Administrative Law Section Newsletter

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Major Test of New APA Pending at First DCA

by Donna E. Blanton
Steel Hector & Davis LLP

A major test of the new rulemaking standard in the Administrative Procedure Act (APA) is pending at the First District Court of Appeal, and it has attracted briefs from a myriad of state agencies, the Governor, the Attorney General, and regulated interests. The Legislature also will file a brief to explain what it meant when it adopted the changes to the APA.

The case is *Consolidated-Tomoka Land Company v. St. Johns River Water Management District*, DOAH Case Nos. 97-0870RP and 97-0871RP. Administrative Law Judge Donald R. Alexander ruled in June that several of the water management district's proposed rules are an invalid exercise of delegated legislative authority because they are based on statutes that provide only general, nonspecific descriptions of the agency's duties.

The proposed rules define two geographic areas of special concern and impose more stringent permitting standards and criteria for systems in those areas. The proposed rules also set water recharge standards and establish riparian habitat protection zones. The cited authority for these rules is statutory language directing the agency to "not allow harm to water resources" and "require such permits and impose reasonable conditions" to assure that all systems will comply with state law. DOAH Final Order at 47.

Judge Alexander found that authority insufficient under the new APA.

"[T]he new law no longer sanctions the concept that a statement of legislative policy or purposes coupled with a broad grant of rulemaking authority constitute sufficient authorization for agency rulemaking," Judge Alexander wrote. "Rather, the law now contemplates that rules must implement statutes which describe more specific programs."

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From the Chair ...

by Robert M. Rhodes

I hope you'll take the time to read Donna Blanton's article entitled, "Major Test of the New APA Pending at the First DCA", which is included in this newsletter. As I write this column, it appears some of the results of the new APA also may be presented to the 1998 Legislature.

Specifically, the Legislature may consider several thousand existing rules identified by agencies as possibly exceeding new rulemaking standards enacted in 1996. To bring existing rules into compliance with these new standards, other 1996 provisions required agencies to review their rules, identify rules that exceed the new rulemaking standards, and provide the Joint Administrative Procedures Committee a list of these rules. I understand the JAPC has submitted 5,850 rules to the President of the Senate and Speaker of the House of Representatives for appropriate action. 3,614 are school board rules, which are not reviewed by JAPC or published in the Florida Administrative Weekly.

Attendant to this review may be possible legislative review of the 1996 rulemaking standards, and perhaps consideration of other means to

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TEST OF NEW APA

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The focus of Judge Alexander's ruling is the new flush-left language in the definition of "invalid exercise of delegated legislative authority" in section 120.52(8). The language is repeated verbatim in section 120.536(1). It provides:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute.

This language was adopted in 1996, along with a number of other substantive amendments to the APA. The language was not a significant issue before the Governor's Administrative Procedure Act Review Commission, which recommended many of the substantive changes that were adopted in 1996 by the Legislature. The language was among a number of changes to the APA that were included in a 1995 Act amending the APA that was vetoed by Governor Lawton Chiles.

Although the new language did not generate much discussion at the time of its adoption, it was quickly recognized by numerous commentators as potentially the most far-reaching of the many changes to the APA adopted in 1996. As one commentator noted:

> [T]he most significant change ultimately may evolve from a series of amendments relating to legislative checks on the rulemaking process. Although these changes have drawn scant attention, they alone have the potential to substantially alter the structure of administrative law in Florida.

F. Scott Boyd, *Legislative Checks on Rulemaking Under Florida's New APA*, 24 Fla. St. U. L. Rev. 309 (1997).

The meaning of the new language is the focus of the briefs in *Consolidated-Tomoka*. Opinions of its significance vary widely, with some parties suggesting that the Legislature took a bold step to rein in agencies that have adopted rules with only the most general authority from the statutes. These parties also view the new legislation as an attempt to correct courts that have blessed agency rulemaking by granting them broad discretion to adopt rules if they are "reasonably related to the purpose of the enabling legislation and are not arbitrary or capricious." *E.g.*, *General Telephone Co. v. Florida Public Service Commission*, 446 So. 2d 1063 (Fla. 1984). Other parties argue that the new language is more narrow and was not intended to make as sweeping a change in agency rulemaking authority as that iterated by the Administrative Law Judge in the *Consolidated-Tomoka* case.

The Joint Administrative Procedures Committee (JAPC) has unanimously recommended to House Speaker Daniel Webster and Senate President Toni Jennings that a brief be filed in the case, and they have approved the filing of a brief. JAPC members left no doubt about their view of the case's significance when they voted on November 6, 1997, to recommend that briefs be filed in *Consolidated-Tomoka*.

"It's critical for the court to receive input from the Legislature, I believe, on the intended result of the '96 APA reform," Senator Charles Williams, D-Tallahassee, told the committee.

The water management district filed its initial brief on October 31. Amicus briefs supporting the district were filed by 1) the Department of Environmental Protection; 2) the Department of Community Affairs; 3) the South Florida Water Management District and the Southwest Florida Water Management District; 4) the Attorney General; 5) the Governor's office; and 6) 1000 Friends of Florida, the Sierra Club, and the Florida Wildlife Federation, Inc.

The Governor's Office brief initially questioned—in a footnote—the validity of section 120.54(4)(c), which gives final order authority to administrative law judges in rule challenge cases. The brief suggests that ALJs should only enter recommended orders in rule challenges, as they do in adjudicatory matters. The Governor's Office withdrew the footnote after attorneys for Consolidated-Tomoka filed a motion to strike, noting that the issue had not been raised during the DOAH proceeding.

Consolidated-Tomoka's Answer Brief is due on December 15. Amicus briefs supporting Consolidated-Tomoka are expected to be filed by the Florida Home Builders Association and the Florida Association of Realtors, U.S. Sugar, and the Legislature. Oral argument on the case had not been scheduled at press time, but it has been requested.

The author's law firm is filing an amicus brief in the case on behalf of the Florida Home Builders Association and the Florida Association of Realtors.

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FROM THE CHAIR
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insure proper executive branch implementation through rulemaking of legislatively established state policy. Based on experience, legislative review of rules may not be a priority during the 60 day 1998 regular legislative session. Consequently, legislators and committees may be hard pressed to study carefully each rule and determine whether it appropriately implements legislative intent. Failing legislative action to authorize or otherwise confirm the validity of rules submitted by the agencies, these rules will be repealed.

Is this the best use of legislative efforts? An alternative legislative overview role was recommended by the Governor's APA Review Commission. The Commission, which I chaired and which included House and Senate members, concluded the Legislature could best set policy and help ensure proper agency implementation by providing more clarity and direction to agencies when legislation is drafted and considered by legislative committees. This could be accomplished by adding to analyses of bills prepared by the committees an identification of provisions that require rulemaking, and discussion of whether a bill provides appropriate standards and guidelines to direct agency implementation of the proposal. Agencies could be asked to provide comments for inclusion in the analysis. This "front end" review process could be complemented by normal JAPC review of proposed rules. Unfortunately, this recommendation, which builds on existing legislative tools, was not included in the 1996 revisions; it merits further legislative consideration.

Turning to an update on section activity, on February 6, 1998, the Section's Public Utilities Committee will present a CLE program addressing legal and policy issues surrounding retail electric regulation. The program will be co-sponsored with and presented at the Florida State University College of Law. Jim Rossi, Doc Horton, Floyd Self and Booter Imhoff have assembled diverse participant perspectives on this very significant public policy issue. Daniel Fessler, former chair of the California Utilities Commission, will keynote.

John Sjostrom is chairing a CLE program that will present law, policy, and practical advice on administrative litigation. This offering is scheduled for May 1, 1998, at the Center for Professional Development, Tallahassee.

The third, and hopefully annual, ethics seminar for Public Service Commission practitioners is being organized by Doc Horton, Everett Boyd, Rob Vandiver, and Floyd Self. This will be a hands-on program that will offer one hour ethics credit. The past two sessions have been lively and very informative, and this one undoubtedly will follow suit.

I again invite all of you to participate in your Section and to contact me or Section officers with program ideas or other comments or suggestions.

Administrative Law Section 1996-97 Actual Budget

Revenues	
Dues	$19,600
Dues Retained by Bar	9,800
Affiliate Dues	345
Affiliate Dues Retained by Bar	280
Total Dues	**$9,865**
Other Revenue	
CLE Courses	$214
Videotape Sales	210
Audiotape Sales	2,126
Interest	3,663
Course Material Sales	184
Section Service Programs	1,425
Contributions	750
Total Revenue	**$18,437**
Expenses	
Staff Travel	$308
Postage	473
Printing	190
Newsletter	1,218
Photocopying	183
Meeting Travel	148
Committees	78
Council Meetings	867
Convention Meeting	401
Awards	1,330
Council of Sections	300
Section Service Programs	1,007
Miscellaneous	123
Total Expenses	**$6,626**
Beginning Fund Balance	**$43,858**
Plus Revenues	**18,437**
Less Expenses	**6,626**
Plus Operations from Other Cost Center	**2,771**
Ending Fund Balance	**$58,440**

Constitution Revision

Deborah K. Kearney, General Counsel
Florida Constitution Revision Commission

One of the several unique provisions of our state's constitution is the establishment of a commission, appointed every twenty years, to examine the constitution, hold public hearings, and place any changes it may recommend on the ballot. No other state has a commission with the authority to place questions directly on the ballot. In those states that have commissions, the commission's recommendations are advisory and must be placed on the ballot by the Legislature. The Commission is comprised of 37 members appointed by the Governor (15), the President of the Senate (9), the Speaker of the House of Representatives (9), and the Chief Justice of the Supreme Court (3); the Attorney General serves by virtue of his office.

The 1997-98 Constitution Revision Commission is in the thick of its business. After an organizational session in early June, the Commission spent most of the summer holding twelve public hearings throughout the state. Two hundred to four hundred citizens attended each of the public hearings. While many of the public proposals were reiterated throughout the public hearing process, there were approximately 700 distinct proposals put forward. The Commission narrowed down the public suggestions to about 130 through a process whereby the suggestion was moved by a commissioner and became a proposal upon the garnering of at least ten votes by other commissioners. In addition, commissioners were permitted to file proposals on their own behalf. There have been 180 proposals filed to date.

Committee meetings and sessions of the Revision Commission were held in October, November, and December. While it is difficult to predict the outcome of the commission's work, certain strains are becoming evident. The commissioners consistently express their awareness of the results of the 1978 Revision Commission's suggestions. In 1978, the Commission placed eight amendments, containing 86 changes, on the ballot. All of the recommendations were voted down. While ultimately more than half of those recommendations have found their way into Florida law, this Commission appears to have a strong desire that its efforts be successful. One of the first actions it took was to adopt a rule that requires an extraordinary vote of 22 members of the Commission (3/5) in order to place a proposal on the ballot. This change from the majority vote required in 1978 is designed to require that a meaningful consensus is reached on each of the issues to be placed on the ballot.

Proposals

The possibly good news for administrative law practitioners is that few proposals are intended to directly affect administrative law. Some proposals, however, would have an effect in particular facets of administrative practice. Most all of the proposals are of interest.

Effect of Administrative Actions or Rules — Local Mandates

As always, the exception proves the rule, and we find one proposal directly relating to administrative action. Proposal 99, which has yet to be heard in committee, amends the local mandates provision of Article VII, Section 18, by stating that a county or municipality is not bound by any agency action or rule that would require the local government to spend funds or take an action requiring the expenditure of funds, or reduce the authority of the local government to raise revenues, or reduce the percentage of a state tax shared with a local government.

Citizens Advocate

Proposal 170 would establish a Citizens Advocate to investigate complaints arising from administrative actions of state agencies or local governments, to seek an appropriate remedy, and to report to the legislature and the public on agency performance and responsiveness.

Unification of Game and Fresh Water Fish Commission and Marine Fisheries Commission

Most obviously, the proposal to unify the Game and Fresh Water Fish Commission and the Marine Fisheries Commission into a new constitutional agency called the Fish and Wildlife Conservation Commission has caused substantial debate as the newly-merged commission would acquire constitutionally-granted regulatory power in areas heretofore in the domain of agencies exercising quasi-legislative powers subject to delegation by the legislature and its attendant APA requirements. Much negotiation has occurred so that as the proposal now stands (Committee Substitute for Committee Substitute for Proposal 45), those powers are somewhat limited. This proposal appears to have garnered a great amount of support. It would not be surprising to see it appear, in some fashion, on the ballot.

Cabinet Reform

The recurrent issue of Cabinet reform is the subject of a number of proposals. Certainly any change in the Cabinet system could have an effect in several areas of administrative practice. The Executive Committee of the Commission has spent much of its time on this issue. Learning from the experiences of the 1978 Commission, it would appear doubtful that this Commission would go so far as to abolish the current system. There have been some well-received, less bold suggestions designed to move toward reform and executive accountability. Particularly, the Comptroller, General Robert Milligan, and Treasurer Bill Nelson jointly suggested a plan for a smaller, elected Cabinet. Their recommendation was to combine the offices of comptroller and treasurer, and to have the Governor act with a Cabi-

net comprised of this statewide-elected "chief fiscal officer" and a statewide-elected Attorney General. This smaller Cabinet could continue to exercise jurisdiction over selected areas about which the public seems hesitant to leave in the hands of one officer, such as the revenue-collecting agency, the state law enforcement agency, and certain critical environmental concerns. The debate also continues as to whether we should have an appointed or elected Commissioner of Education, Secretary of State, and others who now have a seat on the Cabinet.

Public Service Commission

Two proposals address the structure of the Public Service Commission. Proposal 101 would return to the method of electing commissioners. Proposal 174 would provide that the PSC is an executive, not a legislative department, consistent with the exercise of its *quasi*-legislative powers, and consistent with virtually every other state.

Property Rights

Proposal 83 would add to the eminent domain provision of Article X, Section 6, a stipulation that property is considered taken if a government action diminishes the value or use of any discrete property interest by more than 20%, demonstrated by a qualified appraisal.

Other Proposals

There are a number of other proposals that have gotten the attention of the Commission. There are many issues relating to the Declaration of Rights section, and particularly adding various groups to the enumeration of protected classes. Ballot access issues raised the concern of commissioners when we learned that Florida has the most restrictive ballot-access laws in the nation. There are a number of proposals on the judicial article, including various merit selection and retention options, qualifications of judges (including age, as well as years of Bar membership), and yet another stab at addressing the issue of the state responsibility for Article V costs. Sovereign immunity has been the subject of great debate, from abolishing the concept, to specifically extending the constitutional protection to local governments.

There is great interest in establishing an independent reapportionment commission, and in studying the citizen initiative process of amending the constitution. Of course, there is lively discussion on many tax matters. While there is little doubt the proposal to eliminate the prohibition on an income tax will not survive, there are many proposals designed to address our state tax structure that have engendered lively debate and consideration.

How to Stay Up-to-Date

The Constitution Revision Commission has developed an Internet home page *(http://www.law.fsu.edu/crc)* which will allow you to keep abreast of its proceedings. The home page includes all of the proposals filed—by number, by sponsor, and by article and section of the constitution. A click on the number will bring up the full proposal. In addition, such matters as all of our notices and agendas, a listing of the members and their addresses, and committee assignments may be found on the home page. Finally, for this or other use, you will be interested to find a complete history of all of the state's constitutions, including every amendment proposed, whether adopted or not. I would invite you to browse our home page, which is overflowing with helpful information.

Conclusion

The Constitution Revision Commission must file any proposals it places on the ballot with the Secretary of State by May 5, 1998. Time, therefore, is short. The Commission's business is proceeding rapidly. We would invite you to comment on any of the proposals or ask us any questions you may have. My e-mail address is *kearney.deborah@leg.state.fl.us*; our telephone number is 850-413-7740; and our mailing address is Constitution Revision Commission, B-11 Historic Capitol, Tallahassee, FL 32399-1300.

Public Utilities

by Norman H. (Doc) Horton, Jr.

For those of you who have been reading about deregulation of electric utilities and wonder what it means to you and your clients, you now have a chance to learn more. On February 6, the Section and the FSU College of Law will co-sponsor a CLE workshop on **Retail Electric Competition: Legal and Policy Issues.** Organized and arranged by the Public Utilities Law Committee, Jim Rossi and Booter Imhof, this workshop will provide a forum for industry, regulators, legislators, consumer representatives, consultants and practitioners to exchange opinions and views on issues associated with electric competition. The seminar will be especially interesting to those who practice utility law, but the program has been developed to give an overview of the issues involved with "deregulating" the electric industry and how resolution of those issues will affect other areas of practice. This promises to be an interesting seminar and the Public Utilities Law Committee would encourage you to attend. (See brochure on page 9).

In the spring, the Committee will again sponsor a luncheon seminar on a current ethics issue. Participants in these seminars are divided into small groups and each group has a factual scenario from which they explore the relevant ethical and legal issues. The discussions and exchange of ideas has made this a very popular seminar. All participants are invited to participate in this seminar.

On behalf of the Public Utilities Law Committee, we invite your suggestions for articles or programs which might be of interest to you. We certainly invite you to participate with the Committee and hope to see you at the seminar in February.

Case Notes, Cases Noted and Notable Cases

by Seann M. Frazier

Supreme Court Cases

The Supremes brought new energy to administrative law by way of their opinion in *Panda-Kathleen, L.P. v. Clark*, 22 Fla. L. Weekly S571 (Fla. September 18, 1997). In *Panda*, Florida's Supreme Court decided whether Federal legislation (the Public Utility Regulatory Policies Act or "PURPA") preempted the jurisdiction of Florida's Public Service Commission (PSC) to resolve a controversy involving energy utilities and co-generators. The controversy concerned a contract which allowed the Florida Power Corporation to buy cogenerated electricity from Panda. The subject matter of the contract fell within the regulatory authority of both the PSC and the Federal Government pursuant to PURPA. By way of declaratory statements, both parties brought interpretations of the contract before PSC. However, Panda, perhaps fearing PSC's attempts to cage the Panda, asserted that PURPA preempted the PSC's jurisdiction. PSC, of course, claimed it had all necessary power.

After noting deference given the PSC's orders [see *Pan American World Airways, Inc. v. Florida Public Service Commission*, 427 So. 2d 716 (Fla. 1983)], the Supremes limited their review to whether the PSC's actions comported with essential requirements of the law and were supported by competent, substantial evidence. Relying on United States Supreme Court cases addressing state regulatory jurisdiction under PURPA, the Florida Supremes found that the PSC's power was properly distributed. In so holding, the court relied on its ruling in *Florida Power and Light v. Beard*, 626 So. 2d 660 (Fla. 1993) and distinguished the Third Circuit Court of Appeals' holding in *Freehold Co-Generation Associates, L. P. v. Board of Regulatory Commissioners*, 44 F. 3d 1178 (3d Cir. 1995). The Florida Supremes recognized that, pursuant to *Freehold*, utility type rate regulation is clearly preempted. However, the particular electricity contract at issue in *Panda* could not, in the Supremes' view, be characterized as a utility type rate regulation.

* * *

Opinions of the District Courts of Appeal

There was a declaratory statement which was set aside and *Wingo* was its name-o. In *The Agency for Health Care Administration v. Wingo*, 697 So. 2d 1231 (Fla. 1st DCA 1997), the First District Court of Appeal set aside a declaratory statement from the Board of Medicine regarding interpretation of Florida's Patient Self Referral Act. Section 455.236, Florida Statutes. At issue was whether a group practice and its physicians could refer its own patients to its recently purchased magnetic resonance imaging (MRI) system, as well as patients of other physicians, without violating the Act. The Board said it could. However, with a reading in *pari materia* here, and a statutory construction there, the DCA found that the proposed referrals would violate the Act. A physician group may refer its own patients to such a MRI system without violating the Act, but if it accepts outside patients as well, then the barn doors to the exemption to the Act shall close.

Comment:

First, some have proposed legislation which would overrule the holding in *Wingo*. See Proposed Committee Bill 98-01 by the House of Representatives Committee on Health Care Services. But this case raises an additional point important to the APA. In passing, this opinion addresses a challenge to the declaratory statement made because the statement applied to all similarly situated group practices in Florida and therefore was a statement of general agency policy more appropriate to rulemaking than a declaratory statement. The District Court of Appeal side-stepped that buffalo chip by setting aside the declaratory statement on other grounds. However, this point should be addressed eventually. The First District Court of Appeal in this case emphasized that when rulemaking is required, then the Agency should make rules, suggesting perhaps that this particular declaratory statement was overbroad and better suited for rulemaking. But when is the subject of declaratory statement not generally applicable? In almost every instance, one may argue that a declaratory statement would be better promulgated as a rule. Some clarification from the court might assist those of us left down on the farm.

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Rulemaking was also the issue in *University Hospital, Ltd. v. Agency for Health Care Administration*, 697 So. 2d 909 (Fla. 1st DCA 1997). This appeal resulted from the Agency's denial of a request for formal hearing by University Hospital. The litigation itself resulted from a string of challenges brought by University Hospital to the Agency's policies and rules which required CON review, or otherwise prohibited a consolidated license of adjacent, related hospitals. A single, consolidated license would allow University Hospital to qualify for mental health service Medicaid reimbursement. After numerous rules, rule challenges and even circuit court actions, University Hospital discovered that the Agency had issued consolidated licenses to other hospitals University Hospital felt were similarly situated. The Agency, diagnosing no inconsistency, attempted to distinguish those other hospitals from the situation presented by University Hospital. University Hospital petitioned the AHCA to dispute this point and the Final Order denying that petition

became the matter upon appeal.

Among its grounds for denying the petition, the Agency argued that previous positions taken by University Hospital in other, related litigation collaterally estopped the position asserted within University Hospital's petition at issue. The court found that collateral estoppel will bar a Section 120.57(1) hearing only after factual matters have been decided and therefore, could not be resolved by a Motion to Dismiss. See, from the civil side, analogous cases in *Moskovitz v. Moskovitz*, 112 So. 2d 875 (Fla. 1st DCA 1959); and *Sproul v. McDonald Sys., Inc.*, 397 So. 2d 462 (Fla. 4th DCA 1981). More importantly, the court held that previous positions taken by University Hospital were the result of attempts to comply with previous legal standards. The court held that collateral estoppel does not apply where unanticipated subsequent events create a new legal situation. *Id. citing Krug v. Meros*, 468 So. 2d 299, 303 (Fla. 2d DCA 1985). Thus, any allegations of collateral estoppel based on allegedly schizophrenic positions would be premature at the Motion to Dismiss stage and cannot be decided until completion of a Formal Administrative Hearing. The court reversed and remanded the Agency's Final Order.

* * *

Put one in the win column for either the little guy or bureaucracy, depending on your point of view, as a result of *Crudele v. Nelson*, 698 So. 2d 879 (Fla. 1st DCA 1997). Florida's Department of Insurance (DOI) suspended the insurance license of Crudele without prior notice or hearing and this action was, perhaps, a risk DOI should not have taken. The First District Court of Appeal found that the Emergency Order used by DOI to suspend Mr. Crudele's license must specify the "facts and reasons for a finding of an immediate danger to the public health, safety or welfare, and its reasons for concluding that the procedure used is fair under the circumstances." Section 120.54(4)(a)3., Fla. Stat. (Supp. 1996). A general, conclusory prediction of harm will not support an Emergency Order according to the First DCA. Noting that the transactions described in the Emergency Order each were more than 2 years older than the order itself and that no pattern of continuing harmful conduct was demonstrated by the order, the court held that these allegations would not support the imposition of such an Emergency Order. Any allegations regarding Mr. Crudele's complicity or participation in the alleged violations were more appropriate, in the court's view, for an administrative complaint and evidentiary hearing. Barring that due process, DOI's claim for an Emergency Order was denied.

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When a statute and a rule conflict on the same subject matter, the rule will not control, will it? In *Willette v. Air Products*, 700 So. 2d 397 (Fla. 1st DCA 1997), the First DCA held it would not. In this case, a worker's compensation statute required payment of disability benefits within 7 days, but a rule promulgated by the Department of Labor and Employment Security allowed 14 days for such payment. The statute required additional punitive penalties for late payments and the court held that the statutory requirement of payment in 7 days overrode the rule's 14 day provision because "it is axiomatic that an administrative rule cannot enlarge, modify or contravene the provisions of the statute." *Id., citing Dep't. of Bus. Reg. v. Salvation Limited, Inc.*, 452 So. 2d 65, 66 (Fla. 1st DCA 1984). So, rock beats scissors, scissors cut paper, paper covers rock, and a statute trumps the rule.

* * *

In another opinion supporting the enforcement of due process, the First District Court of Appeal reversed an Order which revoked registration orders of land in *B.D.M. Finan. Corp. v. Dep't. of Bus. and Prof. Reg., Div. of Fla Land Sales, Condominiums, and Mobile Homes*, 698 So. 2d 1359 (Fla. 1st DCA 1997). A petitioner argued that the Division relied upon a general cease and desist statute rather than using a more stringent "revocation" statute to revoke the appellant's land registration. Unfortunately, the Final Order did not specifically cite the statute under which the Division sought prosecution. Nevertheless, the court read from the Final Order that the cease and desist section was the apparent pretense of the order and that use of this general statute was in error when a more specific statute addressed revocations. *Id., citing Gretz v. Unemployment Appeals Comm'n.*, 572 So. 2d 1384, 1986 (Fla. 1991). Because the charging Notice and Final Order failed to include elements required for the more specific revocation statute, the court also found that due process had been violated. The insufficient notice and findings impaired the fairness of the proceedings and the correctness of the action. Thus, under Section 120.68(8), Florida Statutes (Supp. 1996) and *Cohen v. Dep't of Bus. Reg*, 584 So. 2d 1083 (Fla. 1st DCA 1991), the Revocation Orders were reversed to the extent that they failed to reference the grounds required by the statute for revocation. To be fair, other portions of the prosecution were pled well enough to withstand appeal, but the partial reversal was an important shoring up of the due process structures within our APA.

* * *

In what would appear to be a theme stringing through recent First District Court of Appeal opinions, an Agency's short shrift to the explanations required by Florida's APA resulted in partial reversal of a Final Order. In *Exclusive Investment Management and Consultants, Inc. v. Agency for Health Care Administration*, 699 So. 2d 311 (Fla. 1st DCA 1997), the Agency entered a Final Order canceling the appellant's Medicaid Provider Numbers for failure to have an annual contract with the Alcohol, Drug Abuse and Mental Health Program Office within the Department of Health and Rehabilitative Services. The requirement of an annual contract stemmed from the Agency's interpretation of Florida Statutes, but the court found that this interpretation was incipient, non-rule Agency policy which the Agency failed to explain during Final Hearing. For this reason, the Final Order was partially reversed, but affirmed on other grounds.

The attempt to cancel the contract came during the same month in which the Agency instituted its new policy through requirements within its Medicaid Handbook. Therefore, the court found, the Agency was required to explicate its emerging policy. *McDonald v. Department of Banking and Finance*, 346 So. 2d 569, 582 (Fla. 1st DCA 1977). When the Agency claimed it had been instituting this policy for a longer period of time and actually relied upon that policy to issue previous, discoverable Final Orders, the District Court of Appeal tested those Final Orders to see if they explicated the incipient policy. Because the court found they did not, it would not consider the earlier rulings discoverable precedent, thereby distinguishing *Meridian, Inc. v. Department of Health and Rehab. Svcs.*, 548 So. 2d 1169 (Fla. 1st DCA 1989), which allows an agency to rely upon discoverable precedent without further explicating policy when prior decisions fully explicate such policy.

In a well reasoned dissent, Judge Benton argued that the Final Orders were entitled to judicial deference. Logical arguments existed within the Final Order, Judge Benton argued, and therefore should have been affirmed.

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Cases Briefly Noted

The appropriate forum for review of different types of administrative agency actions was addressed in *Rowell v. Florida Department of Law Enforcement*, 22 Fla. L. Weekly D. 2440 (Fla. 2d DCA 1997). An appellant, seeking to seal her criminal history records, took appeal from an FDLE letter which stated that a certificate could not be issued because the appellant had pled no contest to a misdemeanor, thus rendering her file ineligible for sealing. The Second District Court of Appeal, noting that final agency action is subject to direct review in the District Court pursuant to Section 120.68, Fla. Stat., held that the same is true of a quasi-judicial agency decision. See *Vaughn Stephens v. School Board of Sarasota County*, 338 So. 2d 890, 892-93 (Fla. 2d DCA 1976). However, relief from an Order which is not quasi-judicial is by an original proceeding in a trial court. *Id.* By looking at the statutory definitions of "agency action" and "order," in the APA, the court concluded that a quasi-judicial agency action is characterized by notice and a hearing of some sort. The FDLE's letter did not qualify as final agency action or a quasi-judicial order. Rather, the court characterized it as a ministerial act and noted that the organic statute allowed the appellant to petition the "court" for compliance. The Second DCA interpreted this use of the word "court" as a "trial court" and noted the appellant had not brought action in a Circuit Court prior to her appeal. Claiming it had no jurisdiction to consider such a premature appeal, the court dismissed the case without prejudice.

* * *

In *Save Anna Maria, Inc. v. Department of Transportation*, 700 So. 2d 113 (Fla. 2d DCA 1997), the Second District Court of Appeal was faced with the interesting issue of whether a party who was successful on the merits below could still appeal a Final Order because it was made for reasons unappealing to the successful litigant. Balancing a lack of standing against potentially harmful *res judicata* and collateral estoppel effects of an order which was not wholly in a party's favor, the court concluded the appeal should be heard. See *State Road Department of Florida v. Zetrouer*, 105 Fla. 650, 652,142 So. 217, 218 (Fla. 1932) and compare *General Dev. Utilities, Inc. v. Florida Pub. Serv. Comm'n., Div. of Admin. Hearings*, 385 So. 2d 1050 (Fla. 1st DCA 1980).

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In *McDaniel v. Florida Keys Aqueduct Authority*, 699 So. 2d 843 (Fla. 3d DCA 1997), an Order Dismissing an Administrative Appeal on the grounds that the appeal was untimely was itself remanded. The court found that the Order on Appeal failed to provide notice of administrative or judicial review and was therefore defective.

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In *Schrimsher v. School Board of Palm Beach County*, 694 So. 2d 856 (Fla. 4th DCA 1997), the 4th District Court of Appeal provided able analysis of oft-cited principles of judicial review of administrative orders. As stated endlessly before, administrative agencies may not reject an Administrative Law Judge's findings unless those findings lack competent, substantial evidence to support them. The agency is not authorized to re-weigh evidence in order to fit its desired ultimate conclusion. *Heifetz v. Department of Bus. Reg., Division of Alcoholic Beverages and Tobacco*, 475 So. 2d 1277 (Fla. 1st DCA 1985). Likewise, the agency cannot avoid this by labeling contrary findings as "conclusions of law." *Id., citing South Florida Water Management District v. Caluwe*, 459 So. 2d 390 (Fla. 4th DCA 1984). The opinion in *Schrimsher* goes on to provide a well-reasoned analysis as to the balance which must be struck between deference to an agency's findings of fact supported by competent, substantial evidence and the deference the agency must give to an Administrative Law Judge's findings. The court turned to *McDonald v. Department of Banking and Finance*, 346 So. 2d 569 (Fla. 1st DCA 1977), *review denied*, 368 So. 2d 1370 (Fla. 1979), to review their duties.

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seminar

Minutes

Administrative Law Section Executive Council Meeting September 12, 1997, Tallahassee, Florida

I. Call to order

Section Chair Bob Rhodes called the meeting to order.

Members Present: Robert M. Rhodes, Dan R. Stengle, Ralf G. Brookes, Ralph A. DeMeo, Robert C. Downie II (via telephone), Seann M. Frazier, Norman H. "Doc" Horton, Jr., William L. Hyde, Patrick L. "Booter" Imhof, Elizabeth W. McArthur, Lisa S. Nelson, Linda M. Rigot, P. Michael Ruff, William D. Watkins.

Members Excused: M. Catherine Lannon, Mary F. Smallwood, William E. Williams, Johnny C. Burris, G. Steven Pfieffer, Charles A. Stampelos, and Board of Governors Liaison Jack P. Brandon.

Members Not Excused: None.

Others Present: Donna Blanton, Jon Sjostrom, and Section Administrator Jackie Werndli.

II. Preliminary Matters

A. Consideration of Minutes — The minutes of the June 27, 1997 meeting of the Executive Council were approved with the following corrections:

The website for the Division of Administrative Hearings (DOAH) is not yet connected to the website for The Florida Bar, but will be in the near future. Additionally, the DOAH website may be reached at *www.doah.state.fl.us*.

Mike Ruff and Bill Hyde should both have been listed as "excused," rather than "not excused" for the June 27 meeting.

B. Treasurer's Report — In the absence of Treasurer Mary Smallwood, the Chair asked Jackie Werndli to give a summary of the section's treasury. She reported that the section is ahead of budget projections.

C. Chair's Report — Section Chair Rhodes asked committee chairs to convene their committees as soon as possible. He stated that the substance of the section this year will be the important work of the committees. He also expressed his desire that the section outreach to people beyond the section for participation in section activities.

III. Committee Reports

A. Continuing Legal Education — Donna Blanton, the CLE Chair, reported on the scheduled October 10 mediation CLE, and reported that 29 people had registered to date, which is slightly ahead of projections to this point. She anticipates a good turnout for the CLE.

She then introduced Jon Sjostrom, who has begun formulating plans for a future CLE on administrative litigation, possibly in May 1998. The basic theme would be litigating under the revised Administrative Procedure Act. Bob Rhodes asked the Executive Committee to review the proposed outline, and to suggest to Jon any proposals for revamping or consolidating topics listed in the proposed outline, and to give Jon the names of potential lecturers.

Donna Blanton also reported that a Spring CLE is contemplated on local government administrative law. She indicated her hope that it would be presented in conjunction with the Local Government Law Section and perhaps also with the Government Lawyer Section. Jackie Werndli noted that the section is not budgeted for a second spring CLE, but that the section certain could consider a joint program with another section. Donna plans to contact the other sections, and Ralf Brookes volunteered to assist.

Bill Hyde suggested future consideration of a federal administrative law CLE. Donna Blanton suggested that FSU Law Professor Jim Rossi may be of some assistance. Section Chair Bob Rhodes suggested that process differences between the federal act and the Florida APA may be a useful topic. He suggested consideration of that topic for the CLE on administrative litigation that Jon Sjostrom is planning.

B. Publications — Publications Committee Chair Dave Watkins reported that the Committee had met by conference call on September 11. Bobby Downie, the section's Bar *Journal* editor, discussed current plans for future *Journal* articles. One of the articles highlighted in discussion was the October issue article by Linda Rigot and Ralph DeMeo regarding the 1997 APA "glitch" bill and the new Uniform Rules of Procedure.

Elizabeth McArthur and Dan Stengle, the *Administrative Law Section Newsletter* co-editors, discussed plans to generate new interest in the *Newsletter*. They indicated that they were planning outreach efforts — including a mailing — to state agency general counsels, water management district general counsels, district courts of appeal staff, administrative law judges, administrative law classes in law schools, and state university system general counsels. The co-editors also reported that they are compiling a "topics" list for potential articles, which may assist those who wish to write but are unable to generate a suitable *Newsletter* topic. Bob Rhodes asked the Executive Committee to furnish suggestions for the "topics" list to Elizabeth and Dan. Former co-editor Seann Frazier has signed on to write the "Casenotes" for the *Newsletter*. Elizabeth and Dan will be laying out a schedule for the next four issues in the near future.

C. Legislative — Committee Co-Chair Linda Rigot reported that it was too early in the Legislative Interim cycle for there to be much legislative activity. She reported, however, that the past session's Department of Revenue "guidelines" bill had been vetoed by the Governor, and the bill was being rewritten for reintroduction in the 1998 Session. She reports that the Florida Chamber of Commerce will once again pursue passage of a 1997 environmental standing bill sponsored by Representative Joe Spratt (House Bill 1509). Linda and Co-Chair Bill Williams will once again try for improvements to that bill. The Florida Chamber has indicated its plans to pursue legislation in 1998 relating to

"frivolous or harassing" intervention in administrative proceedings, whether or not in the form of the 1997 legislation.

Booter Imhof reported that the House of Representatives' Interim Calendar #2 (issued September 5, 1997) had a list of those bills that "carried over" from the 1997 Session to the 1998 Session under the House's new 2-year bill filing rule.

Section Chair Bob Rhodes noted that Carroll Webb of the Joint Administrative Procedures Committee had been invited to the September 12 Executive Council meeting, but was unable to attend.

D. Public Utilities Law — Doc Horton, Public Utilities Committee Chair, reported that the committee was proceeding with plans for a CLE on retail electric competition, an important legislative issue, sometime in the new year. Doc, Booter Imhof, and Floyd Self are working on an outline and a roster of lecturers. Doc reported that the topic is already generating interest, even at this preliminary stage. Bob Rhodes suggested presenting the CLE before the Legislative Session, and suggested that it could be a "membership draw" for the section. Doc reported some trouble regarding logistics, including a potential site for the CLE. Ralph DeMeo volunteered to assist.

E. Membership — Committee Chair Elizabeth McArthur reported that the committee had not yet convened, but that she has been thinking of ways to break the 1000-member-mark. She reported plans to liaise with the law schools, and hoped to speak to administrative law classes regarding the benefits of section membership, in the hope that graduating students would be drawn to the section as new Florida Bar members. She also asked the Executive Council to review the proposed membership brochure, which will be a "targeted" mailing. Section Chair Bob Rhodes suggested that Elizabeth try to speak to water management district legal offices about membership, as well.

The Executive Committee briefly discussed affiliate membership, and the hope that the Membership Committee would promote that, as well.

Ralph DeMeo suggested that the Committee consider cross-recruiting with other sections, as there is a substantial overlap between the section and the Environmental and Land Use Law Section. Jackie Werndli reported that the section was involved in a joint-dues arrangement with the Government Lawyers Section. The Executive Committee concurred with the suggestion that a joint-dues arrangement be explored with the Environmental and Land Use Law Section. The Executive Committee noted that such an arrangement would be a means to building membership, but that the section dues are as low as The Florida Bar allows ($20), and thus dues amounts would not be affected by an additional joint-dues arrangement.

Bob Rhodes asked the Executive Council whether section dues should be increased or whether they are sufficient; the consensus was that present dues are sufficient.

F. Law School Student Writing Liaison — Seann Frazier reported that Johnny Burris, Jim Rossi, and Seann had met and then briefed Co-Chair Bobby Downie. The Executive Committee reviewed the draft competition guidelines. The section will contribute the balance of any shortfall in law firm contributions to the $2,200 prize money. Seann reported that it is anticipated that the section's contribution will be less than $500, and it is hoped that the section's contribution can be eliminated entirely by sufficient law firm contributions. He also reported that all author information will be removed from submissions prior to presentation of papers to the competition judges for evaluation. Section Chair Bob Rhodes will name the three competition judges in the near future.

G. Council of Sections — Section Representative Linda Rigot presented a history of the section's involvement in The Florida Bar lobbying policy, which requires notice and approval prior to lobbying. Until the section responded to the request for section participation in the deliberations of the Governor's Administrative Procedure Act Review Commission in 1996, it was unclear that the policy required permission of The Florida Bar for section activity with respect to the Executive Branch. Further, until the section responded to First District Court of Appeal Chief Judge Edward Barfield's recent request for section participation with regard to the issue of creating a statewide administrative appellate court, it was unclear that the policy required permission of The Florida Bar for section activity with respect to the Judicial Branch.

Recently, the Council of Sections approved a Resolution of Understanding clarifying these and other issues regarding section advocacy and technical assistance. Cathy Lannon attended the Council of Sections meeting, and voted against the resolution. The resolution will be presented to the next-scheduled meeting of the Board of Governors.

The Executive Committee discussed the substance of the resolution, and the procedure used to develop it. The Executive Committee conceded that substantively there was little to quarrel with, since The Florida Bar had approved very broad lobbying subject matters for the Administrative Law Section, and the section has every indication that The Florida Bar will continue to do so. Some members of the Executive Committee expressed greater concern over the procedure used in developing the policy. The policy was presented to the Council of Sections even though it was not part of the agenda package for the Council meeting, and the ad hoc committee appointed by the Chair of the Council of Sections to draft the policy (which ad hoc committee included Linda Rigot as a member) had never met. The Executive Council concurred with Linda Rigot's recommendation, nonetheless, that the section not raise the procedural improprieties with the Board of Governors. It was suggested, however, that Linda Rigot consider seeking a leadership position on the Council of Sections in order that the section may have a greater role in setting policy and ensuring a proper airing of issues among the sections.

IV. Old Business

A. Exceptions to Uniform Rules of Procedure — In the absence of Cathy Lannon, Section Chair Bob Rhodes suggested that members review the Office of Plan-

ning and Budgeting policy regarding exceptions to the Uniform Rules of Procedure. Linda Rigot reported on past activity regarding exceptions, and reported that currently no petitions for exceptions are pending before the Administration Commission.

V. New Business

A. Section Chair Bob Rhodes raised the subject of the Constitutional Revision Commission, and asked whether the section should have formal input to the Revision Commission's deliberations. Bill Hyde reported that he had been monitoring the work of the Revision Commission, and that there have been a number of issues presented that would have either direct or indirect effects on administrative law and procedures. As an example, he cited the proposal by Treasurer Bill Nelson and Comptroller Bob Milligan to drastically revise the structure of the Florida Cabinet. Another instance cited was the suggestion by Department of Environmental Protection Secretary Virginia Wetherell that an "environmental bill of rights" be engrafted on the Florida Constitution.

Bill Hyde suggested that the section continue to monitor and seriously consider providing input to the Revision Commission. Ralf Brookes is the ad hoc committee chair for this issue on behalf of the Environmental and Land Use Law Section, and Bob Rhodes appointed Ralf and Bill to the ad hoc committee to monitor and report on the Constitutional Revision Commission for the Administrative Law Section.

B. Dan Stengle raised the issue of the October 1 deadline for agencies to list rules over which they have insufficient statutory authority under the 1996 APA rewrite, as provided in section 120.536, Florida Statutes. He suggested that the agency lists would be of great importance to administrative practitioners and to the section. He expressed his opinion that listing rules could put agencies at a legal disadvantage in enforcing rules — since by listing the agency admits insufficient statutory authority for the rule — even though the law gives a grace period for administrative challenges to the rulemaking authority until July 1, 1999. He said that he believes that due process problems could arise if agencies persist in applying listed rules.

VI. Time and Place of Next Meeting

The next meeting will be held in Tallahassee (location to be announced) in January 1998 (specific date to be announced).

VII. Adjournment

The meeting adjourned at 11:47 a.m.

Respectfully submitted,
Dan R. Stengle, Secretary

The Florida Bar
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