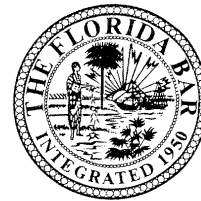


# ADMINISTRATIVE LAW SECTION NEWSLETTER



Vol. VIII, No. 1

THE FLORIDA BAR

OCTOBER 1986

## Incoming Chairman's Report

Welcome to the 1986-87 year of the Administrative Law Section which now has been in existence for 10 years. As your new chairman, I am looking forward to a fruitful and challenging year. Officers elected at the annual meeting are the following: *Chairman-elect*, Mr. Chris Bentley; *Secretary*, Ms. Deborah J. Miller; *Treasurer*, Ms. Drucilla E. Bell. Our Board of Governors Liaison for this year is Mr. Thomas M. Ervin, Jr.

I urge all members to get involved in section committee work and when possible to attend the executive council meetings which are scheduled as follows:

*October 28, 1986* 10:30 a.m. The Florida Bar Headquarters, Tallahassee

*January 23, 1987* 10:30 a.m. The Omni, Miami—The Florida Bar Midyear Meeting

*April 27, 1987* 10:30 a.m. The Florida Bar Headquarters, Tallahassee

*June 12, 1987* 10:00 a.m. Orlando Marriott World Center, The Florida Bar Annual Convention with luncheon to follow

The Administrative Law Conference, which has been a huge success under the leadership of Robert Smith, is scheduled for February 13-14 in Tallahassee. Chris Bentley is chairman this year and he promises an exciting and informative conference. This would be a wonderful experience for potential members and I suggest that members encourage others with administrative law interests to attend. If you have not attended the conference in the past try to attend; this year's conference promises to be an exhilarating experience.

If each member would undertake the successful recruitment of one person for membership in the Section we would be blessed with new ideas and new money. Membership chairman is Pat Maroney and those who have ideas for recruiting new members should let Pat hear from you.

The next CLE seminar is planned for October 1986 in Tallahassee. The seminar title is "Practice Before the Florida Division of Administrative Hearings." Bill Hyde, CLE Chairman, has put together an impressive program consisting of lectures by Richard Donelan ("Adjudicatory Proceedings and Rules Challenges Before DOAH"), Robert T. Benton, II ("Update on Doah Rules") and James S. Alves ("Recent Trends in Administrative Law"). Make plans now to attend.

The response to the committee preference form was excellent which was gratifying. Committee chairmen have been appointed as follows:

John A. Barley, Chairman, Special Adhoc Committee on Public Contract Law

Chris Howard Bentley, Chairman, Administrative Law Conference Committee

Robert Tyrie Benton, II, Chairman, Rules Committee

Dean Bunch, Co-Chairman, State Agency Practice Committee

Richard T. Donelan, Jr., Chairman, Legislation Committee

Julie Gallagher, Co-Chairman, State Agency Practice Committee

*continued . . .*

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## CHAIRMAN'S REPORT

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William Lewis Hude, Chairman, Continuing Legal Education Committee  
Patrick L. Imhof, Chairman, Newsletter Committee  
Rhoda Smith Kibler, Chairman, Insurance Committee  
Patrick Francis Maroney, Chairman, Membership Committee  
John Allan Radey, Chairman, Environmental Law Liaison Committee  
Leslie Kathleen Reicin Stein, Chairman, Communication Committee

Diane Dubois Tremor, Chairman, Annual Meeting Committee  
George Lee Waas, Chairman, Journal Committee  
Patrick Knight Wiggins, Chairman, Regulated Utilities Committee

Please help them make this a successful year for the Section.

Judith A. Brechner  
General Counsel's Office  
Department of Education  
Knott Building  
Tallahassee, Florida 32304

## Legislation of Interest

The 1986 Legislative Session did not make any major changes in the Administrative Procedure Act. Three bills passed which amend the Administrative Practice Act, chapter 120, Florida Statutes.

**House Bill 792 by Representative Dudley (Chapter 86-108, Laws of Florida)** provides that all pleadings, motions, or other papers filed in an administrative proceeding under section 120.57(1), Florida Statutes, must be signed by the party, his attorney or his qualified representative. Such signature acts as a certification that the signatory has read the pleadings, etc., and that to the best of his knowledge the pleadings, etc., are not interposed for any improper purpose such as harassment, unnecessary delay, frivolous purpose or needless increase in the cost of litigation. This act also authorizes the imposition by the hearing officer of reasonable expenses for violation of these provisions.

The act provides time limits for expedited review for petitions challenging the issuance of a construction or operating permit which implements a conceptual review permit issued by a water management district.

**Committee Substitute for Senate Bill 631 by Senator Frank (Chapter 86-30, Laws of Florida)** This act adds an additional week for the procedures concerning the adoption of rules under chapter 120. It provides that the publication, mailing, and posting of the notice of the adoption, amendment, or repeal of any nonemergency rule shall occur at least 21 days prior to the intended action. The notice is required to be published in the Florida Administrative Weekly not less than

28 days prior to the intended action. An affected person may request an opportunity to be heard and submit pertinent material within 21 days of the publication of the notice for rules dealing with actions other than those relating exclusively to organization, procedure, or practice.

The act also extends to 21 days the time for submission of a request by a substantially affected person for a determination that a proposed rule is an invalid exercise of delegated legislative authority.

Under the provisions of this act no rule may be filed for adoption until 28 days after the notice is made. Finally, the act allows the agency to change its rule prior to adoption in response to any written material received by the agency within 21 days of the notice.

**Committee Substitute for Senate Bill 892 (Chapter 86-216, Laws of Florida)** amended several provisions concerning the Division of Administrative Hearings. The act amends section 120.65 to repeal the division's exemption to chapter 216 which had established the division as a separate budget entity, and reemphasized that the division was not subject to the control, supervision, or direction of the Department of Administration. It provides that the division has the right to appeal to the Administration Commission any action taken by the Executive Office of the Governor which affects amendments to the division's operating budget or chapter 216 personnel actions. The Appropriations Committees may act in an advisory capacity and the President of the Senate and Speaker of the House also may object in writing on these issues. Under the provisions of this act all state agencies,

as defined in chapter 216, and all political subdivisions are required to make their meeting facilities available for use by the division at a time convenient to those agencies and subdivisions.

Chapter 216 is also amended by this act to

require the division to submit its final budget request directly to the Legislature and provisions are included which establish the annual salary rate for division personnel directly in the General Appropriations Act or in the Statement of Intent.

## Governor's Committee on the Division of Administrative Hearings Final Report — April, 1986

On April 25, the Governor's Committee on DOAH, chaired by Tallahassee Attorney Betty Steffens, submitted its final report to Governor Graham.

The findings of the report are summarized as follows:

1. Two Hearing Officer positions to be funded for 1986 to adequately handle the immediate impact of the **Growth Management Act**;

2. No **branch offices** need to be established. The Division should continue to maintain a single office in Tallahassee;

3. **Specialization** of Hearing Officers is not desirable;

4. The Hearing officers of the Division of Administrative Hearings need to be **independent** but accountable;

5. The Legislature should move review of the Division's budget from general governmental appropriation subcommittees to **judiciary appropriation subcommittees**;

6. The Governor's Office of Planning and Budget should support the Division in resolving matters related to **"rate"**;

7. All agency final orders, together with the recommended orders should be **published, indexed and accessible to the public**;

8. The **selection and retention of Hearing Officers** should be done outside of a political framework and include a procedure for thorough periodic evaluation of the Hearing Officer;

9. The title of "Hearing Officer" should be changed to **"Administrative Law Judge"**;

10. Where an agency initiates action against a person licensed by the State, a Hearing

Officer's order should be **final agency action**. In her letter to Governor Graham, Steffens stated:

These recommendations and our report address the issues and concerns you, as Florida's Chief Executive, have raised regarding the functions and operation of a division of state government which was created to administrate

justice. We have found that the Division is currently being managed efficiently in that cases are being set promptly and orders are being timely issued. We are also impressed by the quality of work exhibited by the Division.

The entire text of the report follows.

### Growth Management Act of 1985

The Committee assessed the effects of the Act on the Division and any immediate needs that might be generated. Based on the Committee's assessment of the Act, it does not appear there will be a significant immediate impact on the Division. However, at the close of the 1986 Legislative Session, a number of potentially time-consuming rule challenges can be expected. This should continue through 1988, at which time significant numbers of cases can be expected to be filed.

It is obvious that within a two-year period the Division could experience a major increase in requests for hearings. While there is no need for alarm prior to the 1986 Session, the Division is planning for a dramatic impact within the next two years. As can be seen in the flow chart attached at Annex 1, the Division's role in growth management is critical. In order for the legislative intent concerning growth management to be implemented, these cases *must* be heard and decided as promptly as possible. To accomplish this goal, the Division must be assured of adequate resources, in both personnel and support services.

The Division has requested two Hearing Officers and support personnel for the next fiscal year. These positions should be fully funded and brought on line by January, 1987 to ensure adequate personnel are available to expeditiously hear the expected lengthy and complicated challenges to growth management rules promulgated pursuant to the Growth Management Act of 1985.

*continued . . .*

## **Branch Offices**

The Committee determined there was no need to establish branch offices, and that there exist greater advantages in locating all Hearing Officers in one office. This is based primarily on the relatively small number of Hearing Officers (28) and the concern that branch offices would tend to make those Hearing Officers isolated. Also, decisions could materially differ from office to office, and there could be forum shopping for particular Hearing Officers. While there may be some expense and time associated with traveling by Hearing Officers located in Tallahassee, branch offices would create a substantial amount of duplication of capital and operating expense, such as acquiring libraries, additional word processing systems, and coordinating a centralized filing system.

The Division should maintain a single office in Tallahassee, but with the support of the Governor's office, explore utilization of teleconferencing as the State develops the Florida Satellite Network system, which would use locations at community colleges throughout Florida. Some thought should be given to making these facilities available for the conduct of administrative hearings.

Assuming branch office facilities are not established, it can be expected that the Division will outgrow its current location in the near future. The Division presently occupies space in the Oakland Building, isolated from the Capitol Complex and the capability for expansion is limited. The Division presently has only three hearing rooms, which are clearly insufficient to schedule the number of hearings occurring in Tallahassee with ever-increasing frequency. As a result, hearings have been held in Hearing Officers' offices and various other inappropriate locations. The Division's library is totally inadequate for the type of research required in the vast majority of administrative cases. For example, the library contains only one complete set of Southern Reporter and only two sets of Florida Statutes Annotated for 28 attorneys. A significant capital expenditure is required to create an adequate library for the Division.

Considering all of these factors, it was concluded that the most cost-effective approach to dealing with the problems of space, location and library facilities would be relocating the

Division to a building within walking distance of an established full service law library. The logical location to the Committee is the new state office building proposed to be built behind the Tallahassee-Leon County Civic Center and across the street from the Florida State University College of Law. This would place the Division in a location convenient to state agencies, near most private attorneys' downtown law firms and give the Division access to a complete law library for legal research, thus avoiding the unnecessary cost of duplicating another full-scale law library in Tallahassee.

## **Specialization**

The Committee reviewed the issue of subdividing the Division's Hearing Officers by subject matter, including the issue of having specialized Hearing Officers. Presently, of the 28 Hearing Officers, two are designated by statute to preside over cases arising from decisions of the Hospital Cost Containment Board. The Committee discussed whether there was actual need for special expertise in certain subject areas. Some of the advantages would be knowledge of subject, consistency of judgments, and speed in assigning cases.

The Committee determined the disadvantages of having specialized Hearing Officers outweighed the perceived advantages. The Committee determined that no mandated specialization of Hearing Officers or breakdown by subject area is desirable. The Director is and should be responsible for educating Hearing Officers to new procedures and developing their expertise to handle new types of cases, and is and should continue to be responsible for assignment of cases to Hearing Officers. This flexibility of assignment is desirable from a management standpoint and enhances fairness. However, the Office of Management and Budget and the Legislature should ensure funds are appropriated to train Hearing Officers on a continuing basis. In the past, budget requests of the Division for funds for training of new Hearing Officers have been rejected. This is clearly counterproductive since it directly affects the quality of agency decision making and involves relatively small amounts of dollars.

## **Location of the Division of Administrative Hearings within State Government**

The Committee agreed that the Division should be independent but accountable. In being

independent, the Division must be totally free from any executive branch intrusion, financial control, or threat thereof. The Division should be responsible for its expenditures, but accountable to the Comptroller and the Legislature rather than its parent department, the Department of Administration.

The Legislature has specifically recognized the need for the Division to be independent of the Department of Administration by amending Chapter 120, Florida Statutes, in 1979 to provide that "[t]he division shall not be subject to control, supervision or direction of the Department of Administration." See Section 120.65(1), Florida Statutes. However, notwithstanding the Legislature's statement to the contrary, the Department has continued to exercise supervisory powers over the Division in such matters as purchasing, expenditure of funds and personnel. Legislation should be enacted which states as specifically as possible that the Director of the Division is the agency head for all purposes and that all personnel decisions will be made by the Director rather than the Department.

### The Divisions's Funding Problems

The Committee addressed a number of areas associated with the budgetary problems facing the Division. The Division faces a continuing resource problem as the Legislature creates and expands the right to 120 proceedings into new areas without, in many instances, carefully considering the impact of such growth on the Division. The Division handled approximately 4,300 cases during the past year and was appropriated approximately \$2,250,000 for a per case cost of approximately \$500.

Within the executive branch, the workload of the Division is unique. The agency performs only one statutory duty, to hear contested cases, and functions almost identically to an Article V Court. However, because of its placement with the Department of Administration, the Division's budget is assigned for review by the general government appropriations subcommittees in the Legislature. In order to realistically assess the needs as well as the performance of the Division, the Legislature should move the review of the Division's budget from the general government appropriations subcommittees to the judiciary appropriations subcommittees, where a more focused analysis of the Division's operations could be made.

In making such a transfer, the Legislature could obtain more useful information concern-

ing administrative adjudication and its impact on Article V Courts and impose a more thoughtful and consistent approach to the appropriation of funds for all adjudicative tribunals.

During its December, 1985 meeting, the Committee discussed in detail the issue of the Division's budgetary and rate exemption from Chapter 216, Florida Statutes. Although Chapter 120, Florida Statutes, grants the Division a total exemption from Chapter 216, Florida Statutes, the Division has voluntarily complied with the requirements of Chapter 216, Florida Statutes, by submitting its budget to the Office of Planning and Budgeting. A corollary issue arose, however, as a result of the Director hiring more experienced Hearing Officers at a rate of pay above the base set by the Department of Administration.

The Division has taken the position that since it is exempt from Chapter 216, Florida Statutes, including the provisions contained relating to rate, it has the authority to hire personnel within the amounts appropriated by the Legislature without regard to the rate assigned a particular pay category. The Office of Planning and Budgeting has taken an opposite view as indicated in a letter dated January 21, 1986, attached as Annex 2.

After carefully considering the legal issues involved in this question, it is the opinion of the Committee that, as a later and more specific act, Chapter 120, Florida Statutes, supersedes Section 216.351, Florida Statutes, to the extent of any inconsistency. The Committee is not convinced there is in fact an inconsistency between the two acts. A number

*continued . . .*

This newsletter is prepared and published by the Administrative Law Section of The Florida Bar.

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Tallahassee

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## **FINAL REPORT**

*from preceding page*

of suggestions for resolving this issue were discussed, including initiation of a Section 120.565, Florida Statutes, declaratory statement remedy, or amending Chapter 120, Florida Statutes. The Committee does not believe amendatory legislation is necessary inasmuch as the express exemption works to ensure the Division's independence. Since this issue directly relates to the ability of the Director to hire qualified Hearing Officers and could affect, at some time in the future, the independence of the Division, it is urged that the Governor take the lead in finally resolving this question.

### **Reporting System**

One of the primary difficulties encountered by counsel and Hearing Officers is the lack of a complete and timely reporting system of administrative decisions. This problem has existed since the enactment of the Administrative Procedure Act but has progressively worsened as the number of orders issued by agencies and the Division has increased through the years. The Division's recommended and final orders are exceedingly difficult to locate since these orders have not been fully indexed for over ten years. An identical problem exists in virtually every state agency. As a result, administrative practice has become more specialized as particular attorneys are sought out because of their access to information not readily available to the general public. This is contrary to the purpose of the Administrative Procedure Act and can only be corrected when all agency decisions, including the Division's, are published, indexed and accessible to the public.

To begin the publication and indexing of the volume of past and present administrative cases requires a significant commitment of time and dollars. This must, however, be accomplished as quickly as possible before the costs of such an undertaking become prohibitive.

### **Selection and Retention of Hearing Officers**

The status of the Hearing Officers has been subject of confusion within state government since the creation of the Division. The Administrative Procedure Act gives significant powers and responsibilities to the Hearing Officers

and they function in most respects the same as judges.

To ensure Hearing Officers remained independent, the Legislature kept them in the career service system when all other attorney positions in the state were exempted in 1985. Presently, the only personnel within the Division who are not in the career service system are the Director, who is appointed by the Administration Commission, and the Assistant Director, who is a senior management employee appointed by the Director.

The Committee agrees having Hearing Officers classified and evaluated as career service employees was clearly inappropriate and that, eventually, as their powers and responsibilities increase, a system of selection and retention patterned after, but not necessarily identical to, the judicial nominating process should be substituted. A number of alternatives were discussed but no particular selection and retention scheme was finally endorsed.

The method finally selected for selection and retention should contain a procedure for thorough periodic evaluation of Hearing Officers and a mechanism established so that Hearing Officers who do not perform at a reasonable level of competence could be terminated.

The Committee also agreed that the title "Hearing Officer" was ambiguous and failed to convey, especially to private parties and litigants, the actual role of the Hearing Officer in the adjudicative process. To clarify this, Florida should follow the lead of California, Minnesota and other states and change the title of "Hearing Officer" to "Administrative Law Judge."

This subject area is a matter which is continuously discussed and is currently incorporated in a bill pending before the Florida Legislature. The Committee voted to take this matter up and a full discussion was had on the topic.

The Committee first agreed that the Division should remain an administrative entity and not become an Article V Court. The Committee concluded that in proceedings under Section 120.57(1), Florida Statutes, where an agency initiates action against a person licensed by the State, a Hearing Officer's order should be final agency action. If the Division is given this final order authority, the Division should also permit petitions for rehearing. In addition, appropriate amendments should be made to the Florida Equal Access to Justice Act, Section 57.111(4)(a), Florida Statutes, which would state:

If the agency enters an order in a proceeding pursuant to Section 120.57(1) altering a rec-

ommended order's findings of fact or modifying its conclusions of law without a reasonable basis in the record, a prevailing party on appeal shall be entitled to costs and fees under this section.

Likewise, the costs and attorney's fees provision of Section 120.57(1)(b) 9. should be amended as follows:

When there is an appeal, the court in its discretion may award reasonable attorney's fees and costs to the prevailing party if the court finds that the appeal was frivolous, meritless or an abuse of the appellate process. If the agency in its final order modified a

recommended order's findings of fact or modified conclusions of law without a reasonable basis in the record, the appellate court shall award costs and attorney's fees to the prevailing party.

### Florida Bar Administrative Law Section

The Committee recommends that the Administrative Law Section of The Florida Bar be consulted and included in any future studies regarding the functions and operations of the Division of Administrative Hearings.

## Administrative Law Section Detail Statement of Operations (Ending as of 6/30/86 — Fiscal Year 1985-86)

Description	Year to Date	Budgeted			
<b>Revenues</b>					
Dues	\$ 9,495	\$9,750	Newsletter	423	1,000
Dues retained by TFB	4,748	4,875	Membership		100
Net Dues	4,747	4,875	Supplies		100
Videotape Sales		125	Photocopying	82	100
Audio Sales	118		Officers Travel Expense	149	300
Seminar I			Meeting Travel Expense		200
Seminar II			Committee Expense	63	150
Practice Before Doah	1,566	860	Board or Council	32	1,000
Admin Law Ofc.	680	660	Bar Annual Meeting	1,519	3,000
Admin Practice Law			Section Annual		
Ofc.	514		Meeting	2	500
Interest	743	1,500	Mid-year Meeting	56	500
Miscellaneous			Admin Conference	1,833	3,650
Total Revenues	8,368	8,020	Awards	217	300
			Miscellaneous	49	100
<b>Expenses</b>					
Postage	608	500	Total Expenses	5,128	12,350
Printing	95	250	Current Operating Loss	3,240	4,330
Officers Office Expense		600	Begining Fund Balance	9,799	
			Fund Balance	12,724	

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**TALLAHASSEE, FL. 32301-8226**

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