ADMINISTRATIVE LAW SECTION
Newsletter
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Rule Challenges Sprout from the Growing Florida Medical Marijuana Industry

by Paula Savchenko

The stigma attached to marijuana has drastically shifted over the past few years from a space that was once for "stoners" to a space that now patients and professionals have entered. As administrative law practitioners, I think we can all agree that it came as a big surprise to hear the words marijuana and rule challenge being spoken in the same sentence. Today, among both administrative law attorneys as well as most Medical Marijuana Treatment Center ("MMTC," formerly called Dispensing Organization "DO") owners, the two words go hand in hand. In fact, very few MMTCs were fortunate enough to be granted their license without going through the long road from filing a chapter 120 petition to patiently awaiting a recommended order from the administrative law judge (ALJ) and a final order from the Department of Health ("DOH").

Tightly woven throughout the lawsuits challenging DOH's actions in relation to the licensure of MMTCs are a variety of rule challenges. There are several different reasons a rule can be challenged pursuant to the Administrative Procedure Act. A proposed rule can be challenged under section 120.56(2)(a), Florida Statutes, an existing rule can be challenged under section 120.56(3), and an unadopted rule can be challenged under section 120.56(4).

Before diving into the lawsuits revolving around the licensure of MMTCs, it is important to first give a brief background on the laws and rules passed by the Florida Legislature and DOH. In 2014, the Legislature passed the Compassionate

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From the Chair

By Judge Gar Chisenhall

Since becoming involved with the Administrative Law Section in 2011, it has been a great privilege to work with many individuals who have devoted countless hours to furthering the practice of administrative law, and I am very honored to serve as the Section's chair for the next year. I would like to devote my first "From the Chair" column to recognizing a few of the Section's long-standing members and their exceptional service to the Section. I would also like to recognize the work being done by some of our newer members.

During the June 2018 executive council meeting, held in conjunction with The Florida Bar Convention, the Section honored Larry Sellers as the first recipient of the S. Curtis Kiser Administrative Lawyer of the Year Award and Administrative Law Judge Elizabeth McArthur as the first recipient of the Administrative Law Section Outstanding Service Award. Those in attendance were able to watch Senator Kiser, one of the founding fathers of the modern APA, present Larry with his award.

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FROM THE CHAIR
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I could spend the next three "From the Chair" columns describing all of the work that Larry and Judge McArthur have done for the Section. Instead, I will suggest that one or more of our Section members should interview Larry and Judge McArthur and write profiles of our honorees for publication in a future edition of this Newsletter.

I was sad when retired Administrative Law Judge Linda Rigot notified me that she would no longer be serving as chair of the Section's legislative committee. Fortunately, Linda will still be a member of that committee and available to share her considerable experience. I have gotten to know Linda very well over the last few years, and few people care more about the Section. I have no doubt that she will be a valuable resource for many years to come.

Stephen Emmanuel, as co-chair of our publications committee, has done an outstanding job encouraging Section members to write articles for *The Florida Bar Journal*. The Section's profile has been significantly enhanced by the articles on administrative law that have been appearing in the *Journal* on a regular basis. Rather than soliciting articles, Stephen will be spending the next year monitoring our finances as the Section's treasurer.

Lyyli Van Whittle, one of our newer members, has graciously agreed to assume Stephen's former role. Lyyli is very well qualified to act as a conduit between our Section and *The Florida Bar Journal*. She was an editor for Florida State University's Law Review and worked at the Florida Supreme Court as a career staff attorney for over 15 years. Lyyli currently serves as a hearing officer for the Public Employees Relations Commission. If you are interested in writing an article for publication in *The Florida Bar Journal*, please contact Lyyli at Lyyli.VanWhittle@perc.myflorida.com.

Judge Lynne Quimby-Pennock recently notified me that she is stepping down as co-chair of the Law School Outreach Committee. Over the last three years, Judge Quimby-Pennock has traveled several thousand miles making law students aware of the Section via her "law school noshes." We owe Judge Quimby-Pennock a tremendous amount of gratitude for all of the amazing work she has done.

The Section was very fortunate when Sharlee Edwards agreed to take complete charge of the law school outreach committee. Sharlee has also stepped up to take charge of a new effort to create a South Florida chapter of the Administrative Law Section. The idea for a South Florida chapter originated from a recent survey of Section members in which one of the respondents stated that the Section does not do enough for its members outside Tallahassee. Because the majority of the Section's members and leadership are currently located in Tallahassee, it is understandable that many of the Section's meetings and CLE programs occur in Tallahassee. However, if the Section is to grow, then it must be responsive to the needs of administrative law practitioners throughout Florida. As a result, we are creating the South Florida chapter so that there will be Section leaders in South Florida responsible for providing services such as CLE programs and networking events to our South Florida members. I ask all of our South Florida members to contact Sharlee and

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Errata: Please note that the name of one of the presenters for the webinar series, Kristin M. Bigham, was inadvertently misspelled in the June 2018 issue of the newsletter.

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offer to assist her by speaking at a CLE event, serving as a mentor to a young attorney, or simply giving her ideas about how the South Florida chapter can be of service. This is an exciting opportunity for young attorneys (and even those not so young) to give back to their profession.

Under Sharlee's leadership, I have no doubt that the South Florida chapter will be a huge success, and I hope this leads to the creation of chapters in other parts of Florida.

Two former Section chairs, Administrative Law Judge Cathy Sellers and Jowanna N. Oates, have been hard at work organizing the 2018 Pat Dore Administrative Law Conference, which will be held on October 12, 2018, in Tallahassee. Judge Sellers, Jowanna, and their steering committee have done a terrific job organizing our Section's flagship CLE event. While this year's conference has several speakers we have come to expect to see, such as Patricia Nelson and Administrative Law Judge John Van Laningham (the two-time defending APA Jeopardy champion), several newer faces will be appearing. They include Tara Price, Tiffany Rodenberry, Marc Ito, Virginia Dailey, Jennifer Hinson, Tabitha Harnage, Jamie Jackson, Dixie Daimwood, Christine Thurman, and Alexandra Marshall.

While the Pat Dore Conference has been a Section mainstay for many years, I was very happy to assist chair-elect Brian Newman and Louise St. Laurent with producing a unique CLE program for the Department of Health on June 28, 2018. The official title of the program that we gave to The Florida Bar was "The Nuts and Bolts of Administrative Litigation." However, we unofficially referred to this CLE program as "Stop Drop and Roll (How Not to be a Complete and Total Dumpster Fire at DOAH)." As those titles not so subtly imply, this CLE program was focused on teaching basic (but invaluable) litigation skills. Brian, Louise, and I thank Administrative Law Judges Li Nelson, Suzanne Van Wyk, and Hetal Desai for giving presentations. In addition, we thank the First District Court of Appeal for allowing us to use their facility and for providing technical assistance.

As many of you already know, Paul Drake and the technology committee have done a superb job implementing a complete redesign of the Section's website, and that committee is in the process of giving us more reasons to add the website to our favorites list. For instance, you will start seeing descriptions of Section events (along with photographs) posted to the website on a regular basis. I am especially excited to see our electronic bulletin board in action. At some point in the near future, Section members will be able to send an e-mail to ALSYoungLawyers@gmail.com describing a significant event in their professional or personal lives. Those e-mails could describe how a Section member just opened his or her own practice, made partner, earned a promotion, won a big case, or got married. We will let you know when this feature goes "live," and we are counting on the Section members to make it a big success.

Tabitha Harnage is another of our new leaders and she has been leading the effort to draw young attorneys to the Section. Tabitha is in the process of formulating a calendar of Section events for the next year. Expect to see an event calendar posted on the Section's website and other social media platforms in the near future.

One of the primary benefits our Section has to offer is the opportunity for young attorneys to network with established administrative law practitioners. I urge all of our established members to turn out in support of the Section's events. The Section will not grow without your help.

Finally, please join me in thanking Robert H. Hosay for his invaluable service as Section chair over the past year. Robert was the latest in a long line of outstanding Section chairs, and his leadership will benefit the Section for many years to come. Prior to the outset of his term, Robert announced at a Section meeting that he wanted to raise the Section's profile so that administrative law practitioners would view joining the Section as an essential aspect of their professional development. While we have many long-standing members who have been of great service, it has been very encouraging to see Robert's vision become a reality as new leaders have emerged and brought new ideas and energy to the Section.

A Guide to the Recent Amendments to the Bylaws of the Administrative Law Section

by Richard J. Shoop

Recently, the Administrative Law Section made a few amendments to its bylaws. I had the privilege of chairing the committee that shepherded these amendments from the concept stage to reality. In this article, I will enumerate the amendments and explain the rationale behind the amendments and their effect on the future of the Administrative Law Section.

The Amendment to Article I, Section 2(b): Professionalism Is Now One of the Purposes of the Section

In the nine years that I was a part of the Section's executive council, I saw first-hand the importance to the Section of professionalism. As a government attorney, I tended to have an "us versus them" mentality when it came to private practitioners. It did not take long for me to discard that mentality once I got to know some of the private practitioners who are active in the work of the Section. There is a real comradery among the government attorneys and private practitioners who serve together on the executive council. They always seem to put their own interests aside at the drop of a hat in order to do what it best for the Section, as well as the practice of administrative law in general. Thus, it is only fitting that the spirit of professionalism be promoted and encouraged among all members of the Section. We are a small family, and we should try our best to get along with each other and help each other whenever possible. I hope that our members will take this amendment to heart and make it a part of their practice.

The Amendment to Article IV, Section I: Welcome Back, Past Chairs

The list of past chairs of the Administrative Law Section, myself excluded, is like a hall of fame for Florida administrative law practitioners. They include administrative law judges, private practitioners, and government attorneys who help to shape the practice area. It is only fitting that the Section include them as active members of the executive council in order to have a wealth of institutional knowledge on tap in the years to come. After all, it's hard for the Section to determine where it needs to go, if it does not know where it has been. Some of the Section's former chairs played vital roles in past amendments to Florida's Administrative Procedure Act, and can offer sage advice whenever new amendments are proposed. I hope that you will join me in welcoming these past chairs back to the executive council and encourage them to continue serving the Section in the years to come.

The Amendments to Article VI, Section 1: The Creation of Two New Standing Committees

The Section decided to amend the bylaws in order to create two new standing committees that will be vital to the future growth of the Section. The first new committee is the young lawyers committee. The Section recognizes that its growth is dependent on garnering interest and participation from the next generation of attorneys. Young lawyers bring a level of energy and enthusiasm that is contagious and spurs others to action. The young lawyer members of the executive council have done a lot of hard work since the Section decided to create an ad hoc young lawyers committee a few years ago, and it is only proper that their efforts be recognized and rewarded by making the committee a permanent part of the Section.

The second new committee is the technology committee. Like it or not, technology is now an integral part of the practice of law. It was only a few years ago that the Section's sole technological platform was its website. Now, the Section uses multiple platforms, such as Facebook, Twitter, and LinkedIn, in addition to its newly updated and mobile-friendly website, to communicate news and events to its members. In order to stay abreast of any new developments in technology, as well as manage the Section's current platforms, the Section saw the need to establish a permanent committee to handle all technology issues pertinent to the Section and make sure its platforms stay up-to-date and are useful to its members.

The Amendments Recognize the Section's Past While Securing the Section's Future

Two years ago, the Section published a Strategic Plan for 2016-2021. The goals the Section sought to accomplish through implementation of the Strategic Plan included increasing membership, being more responsive to the needs of its members, and increasing the Section's prestige. The recent amendments to the Section's bylaws will help with all three of these goals. The young lawyers committee will increase membership of the next generation of administrative lawyers. The technology committee will help all members be better informed of the Section's activities, as well as provide more online resources for information on the practice of Florida administrative law. The past chairs will provide the historical information that is necessary to help guide the Section in its response to any proposed amendments to Florida's Administrative Procedure Act that might arise in the future. Lastly, promoting and encouraging professionalism among all members will help improve the Section as a whole. I encourage all members to take the time to read the Section's bylaws, which are located at http://flaadminlaw.org/bylaws/ and consider being an active part of the Section.

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RECENT AMENDMENTS
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Richard J. Shoop *is the Agency Clerk for the Agency for Health Care Administration. He attended the University of Miami for both undergraduate studies and law school. He began his legal career at the Quincy office of Legal Services of North Florida, Inc. In 2001, Mr. Shoop went to work for the State of Florida, first with the Agency for Health Care Administration and then with the Department of Health as a prosecuting attorney for the Boards of Medicine, Osteopathic Medicine and Psychology. He accepted the position of Agency Clerk for the Agency for Health Care Administration in 2004. Mr. Shoop has been a member of the Administrative Law Section's executive council since 2009, and is a past chair of the Section.*

DOAH CASE NOTES

Substantial Interest Hearings

Kimberly Ledbetter v. Agency for Persons with Disabilities, Case No. 17-6001EXE (Recommended Order April 13, 2018).

FACTS: The Agency for Persons with Disabilities ("APD") determines whether to approve licensure applications submitted by those wishing to work with vulnerable individuals. A pre-employment background screening of Kimberly Ledbetter revealed that she pled guilty in 2007 to uttering a forged instrument. Under section 393.0655(5)(*l*), Florida Statutes, that offense disqualified Ms. Ledbetter from working with vulnerable individuals. Pursuant to section 393.0655(2), Ms. Ledbetter applied for an exemption from disqualification. In the course of reviewing her application, APD considered investigations of Ms. Ledbetter conducted by the Department of Children and Families ("DCF") in 2010 and 2011. Both of those investigations resulted from anonymous complaints that Ms. Ledbetter was using drugs and selling food stamps to finance a drug habit. During two DCF home visits related to the investigations, Ms. Ledbetter declined invitations from DCF to take a voluntary drug test. APD denied Ms. Ledbetter's exemption request on September 29, 2017. The primary reasons for the denial were: (a) Ms. Ledbetter's failure to accept responsibility for the 2007 offense; and (2) her failure to take voluntary drug tests. Ms. Ledbetter requested a hearing, and APD referred the case to the Division of Administrative Hearings on November 1, 2017.

OUTCOME: The Administrative Law Judge found that Ms. Ledbetter proved by clear and convincing evidence that she is rehabilitated from the disqualifying offense. In doing so, the ALJ concluded that APD "improperly presumed [Ms. Ledbetter] was guilty of drug use because she refused to submit to a drug test." While illegal drug use can be a basis for denying an application from employment disqualification, section 393.0655 does not require drug tests of those seeking licensure to work with vulnerable individuals. In addition, Ms. Ledbetter was not asked to take a drug test as part of a criminal investigation or a work-related incident. Therefore, the ALJ concluded that Ms. Ledbetter had a right under the Fourth Amendment of the United States Constitution to refuse to take the drug tests offered by DCF. "It follows that if DCF did not (and perhaps could not) take action based on [Ms. Ledbetter]'s refusal to take a drug test in 2010, APD cannot use that refusal as a basis to deny her a license in 2017." Thus, "APD's reliance on [Ms. Ledbetter]'s refusal to take the drug tests for [a] finding she was not rehabilitated or that she may pose a threat to vulnerable individuals was an abuse of discretion."

By Final Order issued May 10, 2018, APD adopted the Recommended Order and granted the exemption from disqualification.

Robert M. Day v. Dep't of Mgmt. Servs., Div. of Retirement, Case No. 17-6469 (Recommended Order May 14, 2018).

FACTS: The Department of Management Services, Division of Retirement ("the Division") mailed a letter to Robert M. Day notifying him that his retirement benefits had been forfeited due to criminal convictions. However, the certified mail receipt for the notice was returned unsigned. On July 26, 2017, Mr. Day met with Division employees and received a copy of the forfeiture notice. During that meeting, one of the Division employees told Mr. Day that he would inquire about whether the unsigned return receipt would impact the status of Mr. Day's retirement benefits. That employee also told Mr. Day that he should "sit tight, we'll see what happens." The Division employees did not notify Mr. Day that his 21-day period to challenge the forfeiture letter recommenced because he received a copy during the meeting. On August 9, 2017, the Division transmitted a letter to Mr. Day stating that he had never exercised his right to chal-

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lenge the forfeiture of his retirement benefits. Mr. Day responded with a September 18, 2017, letter stating that he never received the forfeiture notice and requested that the Division "re-issue the forfeiture letter so as to allow me appropriate notice and an opportunity to contest the determination." The Division responded on October 12, 2017, by denying Mr. Day's request to reissue the forfeiture letter. Mr. Day filed a petition on November 2, 2017, seeking an opportunity to challenge the forfeiture of his retirement benefits.

OUTCOME: Based on the equitable tolling doctrine, the ALJ rejected the Division's argument that the 21-day period recommenced when Mr. Day received a copy of the forfeiture letter. The ALJ concluded that "[t]here is no evidence that [Mr. Day] was ever informed that delivery of that copy of the Notice of Forfeiture during that meeting commenced [his] 21-day time period to challenge the forfeiture. Rather, the uncontroverted evidence shows that, at that meeting, [the Division employee] advised [Mr. Day] to 'sit tight' while a review of his file was ongoing. It was reasonable for [Mr. Day] to rely on that advice." Ultimately, the ALJ recommended that the Division reissue the forfeiture notice and allow Mr. Day a clear point of entry to challenge the forfeiture of his retirement benefits because the Division's refusal to reissue the forfeiture notice is "contrary to due process afforded under the Florida Administrative Code."

Nature's Way Nursery of Miami, Inc. v. Dep't of Health, Case Nos. 17-5801RE, 18-720RU, & 18-721 (DOAH Final Order June 15, 2018; DOAH Recommended Order June 15, 2018).

FACTS: The Florida Legislature legalized low-THC, or noneuphoric, cannabis in 2014. Via section 381.986, Florida Statutes, the Legislature directed the Department of Health ("DOH") to license one medical marijuana treatment center for each of five geographic areas referred to as the northwest, northeast, central, southwest, and southeast regions of Florida. A medical marijuana treatment center would be authorized to cultivate, process, and sell medical marijuana to qualified patients. Nature's Way of Miami, Inc. ("Nature's Way"), applied in 2015 to be the southeast region's medical marijuana treatment center. DOH did not assign the competing applications scores that expressed their relative merit in quantifiable intervals. Instead, DOH characterized the application reviewers' qualitative judgments in numeric form, thus giving the false impression that the scores reflected quantified measures of the relative quality of the competing applications. Costa became the medical marijuana treatment center for the southeast region after achieving a "score" of 4.4000. DOH denied Nature's Way's application after it "scored" only 2.8833, and Nature's Way did not challenge DOH's decision by requesting an administrative hearing. Following a state constitutional amendment that became effective on January 3, 2017, and expanded access to medical marijuana beyond what was legislatively authorized in 2014, the Florida Legislature amended section 381.986 in order to establish a process for licensing 10 new medical marijuana treatment centers. As part of that process, the amended statute directed DOH to license any previously unsuccessful applicants that "had a final ranking within one point of the highest final ranking in its region." The amended version of section 381.986 gave DOH authority to adopt rules and emergency rules in order to implement the statute. In reliance on the amended version of section 381.986, Nature's Way applied on October 17, 2017, for registration as a medical marijuana dispensary. On October 26, 2017, DOH issued emergency rule 64ER17-7(1)(b)-(d), which provides that an applicant satisfies the one point condition if: (a) the difference between its score and the highest regional score was less than or equal to 1.0000; or (b) its regional rank was second best. After determining that Nature's Way did not satisfy the requirements of the emergency rule, DOH issued a letter on January 17, 2018, denying Nature's Way's application. DOH also based the denial on the fact that Nature's Way had not challenged the November 2015 denial of its application. Nature's Way requested a formal administrative hearing to challenge that decision. Separately, Nature's Way separately challenged the validity of the emergency rule and also challenging the DOH scoring methodology as an unadopted rule.

OUTCOME: In the case in which Nature's Way challenged the denial of its application (case no. 18-721), the ALJ found that the scoring system utilized by DOH to license five geographic medical marijuana treatment centers was flawed because it did not produce scores that quantified the differences between the quality of the competing applications in order to determine if an unsuccessful applicant had actually been within one point of a successful one. The ALJ found that if DOH had produced scores that actually quantified those differences, then Nature's Way almost certainly would have been within one point of Costa. As for DOH's argument that Nature's Way waived the right to challenge the denial when it failed to initiate a challenge in 2015, the ALJ concluded that the enactment of the one-point condition was a significant change of circumstances that acted as an exception to the concept of administrative finality. As a result, the ALJ issued a Recommended Order recommending that DOH approve Nature's Way's application.

In the Final Order issued in case numbers 17-5801RE and 18-720RU, the ALJ concluded that "[t]he Emergency Rule reflects the Department's interpretation of the One Point Condition as having incorporated and validated the historical, Department-assigned aggregate scores, thereby at once prejudging and foreclosing disputes about whether the scores are true statements of quantifiable fact representing the 2015 DO applicants. This interpretation is clearly erroneous and contravenes the law

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implemented, which must be understood as having left to the branches of government possessing judicial and quasi-judicial power the duty to resolve disputes about whether the Department-assigned aggregate scores are true statements of quantifiable fact respecting the 2015 DO applicants." The ALJ also concluded that the emergency rule "is, in substance and effect, an *order* (or a compilation of orders) determining the substantial interests of the 21 applicants that populate the universe of potentially licensable nurseries under the One Point Condition. The Emergency Rule does not formulate policy at a level of generality that could possibly be considered categorical; rather, it *finds* adjudicative facts material to the substantial interests of identifiable—indeed identified—parties. The Emergency Rule reflects an exercise of quasi-judicial, not quasi-legislative, authority. It is an order masquerading as rule." Accordingly, the ALJ order that the emergency rule is an invalid exercise of delegated legislative authority.

Disciplinary/Enforcement Actions

Dep't of Health, Bd. of Med. v. Raquel C. Skidmore, M.D., Case No. 17-4337PL (Recommended Order April 30, 2018).

FACTS: In 2014, the Florida Legislature created section 381.986, Florida Statutes, sometimes referred to as "Charlotte's Web," which legalized low-THC cannabis for patients suffering from cancer or a medical condition causing seizures or persistent muscle spasms. The Legislature amended section 381.986 in 2016 to allow the use of full-THC cannabis for terminal conditions. In 2017, the Legislature again amended section 381.986 in order to implement a state constitutional amendment providing for the production, possession, and use of medical marijuana in Florida. Dr. Raquel Skidmore is a licensed medical doctor based in Panama City, Florida. On September 28, 2015, R.S. was suffering from Stage IV metastatic renal cell carcinoma and presented to Dr. Skidmore in order to obtain medical marijuana. In the course of giving R.S. a prescription for medical marijuana, Dr. Skidmore did not inform R.S. that medical marijuana was illegal in Florida at that time and that he could be arrested if he purchased it in Florida. After learning that medical marijuana was not yet legal in Florida, R.S. filed a complaint against Dr. Skidmore with the Department of Health ("DOH"). On May 30, 2017, DOH filed a seven-count Administrative Complaint against Dr. Skidmore, and the case was referred to the Division of Administrative Hearings on August 2, 2017.

OUTCOME: Dr. Skidmore asserted the medical necessity defense. Jenks v. State, 582 So. 2d 676 (Fla. 1st DCA 1991), states that the common law defense of medical necessity is still recognized in Florida regarding criminal prosecutions for the possession and use of medical marijuana when certain elements are established. The ALJ concluded that the medical necessity defense "does not apply in a license disciplinary proceeding." "Even assuming its applicability, the elements have not been established in this case. Here, [Dr. Skidmore] intentionally created the circumstances that precipitated the unlawful act, by seeing patients knowing that their goal was to receive a prescription for an unlawful substance. She could have treated those patients with lawful substances, ones that she claimed she recommended, but prescribed medical marijuana knowing that these other alternatives had not been pursued." Ultimately, the ALJ recommended that the Board of Medicine revoke Dr. Skidmore's license.

Dep't of Health, Bd. of Dentistry v. Matthew Moye, D.D.S., Case No. 18-659PL (DOAH Recommended Order June 14, 2018).

FACTS: Dr. Matthew Moye has been a Florida-licensed dentist since August 2, 2002, and has not previously been the subject of any disciplinary action against his dental license. On approximately October 31, 2010, Dr. Moye was under the influence of alcohol when he struck three people with his car, killing two of them. On November 7, 2013, Dr. Moye pled guilty to two counts of first-degree misdemeanor DUI with Property or Personal Damage and two counts of second-degree felony DUI Manslaughter. Dr. Moye's sentence included 12 years of incarceration, 10 years of probation following his release from incarceration, and permanent revocation of his driver's license. On January 23, 2018, the Department of Health ("DOH") filed its First Amended Administrative Complaint alleging that Dr. Moye's crimes relate to the practice of, or the ability to practice, dentistry, in violation of sections 456.072(1)(c)

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and 466.028(1)(c) and (mm), Florida Statutes. Dr. Moye requested a formal administrative hearing and disputed that the crimes set forth in the Administrative Complaint related to his practice of dentistry, or that those crimes are a reasonable indication of his ability to safely practice dentistry. DOH referred this matter to DOAH on February 9, 2018.

OUTCOME: The ALJ found that "the act of driving while impaired is one that generally demonstrates recklessness and a lack of good judgment, and that such attributes can be correlated to one's ability to effectively practice dentistry." However, the ALJ declined to recommend a harsher penalty than would be called for based just on the DUI because Dr. Moye's intoxicated driving resulted in loss of life. While the Florida Legislature has elected to impose a harsher criminal penalty for a DUI resulting in death, the Legislature has not made a similar choice with regard to the regulation of dentists. Instead, "the Legislature has chosen to sanction conduct only to the extent that it relates to the practice of dentistry." "The fact that the Legislature elected to punish DUI Manslaughter more severely than DUI based on the result of the act is not sufficient grounds to impose a different regulatory penalty for the same 'act' based on the result. There has been no express 'policy choice' by the Department that an act is more worthy of a different regulatory sanction based on its result. Again, it is the voluntary act of driving while intoxicated that reflects on the ability to practice dentistry, not the unintended, even tragic, result." "The tragic outcome of Respondent's reckless act of driving while impaired, though it certainly affects how Respondent's behavior is treated from a criminal perspective, has little to do with whether it affects the clinical quality of his work, the quality of his patient care, or his ability to practice dentistry." Accordingly, after concluding that Dr. Moye committed the violations alleged in the Administrative Complaint, the ALJ recommended that the Board of Dentistry enter a final order imposing the following sanctions: (1) one year of probation commencing upon his release from incarceration; (2) a $10,000 administrative fine; (3) reimbursement of costs; (4) completion of an ethics course; (5) 100 hours of community service, and (6) evaluation from the Professionals Resource Network.

Rule Challenges

Dacco Behavorial Health, Inc.; Operation PAR, Inc.; and Aspire Health Partners, Inc. v. Dep't of Child. & Fam., Case No. 17-6655RU (DOAH Final Order April 26, 2018).

FACTS: On May 3, 2017, Governor Rick Scott signed an Executive Order declaring that the federal government had awarded $27,150,403 per year for two years to the Department of Children and Families ("DCF") to provide prevention, treatment, and recovery support services to combat the opioid epidemic. The Executive Order further declared that the federal funds must be immediately drawn upon and that the State could not wait until the next fiscal year began on July 1, 2017. DCF responded by publishing emergency rule 65DER17-2 on September 19, 2017. With regard to the federal funds, the emergency rule stated that DCF "will use these funds in part to expand methadone medication-assisted treatment services in needed areas of the state as part of a comprehensive plan to address the opioid crisis." The emergency rule also stated that DCF will not license any new medication-assisted treatment programs for opioid addiction until DCF conducts a needs assessment to determine whether additional providers are needed. "Should the number of applications for a new provider in a Florida county exceed the determined need, the selection of a provider shall be based on the order in which the complete and responsive applications are received by the Office of Substance Abuse and Mental Health headquarters." DCF ultimately determined that there was a need for one clinic in 47 of Florida's 67 counties and two in Hillsborough County. DCF notified applicants for methadone treatment licenses that applications were to be "accepted at department headquarters from October 2, 2017, at 8 a.m., Eastern Time, until October 27, 2017 at 5 p.m., Eastern Time." The emergency rule thus established a selection system in which those applications received first by DCF would be approved, regardless of any substantive shortcomings or comparative failings as compared to subsequently received applications. As the application acceptance period approached, some prospective applicants lined up at DCF's headquarters days before the 8:00 a.m. acceptance time on October 2, 2017, or had someone wait in line for them. This led to DCF awarding 47 of the 49 available licenses to just three individual applicants with no comparison to competing applications. Several currently-licensed methadone treatment providers whose applications were denied alleged that the "first-in-line" system established by the emergency rule was arbitrary, capricious and contrary to a determination of an applicant's ability to provide care to those suffering opioid addiction.

OUTCOME: The ALJ concluded that "[t]he system for accepting applications on a first-come, first-served basis is arbitrary. It is illogical to assume that the first applications filed, containing scant information, are equal or superior to later filed applications. This scheme contravenes the basic expectation of law for reasoned agency decision making." The ALJ further concluded that "[u]nder the Administrative Procedure Act, there must be reasoned justification for an agency's denial of a license (or, as in the present case, the right to seek a license). See generally § 120.60, Fla. Stat. The Emergency Rule does not provide any justification whatsoever; it deprives the denied applicants the due process afforded by the Legislature."

APPELLATE CASE NOTES

by Gigi Rollini, Tara Price and Larry Sellers

Administrative Hearings—Factual Dispute Arising After "Waiver" of Disputed Facts
Adebiyi v. Dep't of Health, 244 So. 3d 335 (Fla. 4th DCA 2018).

The Board of Nursing proposed the suspension of Adenike Adebiyi's nursing license. Adebiyi sent a handwritten note stating that she wished to have a hearing to present her case. There was nothing in the record to indicate that Adebiyi had waived her right to a formal hearing. However, counsel for the Board assumed that Adebiyi had waived this right.

An informal hearing was held, during which it became apparent that Adebiyi disputed the underlying facts of the proceeding. The Board, however, issued a final order suspending her license following the informal hearing. Adebiyi appealed that final order.

The court determined that Adebiyi's handwritten note indicated that she disputed the facts surrounding the Board's proposed suspension. The court also noted that, "when it became apparent in the informal hearing that the appellant disputed the underlying facts of the proceeding, a formal hearing should have been convened." The court therefore reversed and remanded for a formal hearing.

Certificate of Need—Denial
Compassionate Care Hospice of the Gulf Coast, Inc. v. Agency for Health Care Admin., 247 So. 3d 99 (Fla. 1st DCA 2018).

A hospice care provider must obtain a Certificate of Need from the Agency for Health Care Administration (AHCA) in order to enter the marketplace. Compassionate Care Hospice of the Gulf Coast, Inc. (CHH), applied for such a certificate to serve Sarasota County. AHCA denied this application, as it had previously determined that there was a fixed need of zero new hospice programs in Sarasota County. This created a rebuttable presumption that no new hospice provider is needed.

In its application to AHCA, CHH sought to overcome this presumption based on "special circumstances," including an existing regional monopoly in Sarasota County and the need to promote competition in the area. To obtain a certificate in these circumstances, the applicant must demonstrate that the discouragement of regional monopolies and the promotion of competition, combined with other factors, "outweigh the lack of a numeric need."

The court noted that AHCA still makes the final determination on a case-by-case basis of the weight to be assigned each of these factors. The court concluded that "the case law suggests an appellate court should defer to the result, absent some abdication by the agency of its responsibilities," as long as a "balanced consideration of all relevant criteria was performed, and some reasonable explanation exists for the final outcome." Since AHCA demonstrated that it had considered all relevant criteria, the court affirmed.

Emergency Orders—Challenge to AHCA Emergency Order
Rehabilitation Center at Hollywood Hills, LLC v. Agency for Health Care Admin., 43 Fla. L. Weekly D1377a (Fla. 1st DCA June 20, 2018).

The Agency for Health Care Administration (AHCA) entered three emergency orders against Rehabilitation Center at Hollywood Hills, LLC (the facility) after eight residents died during the aftermath of Hurricane Irma when the facility lost power to its air conditioner. The three emergency orders included an Immediate Moratorium on Admissions, prohibiting the facility from admitting new residents; an Emergency Suspension Order, suspending the facility's license to operate as a nursing home; and an Immediate Suspension Final Order (ISFO), suspending the facility's participation in the Medicaid program.

The facility filed petitions for writ of certiorari challenging the Immediate Moratorium on Admissions and the Emergency Suspension Order. The court held that due to the other orders, a reversal of the Immediate Moratorium on Admissions could have no actual effect on the facility, and the challenge to that order was therefore moot. The court also rejected the facility's claim that the Emergency Suspension Order was facially insufficient, concluding that the order alleged a causal connection between heat and patients' deaths, expressly alleged deficient conduct by staff, described a failure to act towards multiple patients over the course of many hours, and concluded that the staff did not know to call 911 in an emergency. The court held that the order therefore contained sufficiently detailed allegations of an immediate serious danger that was likely to continue without the suspension, and which could not have been more narrowly tailored. Certiorari was therefore denied on both of these orders.

The facility also challenged the ISFO on appeal, arguing that there were insufficient factual allegations to support the ISFO and AHCA erred by failing to provide an administrative hearing. The court noted that while "the allegations could have been more specific, the order sufficiently implied a serious failure by staff to protect the residents from dangerous conditions present in the facility." The court rejected the facility's argument that it was being disciplined for past behavior, noting that prior conduct is relevant to determining future risk. The court also observed that there

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was no requirement that a hearing be held prior to the issuance of an order. The court therefore affirmed the ISFO.

Licensure—Department of Financial Services' Revocation of Insurance Licenses
Turbeville v. Dep't of Fin. Servs., 248 So. 3d 194 (Fla. 1st DCA 2018).

The Department of Financial Services determined that Antony Lee Turbeville violated section 626.621(13), Florida Statutes, and issued a final order revoking his insurance license. Turbeville appealed, arguing that the statute and rule 69B-231.090(13), Florida Administrative Code, are ambiguous, the Department's application of the rule was an ex post facto violation, and that the Department's application of the statute to licensees of the Financial Industry Regulatory Authority (FINRA) violates a licensee's constitutional right to remain silent.

The court cited FINRA rules and federal court rulings, which state that if the Extended Hearing Panel's decision is appealed, the decision by the National Adjudicatory Council is FINRA's final action. The court found that the language of section 626.621(13) is not ambiguous, and the Department's application of the statute and rule 69B-231.090(13) was not an ex post facto application.

Additionally, the court held that, because testimony to FINRA is not compelled by State action, the use of testimony in FINRA license-revocation proceedings does not violate the Fifth Amendment right to remain silent.

The court therefore affirmed the Department's final order.

Licensure—Revocation Based in Part on Adverse Inference Stemming from Declining to Testify
Omulepu v. Dep't of Health, 43 Fla. L. Weekly D1436b (Fla. 1st DCA June 22, 2018).

The Department of Health filed an administrative complaint against Dr. Osakatukei Omulepu, which led to a formal hearing before an administrative law judge. The ALJ found that Dr. Omulepu committed medical malpractice, relying partly on an adverse evidentiary inference against him because he declined to testify. The ALJ also relied on evidence such as expert testimony, multiple punctures of patient organs, and a prior admission from Dr. Omulepu.

The Board of Medicine then entered a final order revoking Dr. Omulepu's license to practice medicine, which he appealed. Dr. Omulepu contended that the adverse inference made by the ALJ violated his right not to incriminate himself under the Fifth Amendment.

The court noted that the Fifth Amendment right against self-incrimination does apply in the context of professional license revocation cases, but that its scope is circumscribed. The court cited to *Baxter v. Palmigiano*, which held that "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them."

The court emphasized that Dr. Omulepu was not forced to waive his right to remain silent, and the ALJ did not, as a consequence of Dr. Omulepu's silence, "automatically find him guilty." Instead, the adverse inference combined with other probative evidence to support the Board's ultimate decision. The court held that under these circumstances, Omulepu's Fifth Amendment rights were not violated.

The court also held that the violations found by the Board were consistent with the allegations in the administrative complaint and were proved by competent, substantial evidence. Accordingly, the court affirmed the final order.

Medicaid—Subrogation & Assignment of Third Party Benefits
Giraldo v. Agency for Health Care Admin., 248 So. 3d 53 (Fla. 2018).

The Supreme Court reviewed the decision of the First District Court of Appeal in *Giraldo v. Agency for Health Care Administration*, 208 So. 3d 244 (Fla. 1st DCA 2016), because it expressly and directly conflicted with the Second District Court of Appeal's decision in *Willoughby v. Agency for Health Care Administration*, 212 So. 3d 516 (Fla. 2d DCA 2017). These decisions both addressed whether the Agency for Health Care Administration (AHCA) may impose a lien on the future medical expenses portion of a Florida Medicaid recipient's tort recovery.

The Court held that according to the plain language of the federal Medicaid Act, AHCA may lien past medical expenses from a Florida Medicaid recipient's tort recovery, but not future medical expenses. The Court approved the Second DCA's decision and quashed the First DCA's decision.

The Court also noted that during the initial DOAH hearing, the Medicaid recipient presented uncontradicted evidence demonstrating what portion of the settlement was properly allocated to his past medical expenses. The ALJ had rejected that evidence and upheld AHCA's lien amount, which the First DCA affirmed. The Court held that there was no reasonable basis in the record for the ALJ to reject this evidence, and therefore remanded the case to the First DCA with instructions to direct the ALJ to reduce the awarded amount for satisfaction of AHCA's lien to the amount supported by the uncontested evidence.

Justice Polston agreed that AHCA may lien only past medical expenses, but cited *Arkansas Department of Health & Human Services v. Ahlborn*, 547 U.S. 268, 275 (2006), as justification instead, rather than the plain language of the Medicaid Act. He further opined that the ALJ should determine the proper allocation for past medical expenses on remand.

*Note: both *Giraldo v. Agency for Health Care Admin.*, 208 So. 3d 244 (Fla. 1st DCA 2016), and *Willoughby v. Agency for Health Care Admin.*, 212

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So. 3d 516 (Fla. 2d DCA 2017), were summarized in Appellate Case Notes in the June 2017 newsletter issue, Vol. XXXVIII, No. 4.

Public Utilities—Application of Public Interest Standard of Review
Sierra Club v. Brown, 243 So. 3d 903 (Fla. 2018).

Florida Power & Light (FPL) brought a case before the Florida Public Service Commission (PSC), and executed a settlement agreement with some of the intervenors who participated in that case.

The PSC held a hearing on the settlement agreement and approved it in its entirety, applying a public interest standard. Sierra Club appealed, contending that it was necessary to instead apply a prudence standard where one individual project is involved. Sierra Club further contended that a prudence analysis on each core element of a settlement is necessary to support an overall public interest finding. The PSC acknowledged that it would have been proper to apply the prudence standard to the project in the absence of the settlement agreement, but in light of the settlement agreement, the public interest standard, alone, was appropriate.

The Supreme Court noted that the PSC regularly and consistently applies a public interest standard when reviewing settlement agreements, and that the Court had recently affirmed a PSC-approved settlement agreement under the same standard. The Court therefore held that the PSC correctly identified the public interest standard as the applicable standard in the PSC's order approving the settlement.

The Court also rejected the argument that a prudence analysis was required on each core element of the settlement, noting that there are no requirements for the PSC to use a prudence standard in reviewing a proposed settlement agreement. The Court also held that an independent express prudence finding was not a prerequisite to a public interest finding. The Court further concluded that the final order sufficiently explained the PSC's decision, and that competent, substantial evidence supported the public interest finding. The Court therefore affirmed the order.

Stays—Motion to Stay AHCA Order Denied
Beach Club Adult Center LLC v. Agency for Health Care Admin., 43 Fla. L. Weekly D1493a (Fla. 1st DCA June 28, 2018).

Beach Club sent an application to the Agency of Health Care Administration (AHCA) for the renewal of a standard adult daycare center license. AHCA determined that the application was incomplete and, after issuing notices to Beach Club, rendered a final order that deemed Beach Club's application withdrawn.

Beach Club filed a motion for stay of the final order, citing Florida Rule of Appellate Procedure 9.190(e)(2)(c) and section 120.68(3), Florida Statutes, which create a presumptive stay "if the agency decision has the effect of suspending or revoking a license," unless the agency demonstrates to the appellate court that a stay would constitute a probable danger to the health, safety, or welfare of the state.

The court held that Beach Club was not entitled to a stay because AHCA's final order did not revoke its license. Instead, AHCA's final order deemed Beach Club's application for the renewal of a license withdrawn. The court looked to *Terrell Oil Com-*

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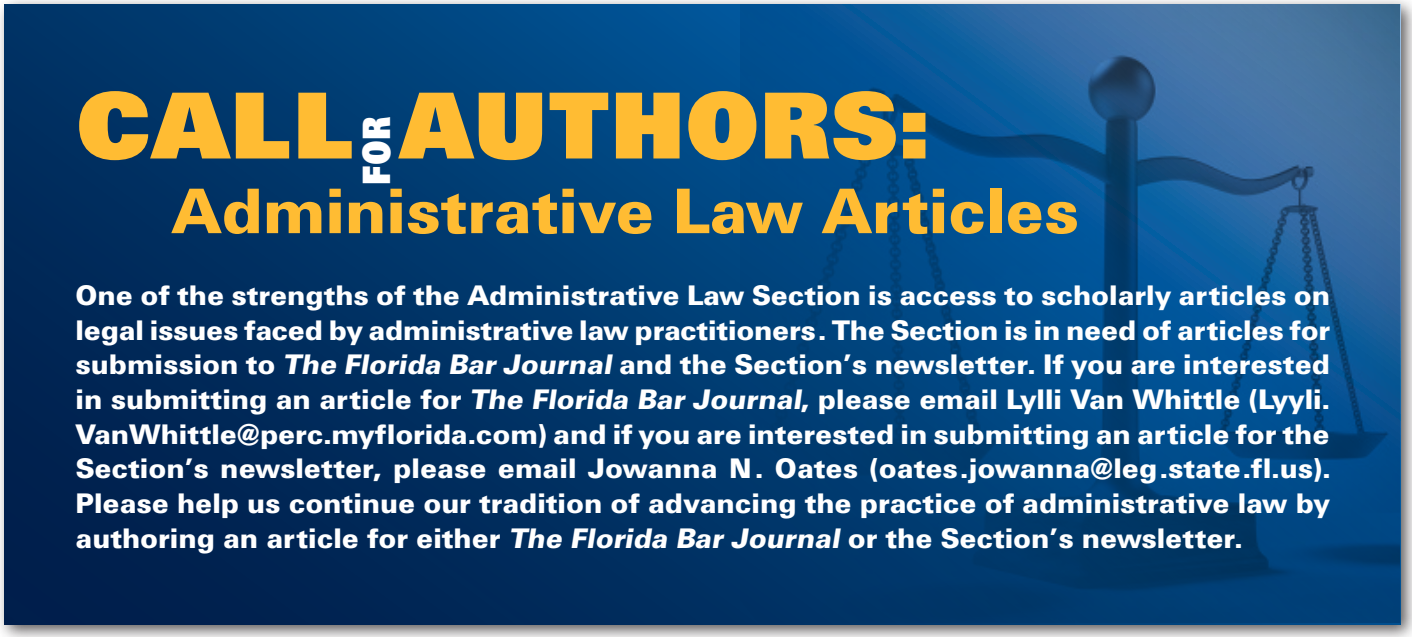

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pany v. Department of Transportation, 541 So. 2d 713 (Fla. 1st DCA 1989), and noted that "there is a qualitative difference between the type of order that denies renewal of a license that has expired or is about to expire and one that suspends or revokes an active license." Thus, the court denied Beach Club's motion for stay.

Sunshine Law—Termination of City Manager Raised Issues of Fact Precluding Summary Judgment

Transparency for Fla., Inc. v. City of Port St. Lucie, 240 So. 3d 780 (Fla. 4th DCA 2018).

Transparency for Florida, Inc. (Transparency) sued the City of Port St. Lucie, certain City Council members, the City Mayor, and the City Attorney (City Defendants), alleging violations of the Sunshine Law involving both the discussions of the City Manager's dismissal and the negotiation of his severance agreement. Transparency also argued that the City's subsequent special meeting was not properly noticed because the City did not provide at least 24 hours' notice of the meeting, and that the meeting itself did not cure the Sunshine Law violations. The City Defendants moved for summary judgment, which the trial court granted. The trial court concluded that the City Manager's employment and potential severance were discussed "at length" during the public meeting, which cured any violation if one had occurred. The trial court also ruled that the City was not required to have given 24 hours' notice prior to holding the meeting. Transparency appealed.

The appellate court recognized that two or more public officials cannot meet in secret to transact public business without violating the Sunshine Law. Moreover, the court noted that public officials cannot use another person, such as an attorney, to serve as a "go-between" or intermediary to communicate the thoughts of an individual public official to the rest of the public board. Here, the court noted that Transparency argued that the City Attorney served as a liaison to facilitate the sharing of information among the City Council. As such, the trial court was correct not to definitively rule out that any Sunshine Law violation had occurred.

But the court held that the trial court erred by ruling that any violation was cured by the City's special meeting. Although independent action at a public meeting can cure a Sunshine Law violation, this is not the case if the public meeting is the perfunctory ratification or acceptance of actions already taken outside the sunshine. After reviewing the record, the court noted that there was no discussion at the special meeting of the terms of the City Manager's separation agreement or the reasons for his separation. The court concluded that these factors were disputed issues of fact that prevented the trial court from ruling on summary judgment that any Sunshine Law violation was cured by the special meeting.

Finally, the court addressed Transparency's argument that the City's special meeting was not properly noticed. The court noted that no bright-line rule exists that would mandate a 24-hour notice period (though it is recommended in Attorney General opinions and the Sunshine Manual). The court concluded that summary judgment could only be granted if there were no disputed issues of material fact about whether sufficient notice was given for the special meeting. Because the record on appeal showed that disputed issues of fact remained as to whether the City's notice was sufficient in this instance, court held the trial court erred in granting summary judgment on this issue. Thus, the court reversed the trial court's summary judgment and remanded the case for additional proceedings.

Unclaimed Property vs. Escheated Funds—DFS Lacks Authority Under Chapter 717 to Reject Probate Court's Order to Disburse Escheated Funds

Choice Plus, LLC v. Dep't of Fin. Servs., 244 So. 3d 343 (Fla. 1st DCA 2018).

Mrs. Rigley died in St. Petersburg, Florida in 2005, and the Pinellas County Probate Court determined in 2007 that she had no known beneficiaries. Pursuant to section 732.107, Florida Statutes, Mrs. Rigley's real property assets escheated to the Chief Financial Officer of the State of Florida to be deposited in the State School Fund. The State of Florida's rights to the escheated estate would become absolute if no claim on the proceeds was made within 10 years of the State's receipt of payment.

Choice Plus, LLC (Choice Plus), is a private investigative company registered with the Department of Financial Services (DFS) as a claimant's representative for unclaimed property. In 2013, Choice Plus petitioned the probate court to reopen Mrs. Rigley's estate and to declare that 10 individuals who lived in Sweden were her beneficiaries and entitled to the escheated estate funds. Choice Plus attached a family genealogical chart and a researcher's report that referenced death and birth records.

The probate court reopened Mrs. Rigley's estate, determined that the 10 individuals were her beneficiaries, specified the share of the estate to which each beneficiary was entitled, and ordered the State of Florida to pay the escheated funds to the beneficiaries. Choice Plus was entitled to a large share of the escheated funds as the claimants' representative. Choice Plus then used DFS's required claim form to file a claim with DFS on behalf of the beneficiaries and submitted the beneficiaries' photo identification, a death certificate, certified copies of the probate court's order, and limited powers of attorney to act on behalf of the beneficiaries. DFS determined that Choice Plus's evidence was insufficient to establish the beneficiaries' entitlement to Mrs. Rigley's escheated estate funds and issued a Final Order denying the claims pursuant to chapter 717, Florida Statutes. Choice Plus appealed DFS's Final Order.

On appeal, Choice Plus argued that there was a difference between escheated funds held by DFS, which are governed by section 732.107, and unclaimed property, which is

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governed by chapter 717. The court agreed, noting that funds which escheat to the State pursuant to section 732.107 are distinct from the general unclaimed property held by the State as a custodian pursuant to chapter 717. Notably, the court held that the only part of chapter 717 that applied to escheated funds was section 717.124, Florida Statutes, which simply provides the process for filing a claim for unclaimed property, and does not require the claimant to prove entitlement to the funds. Thus, the court concluded that DFS erred by determining that escheated funds sent to the State pursuant to section 732.107 were also subject to the entirety of chapter 717. Although DFS has a duty to determine a claimant's entitlement to unclaimed property under chapter 717, escheated funds only revert to the State after a probate court determines that no beneficiaries to an estate exist. Moreover, the court noted that DFS improperly exceeded its authority by rejecting the probate court's order, raising separation of powers concerns by rejecting an Article V court's order. Had DFS wished to influence the probate court's determination of entitlement, it should have intervened in the probate court's proceedings. Thus, the court reversed DFS's Final Order and remanded the case to DFS with instructions to grant the claim.

Windstorm Insurance Rates—Citizens' Policyholders Cannot Seek Administrative Review of Final Orders Setting Rates and Cannot Challenge Rates Before They Are Applied

Fair Ins. Rates in Monroe, Inc. v. Office of Ins. Reg., 244 So. 3d 396 (Fla. 1st DCA 2018).

In 2016, Citizens Property Insurance Corporation (Citizens) submitted proposed windstorm insurance rates for residential and commercial properties in all Florida counties. The Office of Insurance Regulation (OIR), then began a process to establish Citizens' rates, which included a public hearing with the opportunity to comment. Fair Insurance Rates in Monroe, Inc. (FIRM), commented during the public hearing about concerns with the proposed rate increases. Following the public hearing, OIR approved Citizens' proposed windstorm rates for Monroe County by Final Order.

After OIR issued its Final Order, FIRM sent Citizens a letter pursuant to section 627.371(1), Florida Statutes, which allows persons aggrieved by a rating plan or system to request that Citizens recalculate the approved rates. Citizens responded to FIRM that OIR had set the rates for Monroe County, not Citizens, and thus, Citizens could not provide FIRM with the relief it sought. Citizens also responded that FIRM's challenge under section 627.371 was appropriate for rates or rate plans that have been applied, but not rates or rate plans that have merely been established.

FIRM then filed a complaint with OIR pursuant to section 627.371, raising the same arguments. OIR treated FIRM's complaint as an informal administrative proceeding under section 120.57(2), Florida Statutes. FIRM then filed a petition for formal administrative hearing under sections 120.569 and 120.57(1), Florida Statutes. Subsequently, OIR issued a Final Order dismissing FIRM's petition for a formal administrative hearing. OIR concluded that its earlier Final Orders establishing Citizens' rates were not subject to administrative challenges under sections 120.569 and 120.57. OIR also concluded that no disputed material facts existed and that FIRM had failed to provide any additional information that would demonstrate probable cause of a violation. FIRM appealed OIR's Final Order dismissing its petition for formal administrative hearing on both grounds.

First, the court agreed with OIR that Citizens' policyholders—and thus, entities that represent their interests, such as FIRM—did not have a point of entry to seek a formal administrative hearing challenging OIR's Final Orders establishing Citizens' rates. The court analyzed section 627.351(6)(n)1., Florida Statutes, and noted that although it expressly prohibited Citizens from challenging OIR's Final Orders establishing rates, it was ambiguous as to whether Citizens' policyholders could bring such challenges. Because section 627.351(6)(n)1. referred to "final orders," which are the conclusion of the administrative process (not the beginning), the court held that Citizens' policyholders were unable to raise a new administrative challenge upon the conclusion of OIR's administrative review of Citizens' proposed rates. The court also noted that the Legislature in 2007 amended the statute to remove a requirement that OIR first provide notice of intent to approve or disapprove Citizens' rates, which removed the point of entry for administrative review.

Second, the court also affirmed OIR's denial of FIRM's petition for formal administrative hearing on OIR's letter finding no probable cause of a violation under section 627.371. The court, however, reached this decision on alternate grounds, concluding that FIRM had failed to assert a cognizable claim because it was challenging OIR's establishment of Citizens' rates, not Citizens' application of those rates to its policyholders. The court noted that section 627.371(1) explicitly stated that an aggrieved person could challenge rates, rate plans, and rate systems that had "been applied with respect to insurance afforded her or him." The court held that FIRM's challenge was premature because Citizens had not yet applied the rates to insurance afforded to FIRM's members. Thus, the court affirmed OIR's Final Order denying FIRM's request for a formal administrative hearing.

Gigi Rollini *is a shareholder with Stearns Weaver Miller, P.A., in Tallahassee, and was assisted by student intern Jaclyn Weinell.*

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

Law School Liaison

Fall 2018 Update from the Florida State University College of Law

by David Markell, Steven M. Goldstein Professor

Fall 2018 Events

The College of Law will be hosting a full slate of environmental and administrative law events and activities this upcoming fall semester, with more to be announced.

Hog Farming: Past, Present, and Future

This panel discussion, organized by Professor Shi-Ling Hsu, will explore issues surrounding hog farming. Participants include Kelsey Eberly, Staff Attorney, Animal Legal Defense Fund; Justin Marceau, Professor and Animal Legal Defense Fund Professor of Law, University of Denver Sturm College of Law; Laurie Ristino, Director, Center for Agriculture and Food Systems, Associate Professor of Law, Vermont Law School; and Kelly Zering, Professor and Extension Specialist, College of Agriculture and Life Sciences, North Carolina State University. This panel will be held on Wednesday, October 3, 2018, at 3:15 p.m. in room 310.

Fall 2018 Environmental Distinguished Lecture

Nina Mendelson, Joseph L. Sax Collegiate Professor of Law, The University of Michigan Law School, will present our fall 2018 Environmental Distinguished Lecture. Professor Mendelson's lecture will begin at 3:30 p.m. on Wednesday, October 24, 2018, in room 310 and will be followed by a reception in the College of Law Rotunda.

Environmental Law Certificate Lecture

Christine Klein, Chesterfield Smith Professor, University of Florida Research Foundation Professor, Director, LL.M. Program in Environmental & Land Use Law, University of Florida Frederic G. Levin College of Law, will present an environmental law certificate lecture this fall. Professor Klein's lecture will begin at 12:30 p.m. on Wednesday, November 7, 2018, 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.

Agency Snapshot: Office of the Florida Auditor General

by Paula Savchenko

Background

The Office of the Auditor General ("Office") was established in 1969, and has served as the State of Florida's independent auditor ever since. Before the Office came into existence, the Florida Legislature provided for an audit function starting in1845, from the time Florida became a state. The Florida Legislature has modified the Office's authority, duties, and responsibilities several times since it came into existence. However, the core purpose of serving as the independent auditor for the State of Florida has remained unchanged. The Auditor General is appointed by and serves at the pleasure of the Legislature.

As a result, the Auditor General is considered a legislative position. However, the Auditor General has no input in the lawmaking process. The Office's duties include conducting financial audits of state agencies, universities, school boards, and local governments. Typically, the Office is instructed on where to best allocate its time and resources by the Legislature. The purpose of the audits are to evaluate agencies' financial resources and internal controls, and determine whether assets are properly safeguarded. Further, the Office may perform technology audits of state IT systems and data centers.

Auditor General

Article III, section 2, of the Florida Constitution requires the Legislature to appoint an Auditor General to serve at the pleasure of the Legislature. The Auditor General is appointed by a majority vote of the Joint Legislative Auditing Committee, a joint body comprised of five representatives and four senators. The Auditor General must then be confirmed by both chambers of the Legislature. Further, the Auditor General may be terminated at any time by a majority vote of both Legislative chambers.

The current Auditor General is Sherrill F. Norman. Ms. Norman was sworn in on July 2, 2015, and she is the first female Auditor General in Florida's history. State law requires that the Auditor General have at least 10 years of experience in accounting or auditing and have been a certified public accountant in Florida for the same amount of time. The laws governing the Auditor General's duties and powers are outlined in section 11.42, Florida Statutes.

General Counsel

Bruce Jeroslow

Audit Manager

Jennifer Blanca, Quality Control and Professional Practice

Deputy Auditor Generals

Marilyn Tenewitz, Information Technology Audits
Greg Centers, Educational Entities and Local Government Audits
Matthew Tracy, State Government Audits

Hours of Operation

8:00 a.m.-5:00 p.m. Monday-Friday

Headquarters Address and Contact Information

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Public Records Custodian

Bruce Jeroslow, General Counsel
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Administrative Law Section

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

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

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

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

RULE CHALLENGES
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Medical Cannabis Act, creating section 381.986, Florida Statutes. The law granted DOH the power to adopt rules necessary to implement the law. *See* § 381.986(5)(d), Fla. Stat. (2014). Further, DOH was required to grant five nurseries licenses to dispense medical marijuana, one for each region in the state. *See* § 381.986(5)(b), Fla. Stat. (2014). The Office of Compassionate Use ("OCU"), now referred to as the Office of Medical Marijuana Use ("OMMU"), came into existence as the entity within DOH that would oversee the licensing and other portions of the implementation of the statute. DOH then promulgated rules under which a nursery could apply for a DO license, now referred to as MMTC license.[1] Together, these laws and rules laid out the medical marijuana licensing scheme. In the 2015 application cycle, DOH received a total of 28 and scored 26 applications for DO licenses.[2] Then, in 2016, a proposed constitutional amendment passed by 71.3%, which broadened the scope and use of medical marijuana in Florida, and granted DOH rulemaking authority under the Florida Constitution.[3]

This article will zero in on the administrative law experiences of four applicants in their fight to attain the coveted MMTC licenses, with a focus on the rule challenge issues in each case.

2015 Application Cycle - *Plants of Ruskin, Inc. and Tornello Landscape Corp d/b/a 3 Boys Farm v. Department of Health*

Before DOH even began accepting applications, several nurseries challenged DOH's proposed rules, under section 120.56(2)(a). *See Plants of Ruskin, Inc., v. Dep't of Health*, Case No. 14-4299RP (Fla. DOAH Mar. 26, 2015).[4] The petitioners challenged DOH's proposed rule regarding the selection of DOs by a lottery system, along with other portions of the proposed rule. The petitioners claimed the proposed rule was an invalid exercise of delegated legislative authority. Ultimately, the petitioners voluntarily dismissed their challenges before proposed final orders were filed, as DOH withdrew the proposed rule.

In the 2015 application cycle, to apply for one of the initial DO licenses, a nursery was required to submit its application on or before July 8, 2015.[5] Five months later, each applicant received a letter notifying them that they either were the highest scoring applicant in the region, and as a result would receive one of the coveted DO licenses, or that they were not the highest scoring applicant and as a result, were denied a license. From here, lawsuits erupted as each applicant believed it was best qualified to serve the growing Florida medical marijuana market.

Plants of Ruskin ("Ruskin") and Tornello Landscape Corp., d/b/a 3 Boys Farm ("Tornello"), were among the many applicants that were denied licenses in the 2015 application cycle. In response, Ruskin and Tornello filed separate chapter 120 petitions as they both took issue with the method by which DOH scored their applications. *See Plants of Ruskin, Inc. v. Dep't of Health,* Case Nos. 15-7270, 17-0116 (Fla. DOAH May 23, 2017); *Tornello Landscape Corp., d/b/a 3 Boys Farm v. Dep't of Health*, Case Nos. 15-007272, 17-00117 (Fla. DOAH May 23, 2017). The applicants claimed that DOH's scoring method was arbitrary and capricious because its scoring procedures did not mirror the applicable rules and law, as it appeared DOH ranked as opposed to scored their applications. The nurseries claimed they should have received a much higher score and would have received a license if the scoring was done properly. The two cases were consolidated at the Division of Administrative Hearings ("DOAH").

After the applicants filed proposed recommended orders but before the ALJ issued a Recommended Order, the parties filed a Joint Request for Relinquishment of Jurisdiction, "due to settlement."[6] The following day, an order was entered closing the files and returning the cases to DOH. Then, DOH attempted to settle the case by offering a license to only one of the parties involved.[7] As the parties had both already fought for months over the coveted license spots, neither was willing to give up. Once DOH realized that the parties could not come to an agreement, it sent the case back to DOAH, with a Notice explaining "[a]lthough the Department was willing to issue one additional license in hopes of settling the matter, the parties were unable to come to an agreement."[8] Ultimately, the ALJ issued a Recommended Order finding that both nurseries should be granted licenses.[9] The ALJ also found that if it was not possible to grant both applicants licenses, then the license should be granted to Tornello because it scored slightly higher under his scoring method.

In the Recommended Order, the ALJ found that DOH's scoring method was arbitrary, capricious, and an abuse of discretion because it did not give points to specific criteria, did not use an external benchmark for scoring, and compared nurseries instead of scoring individually, making the scoring method inconsistent with the applicable rules and law.[10] More specifically, the ALJ agreed with the petitioners that DOH's rules provided that the reviewers were to score the applications but the reviewers instead ranked the applications within each region as they were instructed to do by a memorandum dated September 15, 2015, which was directly inconsistent with the rules and law, and was not incorporated by reference into the rules.[11] In the memorandum, DOH informed the reviewers that the scoring of the applications was to be comparative and instructed the reviewers to compare each application to the others within the same region, and assign a number value, highest to lowest, for the best to worst responses to each subsection.[12]

Subsequently, the cases settled and both nurseries received MMTC licenses. The nurseries submitted affidavits documenting their compliance with the applicable rules and law and in exchange, DOH agreed to grant each nursery a license to operate as a DO.[13] Even though the cases settled, DOH still felt compelled to issue a Final Order.[14] In its Final

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Order, DOH rejected parts of the Recommended Order, specifically those relating to DOH's scoring method.[15]

2017 Application Cycle - *Keith St. Germain Nursery Farms and Nature's Way Nursery of Miami, Inc. v. Department of Health*

During the 2017 special legislative session, section 381.986 was significantly amended to establish a licensing protocol for 10 new MMTCs by October 3, 2017.[16] This amendment instructed DOH to issue licenses to 10 MMTC applicants that met the following four criteria: (1) prior application; (2) litigation or ranking within one point of the regional licensee; (3) compliance with the law; and (4) documentation of operational capacity within 30 days.[17]

Under the 2017 amendment, the applicants' individual scores became relevant. The floodgates opened to not only additional licenses, but also, lawsuits that challenged DOH's scoring method again. This time, the lawsuits came in a hybrid form of challenges to agency action, unadopted rule challenges, and emergency rule challenges. Under the amendment, a spotlight was placed on DOH's decision to carry out the scores to the fourth decimal place, as opposed to rounding.

After the statutory amendment, several nurseries informed DOH that they met the criteria listed above; however, DOH again denied several of these nurseries' requests for licenses. Again, DOH was caught in the crossfire from applicants that believed their scores were incorrect to begin with and now were again denied licenses they believed they should have been granted. From here, additional issues came to light regarding DOH's scoring method.

Keith St. Germain Nursery Farms ("KSG") and Nature's Way Nursery of Miami, Inc. ("Nature's Way"), challenged DOH's actions claiming that the "ranking" as opposed to "scoring" method previously used in the 2015 application cycle amounted to an unadopted rule. *See Keith St. Germaine Nursery Farms v. Dep't of Health*, Case No. 17-5011RU (Fla. DOAH Oct. 31, 2017). Additionally, the petitioners also claimed that DOH operated under an unadopted rule in carrying out the scores to the fourth decimal place (as opposed to rounding), as nothing in the rules or law gave DOH the authority to do so. KSG also filed a petition and began its fight for licensure before Nature's Way intervened in the case.

During the pendency of KSG's unadopted rule challenge, DOH adopted emergency rule 64ER17-3. This emergency rule attempted to outline the method by which DOH "ranked" as opposed to "scored" the applications in the 2015 application cycle. Further, DOH attempted to codify for the first time its scoring method in carrying out the scores to the fourth decimal point and apply it retroactively. After adopting emergency rule 64ER17-3, DOH's agency clerk entered an order purporting to determine that the unadopted rule challenge was moot and suggested that DOAH had no jurisdiction over the case. DOH then filed notice of its Order Clarifying Jurisdiction and renewed its Motion to Dismiss. DOH also filed a Motion to Dismiss for Mootness. The ALJ denied both motions.

The emergency rule shifted KSG's unadopted rule challenge to an emergency rule challenge. KSG filed a petition claiming that emergency rule 64ER17-3 enlarged, modified, or contravened the statute implemented, in that it attempted to define "one point" as consisting of a number carried out to four decimal points. *See Keith St. Germaine Nursery Farms v. Dep't of Health*, Case Nos. 17-5447RE (Fla. DOAH Oct. 31, 2017).

Soon after, KSG was granted its license through a settlement agreement and Nature's Way went on in its fight for licensure. Nature's Way filed three separate challenges to DOH's actions/rules: (1) a challenge to DOH's denial of licensure; (2) an unadopted rule challenge; and (3) an emergency rule challenge. *See Nature's Way Nursery of Miami, Inc. v. Dep't of Health*, Case Nos. 17-5801RE, 18-0720RU, 18-0721 (Fla. DOAH June 15, 2018). DOH later adopted emergency rule 64ER17-7, which superseded 64ER17-3. Nature's Way successfully challenged the validity of this emergency rule as the ALJ issued a Final Order determining the rule was invalid. The ALJ found that emergency rule 64ER17-7(1)(b)-(d) constitutes an invalid exercise of delegated legislative authority, and the policies upon which DOH based its scoring of applicants in the 2015 application cycle constituted unadopted rules. DOH has appealed the ALJ's decision to the First District Court of Appeal.[18]

Although the three aforementioned cases were consolidated, an order was entered severing Case No. 18-721 before the ALJ issued Recommended and Final Orders. The ALJ issued a Recommended Order determining that Nature's Way met the "within one point" condition of eligibility for licensure and as a result, recommended that the nursery should be granted an MMTC license. On July 13, 2018, DOH issued a Final Order coupled with a settlement agreement indicating that Nature's Way was granted an MMTC license, but also rejecting all of the findings in the ALJ's Recommended Order. Further, in the settlement agreement, incorporated by reference in the Final Order, Nature's Way gave up its right to appeal the Final Order.

The KSG and Nature's Way cases were very interesting for many reasons. One point of interest was DOH's attempt to disqualify the ALJ assigned to the case based on what he had said or done in other cases.[19] Specifically, DOH attacked the ALJ's analysis in the *Plants of Ruskin* case where the ALJ stated that DOH fundamentally erred in ranking as opposed to scoring applications.[20] In determining whether a judge should be disqualified, it is the duty of the judge against whom an initial motion to disqualify is made to determine such motion.[21] Ultimately, the ALJ did not disqualify himself.

2018 Application Cycle

As DOH is currently gearing up for the next application cycle, its proposed rules have already been

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challenged. One challenge is directed to DOH's proposed rule for a supplemental licensing fee for MMTCs in the amount of $174,844.08. DFMMJ Investments, LLC (also known as "Liberty Health Sciences"), challenged this rule and a proposed rule regarding variance procedures for MMTCs. Soon after, DOH withdrew both proposed rules before proposed final orders were filed. As a result, the proposed rule challenges were voluntarily dismissed. *See DFMMJ Investments, LLC v. Dep't of Health,* Case Nos. 18-3247RP and 18-3246RP (Fla. DOAH July 20, 2018).

Another proposed rule challenge that has received a lot of attention is a challenge to DOH's proposed rule to implement the statutory preference for applicants that own facilities formerly used for processing citrus. *See* § 381.986(8)(a)3, Fla. Stat. (2018). Louis Del Favero Orchids, Inc. ("Del Favero"), challenged DOH's proposed rule under the following grounds: (1) the proposed rule enlarges, modifies, or contravenes the statute because the statute uses the word "facility" and the rule uses the word "property"; (2) the proposed rule's point system to evaluate MMTC applicants is arbitrary and capricious, and grants unbridled discretion to DOH; and (3) 35 points is an insufficient amount of points to give a citrus-preferred applicant to become preferred over a non-citrus-preferred applicant. Mecca Farms, Inc., intervened and agreed with Del Favero's second and third challenges to the rule, while siding with DOH on the first challenge to the rule. The ALJ issued a Final Order declaring the proposed rule to be an invalid exercise of delegated legislative authority. The ALJ upheld the portions of the rule relating to the second and third challenge, but declared the facility versus property language used to be invalid. *See Louis Del Favero Orchids, Inc., Dep't of Health*, Case No. 18-2838RP (Fla. DOAH Aug. 6, 2018).[22]

Conclusion

As the legalization of medical marijuana is fairly new to Florida, it has been a trial and error process for all parties involved. If the past is telling of the future, the fight for MMTC licenses is far from over when both sides are trying to tackle this new area of state law. It is imperative for applicants and their attorneys to determine their strategies from early on, far before the application cycle begins. Many believe it is best to litigate and challenge proposed rules before DOH even begins accepting applications. Others believe it is better to hold off, hope for the best, and only litigate in the event of a denial. When deciding which strategy works best for you and your client, it is important to keep in mind that each time the proposed rules are challenged, this pushes back DOH's ability to finalize these rules and ultimately begin taking applications for the next round.

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Endnotes:

1 *See* Fla. Admin. Code R. 64-4.002 (June 17, 2015).

2 *See* OMMU Dispensing Organization Applications Chart, OMMU November 2015 Aggregated Score Card; *Nature's Way Nursery of Miami, Inc., v. Dep't of Health*, Case Nos. 17-5801RE, 18-0720RU at ¶ 157 (Fla. DOAH June 15, 2018).

3 *See* Art. X § 29, Fla. Const.

4 There were a total of five petitioners in this case as several parties intervened: Plants of Ruskin, Inc.; Costa Farms, LLC; Florida Medical Cannabis Association, Inc.; Tree King-Tree Farm, Inc.; and Tornello Landscape Corp.

5 *See* Fla. Admin. Code R. 64-4.002(5).

6 *See Tornello Landscape Corp.,* Case No. 15-7272, Joint Request for Relinquishment of Jurisdiction (Dec. 6, 2016), and Order Closing Files and Relinquishing Jurisdiction (Dec. 7, 2017).

7 *See Tornello Landscape Corp.*, Case No. 15-7272, Notice (Jan. 6, 2017).

8 *Id.*

9 *See Plants of Ruskin, Inc.,* Case Nos. 17-0116, 17-0117 (Fla. DOAH May 23, 2017).

10 *See id.* at ¶¶ 19-43.

11 See *id.*

12 *See id.*

13 *See Plants of Ruskin,* Case Nos. 17-0116, 17-0117, Settlement Agreement (July 31, 2017).

14 *See Plants of Ruskin,* Case Nos. 17-0116, 17-0117 (DOH Final Order Aug. 22, 2017).

15 *See id.*

16 *See* Ch. 2017-232, Laws of Fla.

17 *See id.*

18 The case is proceeding at the First District Court of Appeal under Case No. 1D18-2929.

19 *Keith St. Germaine Nursery Farms*, Case No. 17-5011RU, The Department's Notice to Agency Clerk of Filing Request to Disqualify ALJ and to Reassign Case (Oct. 10, 2017).

20 *See id.*

21 *See* Fla. R. Jud. Admin. 2.330(f).

22 The decision may be inconsequential, if a circuit court's initial ruling in an order issued August 2, 2018, denying a motion for temporary injunction is sustained. In *Florigrown, LLC v. Department of Health*, Case No. 2017CA002549, Second Circuit Judge Charles W. Dodson found a substantial likelihood that the plaintiffs would prevail in the case to declare the citrus preference unconstitutional.

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