALJ recommended that AHCA impose a \$11,500 fine on Life Care Center.

Dep’t of Fin. Svcs., Div. of Workers’ Compensation v. Tarpon Liquors, LLC, Case No. 19-3961 (Recommended

Order Jan. 3, 2020). <https://www.doah.state.fl.us/ROS/2019/19003961.pdf>

FACTS: The Department of Financial Services, Division of Workers' Compensation ("the Division") issued an Amended Order of Penalty Assessment ("the Amended Order") on December 13, 2018, stating that Tarpon Liquors, LLC ("Tarpon Liquors") had failed to secure required workers' compensation coverage. The Amended Order also stated that Tarpon Liquors had 21 days from receipt of the Amended Order to request an administrative hearing. The Division transmitted the Amended Order to Tarpon Liquors via certified mail and received a certified mail receipt bearing the signature of Lor-

raine Maniscalco, Tarpon Liquors' managing member. No hearing was requested. However, after a conversation between a Tarpon Liquors managers and a Division investigator in June 2019 and transmittal of a copy of the Amended Order on July 3, 2019, the Division received a request for hearing on July 9, 2019, asserting that Tarpon Liquors never received the Amended Order that was transmitted in December of 2018. The hearing request also asserted that the signature on the certified mail receipt was not Lorraine Maniscalco's. The Division concluded that the hearing request was untimely but referred the matter to DOAH.

OUTCOME: While a certified mail

return receipt creates a strong presumption that the addressee received the mail, that presumption is not irrebuttable. It may be overcome with substantial and probative evidence. The ALJ found that the signature on the return receipt was significantly different from the signature on Ms. Maniscalco's driver's license and the sample signature that was admitted into evidence. The ALJ ultimately found that "[t]he weight of the credible, persuasive evidence . . . proves that Ms. Maniscalco did not sign" the return receipt. Accordingly, the ALJ ruled that Tarpon Liquors did not receive the Amended Order transmitted in December of 2018, did not receive the Amended Order until July 3, 2019, and its July 9, 2019, hearing request was timely.



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Law School Liaison

Spring 2020 Update from the Florida State University College of Law

By David Markell, Steven M. Goldstein Professor

This column highlights recent accomplishments of our Florida State University College of Law alumni and students. It also lists the rich set of programs the College of Law is hosting this semester and reviews recent faculty activities.

Recent Alumni Accomplishments

- Carolyn Haslam was recently promoted to Partner at Akerman LLP, where she primarily focuses on real estate and land use law.
- Jessica Icerman recently joined Stearns Weaver Miller Weissler Alhadeff & Sitterson as an associate.

Recent Student Achievements

The following students are participating in administrative law externships this spring:

- Sara Finnigan – Florida Commission on Human Relations
- Jacob Imig – Division of Administrative Hearings
- Laurence Jeanlus – Department of Business & Professional Regulation, Office of the General Counsel
- Alessandra Norat Mousinho – Department of Management Services
- Carla Sanchez – Public Employees Relations Commission

A team comprised of FSU Law student Sordum Ndam and FSU Urban & Regional Planning students Brittany Figueroa and Jonathan Trimble earned second place in a recent Student Environmental Challenge hosted by the Florida Air and Waste Management Association (A&WMA). The team's task was to select a rural coastal city in Florida and persuade

the selection committee, through a written and oral presentation, that this community should be selected for funding of sea-level rise resiliency and adaptation measures. The team presented sea-level rise resiliency solutions for Alligator Point, Florida, to an A&WMA Selection Committee comprised of representatives from the private sector, not-for-profit associations, and the public sector.

Ashley Englund, Alex Purpuro, and Steven Kahn competed in and won the Jeffrey G. Miller National Environmental Law Moot Court Competition at Pace University in February 2020. The team was coached by Segundo Fernandez and Tony Cleveland, partners with Oertel, Fernandez, Bryant & Atkinson, P.A.

The Environmental Law Society (ELS) is organizing its annual mentoring program for new members designed to connect students with professionals in their desired area of practice. Arielle Vanon is chairing the mentoring program this year. In November, members wishing to become a mentee were invited to fill out a questionnaire to ascertain the mentee's desired practice area and practice location to help pair each mentee with a mentor. This January, ELS hosted a mixer for mentees to meet their mentor in a fun, casual setting. ELS is always looking for new mentors or guest speakers for our lunch meetings. If any readers are interested, please email fsuenvironmentallawsociety@gmail.com.

The Journal of Land Use & Environmental Law will be publishing Volume 1 this spring, which will include two articles from students, "National Flood Insurance Program Reform" by Gabriel Lopez and "State Farm, Secret Science and the Environmental Protection Agency's Postmodern

Attack on Agency Decision-Making" by Young Kang. The forthcoming volume will also feature "Puerto Rico's Road to Resilience: An Island's Challenging Transition to a Cleaner, More Resilient Future" by Kevin B. Jones, Sarah MullKoff, and Justin Cooper; "Valuing Resiliency - Approaches and Public Policy Implications" by SchefWright; "Quantifying The Resilience Value of Distributed Energy Resources" by James M. Van Nostrand; and "Framing Energy Resilience" by Sara Gosman.

Faculty Achievements

Professor Shi-Ling Hsu was one of three expert panelists convened at the Bar Ilan University's Faculty of Law in Israel to conduct a workshop for the Israeli Ministry of the Environment. The other panelists were John D. Graham, Dean Emeritus of the Indiana University's School of Public and Environmental Affairs, and a former director of the White House Office of Information and Regulatory Affairs under President George W. Bush; Cary Coglianese, the Edward B. Shils Professor of Law and Director of the Penn Program on Regulation at the University of Pennsylvania School of Law; and Oren Perez, dean of the Bar Ilan Faculty of Law. The workshop, "Cost-Benefit Analysis and Regulatory Impact Analysis: Government Practice and Implementation," was held December 9-10, 2019, on the Bar Ilan campus, and included presentations on governmental practices and administrative law in the U.S. and elsewhere on using cost-benefit analysis as a tool for environmental law and policy-making.

David Markell featured several guest speakers in his Fall 2019 Current Issues in Environmental Law

continued...

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and Policy Seminar, including: John Truitt, Deputy Secretary for Regulatory Programs, Florida Department of Environmental Protection; Justin Wolfe, General Counsel, Florida Department of Environmental Protection; David Childs, Partner, Hopping Green and Sams; Whitney Gray, Administrator, Florida Resilient Coastlines, Florida Department of Environmental Protection Office of Resilience and Coastal Protection; Jeffrey Wood, Partner, Baker Botts L.L.P., and former Acting Assistant Attorney General for the U.S. Department of Justice Environment and Natural Resources Division; Janet Bowman, Senior Policy Advisor, The Nature Conservancy; Julie Dennis, Owner, OVID Solutions; Former Director, Division of Community Development, Department of Economic Opportunity; and Alisa Coe, Staff Attorney, Earthjustice.

Erin Ryan spent the summer as a Fellow at the Rachel Carson Center for Environment and Society, an international interdisciplinary research center at the Ludwig Maximilians Universität in Munich. There, she researched Chinese environmental governance and offered two lectures, “Breathing Air with Heft: An Experiential Report on Environmental Law and Public Health in China,” and “The Public Trust Doctrine, Private Rights in Water, and the Mono Lake Story.” She published “From Mono Lake to the Atmospheric Trust: Navigating the Public and Private Interests in Public Trust Resource Commons,” 10 GEO. WASH. J. ENERGY & ENVTL. L. 39 (2019); “Federalism as Legal Pluralism,” in THE OXFORD HANDBOOK ON LEGAL PLURALISM (2020); and “Environmentalists: Brace for Preemption, Propertization, and Problems of Political Scale,” in ENVIRONMENTAL LAW, DISRUPTED (Owley & Hirokawa, 2020). She presented

on environmental federalism at a William & Mary symposium on mining regulation, served on a separate panel about Chinese regulation at the same conference, and presented on Chinese environmental law at the ASU Sustainability Conference. She also presented “Rationing Federalism vs. Negotiating Federalism: Mud and Crystals in the Context of Dual Sovereignty” at a Wisconsin symposium about Andrew Coan’s book, *RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME DECISION-MAKING*.

Professor Hannah Wiseman will be a Visiting Scholar at the University of Pennsylvania’s Kleinman Center for Energy Policy in mid-March. As part of this visit she will deliver a public lecture on Local Energy Externalities and guest teach a seminar.

Spring 2020 Events

The College of Law is hosting a full slate of impressive environmental and administrative law events and activities this semester.

Reynolds v Florida Panel Discussion

On January 8, 2020, a panel discussed Florida climate change litigation in relation to the *Reynolds v. Florida* hearing. Panelists included Andrea Rodgers, Senior Staff Attorney with Our Children’s Trust, and plaintiffs of the *Reynolds v. Florida* lawsuit Delaney Reynolds, Valholly Frank, Isaac Augspurg, and Levi Draheim. A recording of the panel is available here:

<https://mediasite.capd.fsu.edu/Mediasite/Play/9a8496fb1b81480e93e947ce0def402e1d>.

Spring 2020 Environmental Distinguished Lecture

Cary Coglianese, Edward B. Shils Professor and Professor of Political Science, University of Pennsylvania Law School, will present the College of Law’s Spring 2020 Environmental Distinguished Lecture on Wednesday, March 11, 2020, at 3:30

p.m. in Room 310. A reception will follow in the Rotunda.

Local Autonomy and Energy Law Symposium

On February 21, 2020, a symposium discussing rapid energy transition in the United States was held. This symposium featured keynote speaker, Richard Briffault, Joseph P. Chamberlain Professor of Legislation, Columbia Law School; Alexandra Klass, Distinguished McKnight University Professor, University of Minnesota Law School; John Nolon, Professor of Law, Pace University Elisabeth Haub School of Law; Ashira Ostrow, Peter S. Kalikow Distinguished Professor of Real Estate and Land Use Law, Hofstra University Maurice A. Deane School of Law; Erin Scharff, Associate Professor of Law, Arizona State University Sandra Day O’Connor College of Law; Rick Su, Professor of Law, University of North Carolina School of Law; Sarah Swan, Assistant Professor, FSU College of Law; Shelley Welton, Assistant Professor of Law, University of South Carolina School of Law; and Michael Wolf, Richard E. Nelson Eminent Scholar Chair in Local Government Law, University of Florida Levin College of Law.

Environmental Law Enrichment Lectures

Inara Scott, Assistant Dean for Teaching and Learning Excellence and Associate Professor, Oregon State University College of Business, presented a guest lecture on January 29, 2020.

Shalanda Baker, Professor of Law, Public Policy and Urban Affairs, Northeastern University School of Law, will present a guest lecture on Wednesday, April 1, 2020, at 12:30 p.m. in Room 208.

Information on upcoming events is available at <http://law.fsu.edu/academics/jd-program/environmental-energy-land-use-law/environmental-program-events>. We hope Section members will join us for one or more of these events.



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OFF TO A GREAT START

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order to sharpen their skills. The ALS also selected a balance of students between agency attorneys and attorneys from the private sector.

Before the academy started, students were given materials that were based on a real administrative law case with various additions to give students the opportunity to practice certain skills. On the first day of the academy, the program was a traditional lecture given by ALJs and experienced attorneys. The lecturers covered trial skill topics such as opening statements, proposed recommended orders (PROs), evidence, depositions, and the examination of witnesses.

On the second and third days of the academy, students were split into smaller groups that were led by experienced coaches. The small groups participated in workshops on depositions and the examination of witnesses. Students had the chance to depose a key witness and then conduct both direct and cross-examination of the witness, which gave them the chance to practice proper impeachment. "I was honored to participate as an instructor in the inaugural Trial Academy," said Ralph DeMeo, one of the coaches that led



these workshops. "The program provided a unique opportunity for beginning administrative lawyers to learn from experienced practitioners and ALJs in a realistic trial setting. Both the instructors and students benefited from the real-world case studies, focused trial preparation, small group setting, immediate feedback, and the DOAH courtroom experience."

On the fourth day, ALJs Bruce Culpepper and Yolonda Green taught a workshop on opening statements, culminating in the opportunity for students to give an opening state-

ment in front of an ALJ. Later in the day, ALJs Gar Chisenhall and Li Nelson offered a workshop on how to write effective PROs.

The Trial Academy culminated on its final day with a mock trial in front of ALJ Bob Cohen. The participants in the mock trial were chosen based on the workshop coaches' assessment of the students' participation in the workshops. A court reporter transcribed the hearing and each of the students were asked to prepare a PRO based on the record of the mock trial. Following the mock trial, students and coaches attended a happy hour mixer.

The coaches also selected students for awards based on the skills that were taught during the academy: Virginia Edwards (Best Opening Statement); Amanda McKibben (Best Direct Examination); Johnny ElHachem (Best Cross Examination); and Kristen Bond (Best PRO).

Based on feedback, the Trial Academy was appreciated by everyone who was involved. "As a practicing attorney with five years of experience, I was initially skeptical about attending the Administrative Law Academy," said Kimberly Murray, an attendee from the Agency for Health Care Administration. "However, I had the unique opportunity to learn from Administrative Law Judges and experienced practitioners who pro-



vided valuable practical insight. I would encourage everyone to attend if they have the opportunity.” The success of the inaugural academy has led to efforts by the ALS to make it an annual event. This will allow more students to receive training in an atmosphere similar to what takes place during a real administrative hearing. Planning for the second Trial Academy is already underway and it is being scheduled for September 2020, with the exact dates to be determined.

The inaugural Trial Academy 2019 Class consisted of Corynn Alberto, Kristen Bond, Matt Bryant, Bradley Butler, Paul Drake, Virginia Edwards, Johnny ElHachem, Gabe Girado, Amanda Godbey, Kelly Kibbey, Amanda McKibben, Ryan McNeil,

Erica Moore, Kimberly Murray, Malory Neumann, Nikita Parker, Hannah Phillips, Annie Prescott, Cody Short, and Timothy Sparks.

Thank you to the ALJs and coaches that participated: Hon. Suzanne Van Wyk, Hon. Brian Newman, Hon. Bob Cohen, Hon. Gar Chisenhall, Hon. Bruce Culpepper, Hon. Yolanda Green, Hon. Li Nelson, Ralph DeMeo, Seann Frazier, Kathy Hood, Gregg Morton, Louise St. Laurent, and Richard Shine.

Gregg Riley Morton is deputy general counsel and a hearing officer at the Public Employees Relations Commission presiding over labor and employment cases brought before the Commission. Prior to his appointment as a hearing officer, Mr. Morton was a staff attorney for Chief Justice Harry

Lee Anstead at the Florida Supreme Court and later served as chief counsel for the Division of Finance at the Office of Financial Regulation, where he supervised a team of attorneys. He has participated in numerous administrative proceedings and is a co-author of the *Administrative Adjudication Chapter in Florida Administrative Practice* (12th ed., The Florida Bar 2019). Mr. Morton is a member of the Executive Council of the Labor & Employment Law Section of The Florida Bar and is also the current Chair of the Council of Sections of The Florida Bar. Mr. Morton received his B.A. and M.A. degrees from Ohio University and graduated with honors from the University of Florida College of Law, with his J.D. in 2000.



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