

The Maryland State Bar Association

Section of Administrative Law

Newsletter

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REPORT FROM THE CHAIRPERSON

I have now completed my one year term as Chair of the Administrative Law Section. Although the year began slowly because I missed the MSBA orientation meeting for new Section Chairs, we picked up speed during the year and the Section had an eventful year.

As usual, our year culminated in our educational session at the MSBA Annual Meeting in Ocean City. We produced a special educational session this year under the able leadership of Section Council Member Jack Gohn entitled, "Young Drivers, Alcohol and Consequences: the Human Side." Although we strayed from our more traditional educational session, we were pleased and honored to present the MSBA premiere of *Branded, DUI*, a movie that was produced this year by Section Council Member and Administrative Law Judge Yvette Diamond in a joint effort of the Administrative Law Section and the Maryland Office of Administrative Hearings.

The movie explores, through the words and thoughts of the young people involved, the impact of drunk driving arrests and convictions upon their lives. After watching this powerful movie, the audience was treated to a panel discussion from some of the legal professionals involved in these dramatic and life altering legal proceedings. It was an important session for young drivers, parents of young drivers, parents of children who will become young drivers, and anyone else who regularly shares the road with young drivers. We were honored to have on our panel Thomas Dewberry, Chief Judge of the OAH; Retired Chief Judge James N. Vaughn of the Maryland District Court; John P. Kudel, Esq., private practitioner (and Treasurer of the Association); Lawrence Wescott II, Esq., Deputy Administrator of the MVA; and Roxanne Langford, Division Manager of the Administrative Adjudication Division of the MVA.

Finally, at the business meeting of the MSBA on Saturday, June 17, I was honored to accept on behalf of the Section and Yvette Diamond, the Presidential Best Section Award for Service to the Community for *Branded, DUI*.

The Section Council was busy this year with other events as well. The January/February Issue of the Maryland Bar Journal was devoted to Administrative Law. Members of our Section contributed 10 separate articles on administrative law for this issue. Members of our Section Council spoke to students at both the University of Maryland Law School and the University of Baltimore Law School about careers in administrative law during the year. We produced a Spring Dinner Meeting this April that consisted of a good natured roast in honor of Assistant Attorney General Robert A. Zarnoch for his years of dedicated service to the Administrative Law Section and the MSBA. The audience was treated to the collective barbs of a "stellar" list of distinguished speakers. The Subcommittee was surprised at how easy it was to sign up a long list of distinguished attorneys and public officials who wanted to throw some verbal missiles at Bob.

I would like to take this opportunity to thank Paul Carlin and the staff at the MSBA for making my term as Chair much easier than I expected. The MSBA staff was always responsive to my various requests and never once laughed at me. I am not a natural volunteer, and, consequently, I stepped into this role with some reluctance. Thanks to the hard work and friendliness of my colleagues on the Section Council, I can report that I enjoyed my year as Chair. I recommend this experience to any of you who may get this type of opportunity in the future. Finally, I want to welcome our new Chair, Michele McDonald. We are all looking forward to an exciting year under her able leadership. In the words of the immortal Groucho Marx, "outside of the improvement, you'll never notice the difference."

Robert H. Drummer
Chair

Albert S. v. Department of Health and Mental Hygiene,

166 Md.App.6, 891 A2d 402 (2006)

By Sandra T. Brushart

Very poor and ill adults who are in desperate need of medical care are now guaranteed a final determination of their eligibility for health insurance under the Medicaid (also known as Medical Assistance) program at the administrative hearing level. In a published Opinion, Judge Hollander found that the Administrative Law Judge (ALJ) had failed to make a determination of Albert S's eligibility for Medical Assistance as required by federal and state law. (42 C.F.R. § 431.244; COMAR 10.01.04.08 A)

At the administrative hearing, which was held ten months after Mr. S's initial application for Medical Assistance, the Appellant presented new medical evidence and testimony to support his eligibility. At age 47, after working for 21 years, Albert S. was unable to support himself due to an unhealed injury to his right ankle, a burn that immobilized his left hand, hypertension, uncontrolled diabetes, arthritis and depression. The ALJ remanded the case back to the State Review Team (SRT), which had made the initial determination of ineligibility, with the instruction to consider the additional medical evidence presented at the hearing. This delayed the decision on Mr. S's eligibility for greatly needed medical care by several months.

Mr. S. appealed to the Board of Review of the Department of Health and Mental Hygiene, which affirmed the ALJ's decision to remand the case to the SRT. The Department of

Health and Mental Hygiene (DHMH) agreed that it was an error of law for the ALJ to remand the case to the SRT for a new determination. However, DHMH Counsel argued that the case was moot because Albert S. had received medical assistance in the interim. Judicial review of the Board's decision was sought in the Circuit Court for Baltimore County. Judge Finifter dismissed the appeal as moot.

Judge Hollander reached a decision on the merits of the case because, *inter alia*, the Court found that the matter involved a reoccurring issue of great public importance that evades review but affects many public benefits applicants. The case established a rule for future conduct, as there was no reported decision in Maryland that had addressed the issue presented.

"[O]ur opinion will help to educate counsel as well as the ALJ" (Opinion at page 22)

As a result of Albert S., Medical Assistance applicants, vulnerable individuals who may have to delay or forego necessary medical care or sacrifice necessities like food and rent to pay for medical care, are able to go before an ALJ, who will determine, based upon all the evidence and testimony introduced at the hearing, whether or not that person is disabled in accordance with the federal SSI disability standards.

Recent Attorney General Opinions of Note to Administrative Lawyers

CHILD CUSTODY AND SUPPORT – VEHICLE LAWS – LICENSING – EXTENT OF AUTHORITY TO SUSPEND DRIVER'S LICENSE FOR FAILURE TO PAY CHILD SUPPORT

When an individual, typically a non-custodial parent, is delinquent in making child support payments, a statute authorizes the Child Support Enforcement Administration ("CSEA") of the Department of Human Resources ("DHR") to notify the Motor Vehicle Administration ("MVA") of the delinquency, requires the MVA to suspend the individual's driving privileges, and permits the MVA to issue a work-restricted driver's license to the individual.

Question 1: If the individual continues to fail to make court-ordered child support payments, may CSEA request the MVA to revoke the individual's work-restricted license?

Answer: No. The relevant statutes do not authorize CSEA to seek revocation of a workrestricted license. The General Assembly has authorized suspension of driving privileges of a non-custodial parent who fails to make child support payments, but has provided for the issuance of a work-restricted

license to ensure that the individual may maintain employment and earnings from which the child support arrearage could be recovered. Even if the individual remains delinquent after suspension of his or her license and the issuance of a work-restricted license, CSEA has other remedies to recover child support from that income stream, such as an earnings withholding order directed to the individual's employer.

Question 2: If the CSEA has such authority, must it seek revocation in all such cases or does it have discretion not to take action in a particular case?

Answer: Because CSEA does not have authority to seek revocation of a work-restricted license, we need not address the second question. 91 *Opinions of the Attorney General* 81 March 31, 2006

(continued on page 4)

PUBLIC INFORMATION ACT FAQ # 37

June/July 2006

PIA FAQ 2006 Legislation

Did the Legislature amend the Public Information Act during its 2006 session?

Yes. The General Assembly passed House Bill 1625, which became Chapter 412 of the Laws of Maryland 2006 upon receiving the Governor's signature. (The Legislature also passed the crossfiled Senate Bill 1040, which the Governor vetoed as duplicative).

The 2006 legislation amended the PIA to restrict the disclosure of certain categories of information about individuals who have a disability or who are "perceived to have a disability." It essentially created a new exemption for personal information related to such individuals and modified existing exemptions that relate to medical information and information concerning individual licensees. For this purpose, it incorporated into the PIA the definition of "disability" set forth in the State's anti-discrimination law relating to housing. New SG §10617(b)(1).

Personal Information about Individuals with Disabilities.

First, a custodian of public records must now deny inspection of any part of a record that contains "personal information" about an individual who has a disability or is perceived to have a disability. New SG § 10617(b)(2)(ii). "Personal information" is defined in SG § 10611(f) and includes such things as an individual's address, driver's license number or any other identification number, medical or disability information, name, photograph or computer generated image, Social Security number, or telephone number.

However, the legislation also provided that the existing PIA exemption relating to medical and psychological information, as well as the new exemption relating to personal information about individuals with a disability, do not apply to nursing homes or assisted living programs. New SG § 10617(b)(4). This provision raises some interpretive issues, as it might be suggested that it effectively requires disclosure of information that was previously confidential under the PIA. The Attorney General's bill review letter suggested that the Legislature clarify its intention in carving out nursing homes and assisted living programs from those exemptions.

Licensing Records: Home Address of Individual with a Disability. A second aspect of the 2006 legislation concerns the exemption that relates to licensing records. Currently, the PIA generally prohibits a custodian from disclosing records that contain "information about the licensing of an individual in an occupation or profession." SG § 10617(h).

Examples of such licensing records include those related to investment advisers, architects, nurses, and other occupations and professions. However, that exemption is subject to certain qualifications. A custodian is to permit inspection of certain basic information about the individual licensee name, business address (or home address, if no business address is available), business telephone number, educational and occupational background of the licensee, professional qualifications, disciplinary orders, and evidence provided to the licensing agency to meet financial responsibility requirements. SG § 10617(h)(2). A custodian may permit inspection of other information about licensees if it finds a "compelling public purpose" and incorporates that determination in its regulations. SG § 10617(h)(3). Finally, a "person in interest" usually the licensee himself or herself is generally entitled to inspect his or her own licensing records. SG § 10617(h)(4).

The 2006 legislation limits the information that would previously be available about the home address of the licensee if there is information in that record that indicates that the address is also the home address of an individual with a disability. New SG § 10-617(h)(2)(ii). On its face, this provision appears to apply to situations where the licensee or members of the licensee's household have a disability and that fact is reflected in the licensing records. The Attorney General's bill review letter suggested that the Legislature should clarify its purpose in this amendment as well.

The *OAG PIA Manual* contains a comprehensive discussion of the statute, sample letters, model regulations on the PIA, a list of Attorney General Opinions and suggested procedures for responding to PIA requests.

To obtain a copy, email Kathy Izdebski at kizdebski@oag.state.md.us.

If you wish to add your name to the OAG PIA EMail Group for those handling PIA issues, please contact dpanaqeotou@oag.state.md.us.

In general, direct your PIA questions to the Opinions and Advice Unit: bmcdonald@oag.state.md.us or wvarga@oag.state.md.us

EDUCATION – PUBLIC SCHOOLS – AUTHORITY OF LOCAL BOARD TO ENTER INTO TRANSACTION INVOLVING LONG TERM LEASE OF SCHOOL PROPERTY FOR COMMERCIAL USE

Question: May the Board of Education of Harford County (the “Board”) lease real property owned by the Board to a private corporation for a 99-year term in return for a \$500,000 cash payment and certain real property in fee simple?

Answer: In an opinion dated November 22, 2005, the General Counsel for the Board (“Board”) concluded that the Board does not have such authority. We have reviewed Board Counsel’s opinion and agree with his analysis and conclusion. *91 Opinions of the Attorney General 33*
January 30, 2006

MENTAL HEALTH – HEALTH CARE DECISIONS ACT – CIRCUMSTANCES UNDER WHICH MENTAL HEALTH FACILITY MAY ACCEPT AN INDIVIDUAL FOR VOLUNTARY ADMISSION AT THE REQUEST OF THE INDIVIDUAL’S HEALTH CARE AGENT

Question: Can a facility that provides treatment for individuals with mental disorders accept an individual for voluntary admission at the request of a health care agent for the individual?

Answer: A facility that provides treatment for individuals with mental disorders may accept an individual for voluntary

admission at the request of a health care agent for the individual if: (1) the health care agent is acting within the scope of his or her authority under a then-effective advance directive; (2) the health care agent will monitor the circumstances of the patient’s course of treatment so as to be able to exercise judgment about the patient’s retention or release; and (3) the patient does not express disagreement with the voluntary admission. *91 Opinions of the Attorney General 3*
January 12, 2006

TRANSPORTATION – MASS TRANSIT ADMINISTRATION

Question: Would §§7-902 and 7-506 of the Transportation Article, Annotated Code of Maryland, preclude the Mass Transit Administration from closing the Boyd and Dickerson MARC train stations because it would constitute a reduction in the levels of service that were established in the 1981 and would require notice of the closing of these stations.

Answer: The closing of these two stations does not constitute a reduction in the levels of service and the mandatory notice provision does not apply to the closing of MARC stations.

*Letter to
Delegate Brian Feldman
February 10, 2006*