ADMINISTRATIVE LAW SECTION NEWSLETTER

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The New Role of a Statement of Estimated Regulatory Costs in the Rulemaking Process[1]

by Fred R. Dudley

Introduction and Definitions:

Effective July 1, 2008, a new statutory provision was added in the administrative rulemaking adoption process: inclusion of a "mandatory" Statement of Estimated Regulatory Cost ("SERC"), "if the proposed rule will have an impact on small business." It is critical that each agency subject to the rulemaking requirements in Chapter 120, Florida Statutes, comply with this new provision.[2]

For purposes of this new law, "small business" is defined in section 288.703(1)[3], as follows:

> (1) "Small business" means an independently owned and operated business concern that employs 200 or fewer permanent full-time employees **and** that, together with its affiliates, has a net worth of not more than $5 million **or** any firm based in this state which has a Small Business Administration 8(a) certification. As applicable to sole proprietorships, the $5 million net worth requirement shall include both personal and business investments.

(Emphasis added.)

From this definition, several observations can be made. First, the type of business organization, whether sole proprietorship, partnership, corporation, limited liability company or

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From the Chair

by Seann M. Frazier

Since 1976, The Florida Bar has published its Florida Administrative Practice Manual. Over the years, the Manual has been revised and republished, most recently in 2004 when the seventh edition of this valuable resource was issued. As a result of tireless work by many, the Florida Administrative Practice Manual's eighth edition has now been published. Through leadership provided by a Steering Committee comprised of Administrative Law Judge ("ALJ"), Linda Rigot and former ALJ, T. Kent Wetherell, II (now serving as an appellate judge with the First District), the Manual has been updated and once again provides a current and very useful resource for administrative law practitioners. The Manual covers a wide variety of subjects and even some particular regulated areas "substantially affected" by administrative law (pardon the pun).

The book begins with a chapter concerning the administrative process and constitutional principles by ALJ, Charles Stampelos, which is then followed by an overview of the Administrative Procedure Act submitted by Scott Boyd, General Counsel of the Joint Administrative Procedures Committee of the Florida Legislature.

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There are also informative chapters concerning other basic tenets of the Administrative Procedure Act, such as rule adoption and review (by DEP's Francine Ffolkes), Administrative Adjudication (by Steven Pfeiffer and Brent Spain), Informal Hearings (by ALJ, Li Nelson), Judicial Review (by Elizabeth McArthur and Donna Blanton), and Attorneys Fees and Costs Awards (by Stephen Emmanuel).

The Florida Administrative Practice Manual also provides a review of substantive areas of law. A chapter on Professional and Occupational Licensing was authored by Ed Bayó and John Rimes. With Craig Smith's help, I provided a chapter concerning Florida health care facility and clinic regulation, including certificate of need processes and litigation. A comprehensive chapter was also provided by Ralph DeMeo, Susan Stephens, Winston Borkowski, Vinette Godelia and Doug Smith regarding the broad topic of environmental agencies including the Department of Environmental Protection, the Department of Community Affairs and the Florida Fish and Wildlife Conservation Commission. Mark Holcomb provided a less than taxing chapter on the Department of Revenue. Patrick Wiggins and Teresa Lee Neng Tan authored a utilitarian chapter on the Public Service Commission. Finally, Mary Piccard Vance and Ed Lombard offered guidance on bid dispute resolution.

I encourage all of our members to purchase the Manual. It serves as another work in a continuing series of publications from The Florida Bar designed to aid lawyers to practice more efficiently and effectively. The Manual has always been a tremendous resource for APA practitioners. This latest edition, due to the countless hours of research and authorship, provides an updated review of the law that only increases the Manual's value.

Florida Administrative Practice, 8th Edition with CD-ROM is available through LexisNexis at http://www.lexisnexis.com/store/catalog/booktemplate/productdetail.jsp?pageName=relatedProducts&prodId=13234.

APPELLATE CASE NOTES

by Mary F. Smallwood

Adjudicatory Proceedings

Hallendy v. Florida Atlantic University, 16 So. 3d 1057 (Fla. 4th DCA 2009) (Opinion filed September 16, 2009)

Hallendy sought resident status in Florida to qualify for in-state tuition. The Residency Appeals Board of Florida Atlantic University denied her that status finding that she had moved to Florida from Michigan to attend college in 2004, did not own property or a vehicle in the state, worked only part time, and had only obtained a Florida driver's license a month before applying for resident status. The Appeals Board found that her residency was only incidental to her enrollment in college.

On appeal, the court affirmed the decision. It held that there was competent substantial evidence to support the Appeals Board's decision. The court noted that Rule 1009.21(2)(a)2., Fla. Admin. Code, requires that an applicant for residency demonstrate that it is for the purpose of maintaining a bona fide domicile rather than maintaining a temporary residence incident to enrollment in college.

The court distinguished the case of *Lindsey v. Board of Regents*, 629 So. 2d 941 (Fla. 1st DCA 1993), where an out-of-state law student was granted residency status. In the *Lindsey* case, the Board of Regents had impermissibly required that Lindsey establish that she had an independent reason for moving to the state. The court reversed on the grounds that neither the statute nor the rule contained that requirement.

Licensing

Aleong v. Department of Business and Professional Regulation, 16 So. 3d 190 (Fla. 4th DCA 2009) (Opinion filed August 5, 2009)

Aleong, a veterinarian, was disciplined by the Department of Business and Professional Regulation for violations of regulatory requirements involving treatment of a horse. Initially, the Department had denied Aleong a hearing when he failed to file an Election of Rights form. That determination was upheld on appeal, but the court remanded the case for a determination of an appropriate penalty, holding that the Department had imposed penalties exceeding those allowed by statute.

Aleong v. Department of Business and Professional Regulation, 963 So. 2d 799 (Fla. 4th DCA 2007).

On remand, the Board of Veterinary Medicine determined that the original penalty was appropriate, finding that Aleong had two prior actions against his license, that one was for the same violation alleged in this case (failure to maintain records), that he had failed to timely comply with a prior order of the Board, and that he was on probation at the time this matter came before the Board.

Aleong appealed the final order. On appeal, the Department admitted that it was in error about Aleong being on probation at the time of the Board considering this matter. The court, however, upheld the penalty, noting that he had previously been on probation and that was a legitimate factor for the Board to consider.

Rulemaking

Lamar Outdoor Advertising-Lakeland v. Department of Transportation, 17 So. 3d 799 (Fla. 1st DCA 2009) (Opinion filed August 9, 2009)

Lamar Advertising challenged Rule 14-10.007(2)(b), Fla. Admin. Code, as an invalid exercise of delegated legislative authority after the Department revoked the license for certain signs that had been modified. The rule governs maintenance of nonconforming advertising signs. Lamar had raised the height of a number of signs on Interstate-10 after a noise attenuation barrier was constructed that affected the visibility of the signs.

Lamar argued that the Department lacked statutory authority for the rule. The rule cited sections 479.02 and 339.05, Fla. Stat., as the provisions being implemented. Section 479.02(1) provides that it is the duty of the Department to administer and enforce provisions of the statute and the agreement between the Department and the U.S. Department of Transportation "relating to the size, lighting, and spacing of signs...." Section 339.05 provides that the Department is authorized to "do all things necessary to cooperate with the United States Government in construction of roads under the provisions of such Acts of Congress...."

The administrative law judge found the statutory provisions provided sufficient authority for the rule. Lamar appealed the decision.

On appeal, the court reversed. It held that the section 479.02(1) did not include the authority to regulate the height of signs, noting that the terms height and size were used differently and that other provisions of the statute specifically referenced sign heights.

Abbott Laboratories v. Mylan Pharmaceuticals, Inc., 15 So. 3d 642 (Fla. 1st DCA 2009) (Opinion filed June 22, 2009)

Mylan Pharmaceuticals filed a challenge to Rule 64B16-27.500(6), Fla. Admin. Code, which listed levothyroxine sodium ("LS") on the negative drug formulary ("NDF"). Synthroid is manufactured by Abbott Laboratories. Section 465.025(6), Fla. Stat., requires the Boards of Medicine and Pharmacy to establish the NDF to identify drugs that "demonstrate clinically significant biological therapeutic inequivalence" such that substituting a generic drug would threaten a patient's health or safety. In general, a pharmacist is required to substitute a generic unless the doctor or patient directs otherwise. A drug listed on the NDF must be removed

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pursuant to section 465.0251(1), Fla. Stat., under certain circumstances, including where the drug is a "reference listed drug referred to in 'Approved Drug Products with Therapeutic Equivalence Evaluations' (Orange Book)" published by the U.S. Food and Drug Administration. At the time the statutory provision was enacted, the 2001 Orange Book was in effect which did not list all versions of LS that are currently "A-rated" as safe for generic substitution.

Mylan filed a petition under section 120.63, Fla. Stat., seeking to have Rule 64B16-27.500(6) declared an invalid exercise of delegated legislative authority on the grounds that the listing of LS in the 2007 Orange book, showing that all commercially available versions of LS are A-rated, required the removal of LS from the NDF.

LS had been listed on the NDF since 1984. In 2001, the Florida Legislature adopted section 465.0251, Fla. Stat., requiring removal of generic drugs from the NDF under certain circumstances. Mylan filed a petition to have rule 64B16-27.500(6) declared invalid in August 2007.

At the hearing, Mylan argued that section 465.0251 required the removal of LS from the NDF based on the 2007 Orange Book. Abbott countered that only the 2001 version of the Orange Book in effect at the time the statute was adopted could be considered. The 2001 Orange Book included only two reference listed LS drugs. However, the 2007 version included a number of additional LS drugs, including two generic drugs manufactured by Mylan.

The administrative law judge accepted Mylan's argument that the 2007 version of the Orange Book should be considered in determining whether to remove LS drugs from the NDF. While the general rule is that the Legislature may incorporate federal rules of publications by reference only as they exist on the date of adoption of the statute, the administrative law judge relied on *Eastern Air Lines, Inc. v. Department of Revenue*, 455 So. 2d 311 (Fla. 1984), which establishes an exception to the general rule. Under the *Eastern Air Lines* case, the Court found that a statute that simply incorporated an index or formula (in that case, the Consumer Price Index or CPI) used to make a ministerial determination was not subject to the general rule that documents incorporated by reference are those in existence at the time of incorporation. Abbott appealed.

On appeal, the court reversed. It concluded that the Orange Book and the process used by the Food and Drug Administration to develop that document are not comparable with the CPI in that the Orange Book revisions make substantive changes to the law. In incorporating the CPI, the Legislature was simply directing an agency to use a particular method to calculate future fuel taxes.

Final Orders

Siegers Seed Co. v. Williams Farm Partnership, 17 So. 3d 848 (Fla. 1st DCA 2009) (Opinion filed August 31, 2009)

Siegers Seed Company sought a writ of certiorari to challenge a letter of the Agricultural Commissioner which it characterized as a final agency action. The letter stated that the Commissioner concurred with the recommendations in a report issued by the Department of Agriculture, Florida Seed Investigation and Conciliation Council. In particular, Siegers sought to challenge a statement in the report relating to use of monetary damages as opposed to cost damages on the grounds that it exceeded the Council's statutory authority.

The petition for writ of certiorari was dismissed. The court held that neither the letter nor the report was a final agency action as neither was filed with the agency clerk. Since the order was never rendered, appellate jurisdiction was not invoked.

Mary F. Smallwood *is a partner with the firm of Ruden, McClosky, Smith, Schuster & Russell, P.A. in its Tallahassee office. She is Past Chair of the Administrative Law Section and a Past Chair of the Environmental and Land Use Law Section of The Florida Bar. She practices in the areas of environmental, land use, and administrative law. Comments and questions may be submitted to* Mary.Smallwood@Ruden.com.

Agency Snapshot

Florida Department of Veterans' Affairs

by Mary Ellen Clark

Whereas many Florida agencies exist to regulate certain activities that impact the state, the Florida Department of Veterans' Affairs (FDVA) exists to assist an important class of citizen, our veterans. Florida is home to the nation's second largest population of veterans, currently estimated to be more than 1.7 million. A Cabinet agency, the FDVA's duties are established in section 292.05(1), Florida Statutes, and its mission is to assist, without charge, Florida's veterans, families and survivors to improve their health and economic well being through quality benefit information, advocacy and education. With approximately 1,000 employees, the agency has benefits counselors co-located at the VA Regional Office in St. Petersburg, each VA Medical Center and most VA Outpatient Clinics throughout the state. FDVA also operates five veterans' nursing homes (with a sixth one under construction), one assisted living facility and is a clearing house for all state and federal veterans' benefits with an informative website and comprehensive benefits guide.

Much of the FDVA's staff is located in the Largo/St. Petersburg area where the U.S. Department of Veterans Affairs maintains a large facility. The Tallahassee office moved to the Southwood state office complex in 2003 and is co-located with the Florida Departments of Elder Affairs and Health.

Headquarters:
Florida Department of Veterans' Affairs
4040 Esplanade Way, Suite #180
Tallahassee, Florida 32399-0950
(850) 487-1533
www.FloridaVets.org

Head of the Agency:
LeRoy Collins Jr., Rear Admiral, U.S. Navy Reserve (Ret.), Executive Director

General Counsel & Agency Clerk:
David Herman

One of two attorneys at the FDVA, Mr. Herman is a graduate of the Florida State University College of Law and Rollins College. Prior to becoming General Counsel in 2005, Mr. Herman served as the Privacy Officer at AHCA, was a prosecutor for DOH and an Assistant Attorney General in civil litigation.

The General Counsel's office represents FDVA in litigation concerning employment issues, fair hearings (resident discharge appeals), collections, and veterans' advocacy. FDVA also investigates complaints from veterans denied benefit of preference in public employment (see §§ 295.07 and 295.11, Fla. Stat.), which are then litigated before PERC. Don Post is the Veterans Preference Coordinator and complaints are filed at this address:

State of Florida, Department of Veterans-Affairs
Post Office Box 31003
St. Petersburg, Florida 33731

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other form, is not relevant. Second, the duality of this definition requires an inquiry into the requirements of the Small Business Administration's ("SBA") section 8(a) certification (which, in this author's opinion, are not entirely objective, but which are beyond the scope of this article).

According to the SBA's Office of Advocacy, which defines a "small employer" as one having less than 500 employees, there were an estimated 1.9 million small businesses in Florida in 2006, representing 99% of the state's employers and 44% of the private sector employment, the construction industry being the state's largest small business employer. SBA estimates that almost 59% of the state's net new jobs from 2004 to 2006 were created by small businesses.

2008 Statutory Changes:

Section 7 of Chapter 2008-149, Laws of Florida, amended section 120.54(3)(b)1, Florida Statutes, to *require* a statement of estimated regulatory costs "if a proposed rule will have an impact on small business." Immediately prior to this amendment, an agency was only *encouraged* to prepare such a statement. This subsection was further amended to require that the agency also send written notice of the rule to the newly-created Small Business Regulatory Advisory Council ("SBRAC" or the "Council")[4], *in addition to* the Office of Tourism, Trade and Economic Development.

Statutory Role of the Council:

The Council's duties and responsibilities are set forth in section 288.7001, Florida Statutes, and include:

1. Provide agencies with recommendations regarding proposed rules or programs that may adversely affect small business;

2. Consider requests from small business owners to review rules or programs adopted by an agency;

3. Consider requests from small business owners to review their private property rights related to such rules or programs;

4. Review and determine whether a rule places an unnecessary burden on small business and make recommendations to the agency to mitigate adverse effects.

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While the Council does *not* have authority to initiate or intervene in any administrative or judicial proceedings or to issue subpoenas,[5] it is required to submit a written annual report to the appointing authorities to include a description of the activities and recommendations of the Council.

In addition to the Council's role "to reduce the impact on small businesses" of proposed agency rules, section 288.7001(4), also provides for the Council's participation with the legislature as part of the sunset review process outlined in section 11.905, Florida Statutes, by applying the following factors to a review of all existing rules of those agencies subject to the sunset review process:

1. Continued need for the rule;
2. Nature of any public complaints or comments;
3. Complexity of the rule;
4. Extent to which the rule overlaps, duplicates, or conflicts with other federal, state and local government rules;
5. Length of time since the rule has been evaluated in light of changes in technology, economic conditions or other factors.

While no SERC may be required by an agency for rules promulgated prior to July 1, 2008 (except pursuant to section 120.541(1)(a)), the impact of any such existing rule on small businesses may be called into question during this sunset review process and reported to the legislature as part of the Council's required annual report[6] with its "scorecard" of agencies and recommendations for possible statutory changes. In this regard, it is interesting to note that three (3) current members of the Council, including the chair, are former state legislators and that several key current House members attended and actively participated in the Council's first in-person meeting this summer in Orlando.

Practice and Procedure:

Each agency must determine if a new rule being promulgated has any effect[7] on Florida's small businesses; if there is any such effect, a SERC *must* be prepared by the agency. Since this determination is the agency's burden, in light of the prevalence of small businesses in Florida, an agency would be wise to consider that every rule is likely to have some effect on small business and a SERC should be prepared accordingly.[8] However, the need for a SERC would not be indicated if the agency determines that there is no such effect and prepares and files a written statement supporting that determination.

The new law requires that written notification of each proposed rule be given to the Council not less than 28 days prior to the rule adoption, and this notice should include a copy of the SERC. This notice begins the Council's 21-day review process. If no SERC is included with the rule notice, Council's staff has been directed to request a copy of the SERC from the submitting agency before beginning the review process. At the conclusion of its review, the Council may find that the proposed rule has an effect[9] on small businesses and recommend alternatives or changes to the rule in order to mitigate any effect on small businesses. The making of such recommendations extends the submitting agency's 90-day rule filing period for 21 days.

The new law *requires* the submitting agency to adopt those regulatory alternatives offered by the Council as a result of this review process that are feasible and consistent with the stated objectives of the proposed rule, and which would reduce the impact on small businesses. However, if the submitting agency does not adopt all alternatives offered by the Council, it must file with the Joint Administrative Procedures Committee (JAPC) a detailed written statement explaining the reasons for its failure to do so, and send a copy of that statement to the Council within three (3) working days.

Future Statutory Changes:

While JAPC may object if a SERC does not comply with the requirements of section 120.541,[10] the exact role of JAPC with respect to SBRAC's review is not clear, and some statutory changes may be desired to clarify JAPC's duties and responsibilities. Currently, it appears that JAPC is requiring each submitting agency to also file a copy of the SERC with the proposed rule.

Agencies may well wonder where or how they are going to acquire the expertise to analyze each new rule for its economic impact, adverse or positive, on small businesses. JAPC may also need to determine a methodology by which any such impact can be measured. To what extent JAPC can or should respond if it disagrees with the submitting agency's analysis and determination of adverse impact has yet to be determined.

It may be also be appropriate for the legislature to provide guidelines for agency determinations of the impact on small businesses. For example, what if the rule merely implements a statutory mandate to the agency? In that case, it would appear to be the statute itself, rather than the rule, that created the impact, resulting in a potential unfairness to require the agency to prepare a SERC. In addition, perhaps some consideration should be given to defining the extent and nature of the impact on small businesses that would be sufficient to trigger the requirement for a SERC. For example, should it be a "substantial" impact (as appears to apply to federal rules) or, should it have to involve an "adverse" impact?

Finally, there is some confusion regarding the statutory definition of "small business." First, the reference to section 8(a) certification by the Small Business Administration incorporates several factors under federal laws that appear to be subjective and, thus, difficult to determine and apply. Second, if an agency elects, pursuant to section 120.54(3)(b) 2. a., to alter the definition of "small business," a notice of that election should be required as part of the SERC for purposes of the Council's review and determination of any impacts.

Observation: Perhaps this definition should conform to that of a "small business" contained in section 57.111(3)(d), Florida Statutes, allowing attorneys' fees and costs in civil or administrative proceedings to be awarded against an agency in favor of a prevailing party with not more

than 25 full-time employees or a net worth of not more than $2 million.

Conclusion:

Every agency subject to the rulemaking requirements of Chapter 120, Florida Statutes, must be aware of the additional statutory requirements, and possible procedures it may be required to follow, for any rule proposed on or after July 1, 2008. In addition, every agency should be aware of the possible inclusion of the Council's review of all existing rules in the legislative sunset review process.

Making a determination of a proposed rule's adverse impact on small businesses may not be easy in many cases. Absent clear statutory guidelines, however, every new rule should be accompanied by a SERC, or by a written statement that the submitting agency has found no impact on small businesses, and the reasons for that conclusion.

In light of current economic conditions, the present approach legislators appear to be taking toward the rulemaking process, and these new statutory provisions for the Small Business Regulatory Advisory Council, some written statement regarding any known impacts, positive or negative, of a proposed rule on small businesses should accompany every proposed rule. An agency's failure to submit such statement to the Council, could well result in an objection by the Council, along with alternatives or changes being proposed to the submitting agency for a required response.

Endnotes:

[1] Much of these materials are taken from the author's July 22, 2009 presentation to the Government Bar Association.

[2] Prior to 1992, agencies were *required* to prepare economic impact statements for virtually every proposed rule. For a discussion of the changes enacted in 1992 and 1996, *see* Lawrence Sellers, *The Third Time's the Charm: Florida Finally Enacts Rulemaking Reform*, 48 Fla. L. Rev. 93, 113 (1996).

[3] However, section 120.54(3)(b) 2.a. allows an agency to define "small business" to include those "employing more than 200 persons."

[4] The Small Business Regulatory Advisory Council is a 9-person group, also created by Chapter 2008-149 (Section 2), Laws of Florida, section 288.7001, Florida Statutes, with an equal number of members appointed by the Governor, Senate President and Speaker of the House of Representatives. The author was appointed to the SBRAC by Senate President Atwater.

[5] The Small Business Advocate may have implied authority to intervene pursuant to new section 288.7003(3), Florida Statutes, found in Section 3 of Chapter 2008-149, Laws of Florida.

[6] *See* § 288.7001(3)(e), Fla. Stat. (2009).

[7] The law does not specify that any such effect must be "adverse," so even positive effects must be determined. Since the law also refers to an agency's required consideration of any "alternatives" proposed by the Council, there is some implication that the law was intended to apply only where a rule's impact on small businesses is "adverse" or "negative," but that is not clear.

[8] One agency, DBPR, has determined that a SERC must be prepared before any rule is even published and has directed that responsibility to the regulatory board proposing the rule.

[9] To date, such alternatives or changes have appeared to be predicated on a determination by the Council that any effects are "adverse" to small businesses.

[10] *See* § 120.545(1)(j), Fla. Stat. (2009).

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