Administrative Law Section Newsletter

Vol. XXIV, No. 2 **Elizabeth W. McArthur, Editor** **December 2002**

Point-Counterpoint: Administrative Law Certification?

An Argument in Favor of Administrative Law Certification

by Robert C. Downie, II

At its September 2002 meeting, the Executive Council of the Administrative Law Section discussed the idea of creating a certification program for practitioners of administrative law. Although the vote was close, the Council decided not to explore the issue any further. However, the Council did decide to air the debate among the Section membership, including presentations in the Section Newsletter. The purpose of this article is to explain why such a certification program makes sense. I invite people who are so inclined to respond to my arguments.

The same two reasons that every other certification program has come into existence apply to a potential certification program for administrative law. First:

> [S]pecialization establishes goals and provides incentive for continuing legal education which should improve the competency of the bar; second, it identifies for people both

See "Pro Certification," page 3

Administrative Law Certification – No Need, No Reason, No Way

by Allen R. Grossman

Once again the issue of specialty certification in administrative law is being discussed. This is not a new issue, but it continues to be a source of disagreement between colleagues. There are those of us who practice before a variety of government agencies who long for the perceived recognition that "specialization" may bring and there are those of us with the same types of practice who abhor the idea of artificially creating stratification in a practice that is so necessarily intertwined in the entire spectrum of different governmental entities and substantive subject matter areas. The Executive Council of the Administrative Law Section has again declined to adopt specialty certification and it should continue to do so.

I cannot pretend to be in a position to second-guess our Supreme Court or The Florida Bar with regard to the general concept of legal specialization. However, I must wonder about the notion that designating existing areas of legal practice as "specialties" will somehow improve the competency of the bar. It should be the goal of every lawyer to always practice at the highest level of skill

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INSIDE:

From the Chair

by Lisa "Li" S. Nelson

The last few months have been busy ones for the Section. Much has been accomplished and much remains to be done, but given the willingness of our members to pitch in and join the effort, I am convinced that this year will be a fruitful one for administrative law practitioners.

On September 6, 2002, the Executive Council met at Melhana Plantation, near Thomasville, Georgia, for its annual long-range planning retreat. In addition to enjoying the beautiful surroundings, we were able to conduct a productive meeting to deal with several issues confronting the Section. One area of discussion dealt with the Section's relationship with the Florida State University College of Law and the appointment of a professor to the Pat Dore Chair at the law school. Dean Donald Weidner joined us for this discussion and shared with us his goals for the law school in terms of administrative law and his desire that the Pat Dore professor act as a liaison to the Section. Council members were able to share with Dean Weidner their concerns that a working knowledge of Chapter 120 is essential for young lawyers who practice before governmental entities, and to ask how, as administrative practitioners, we can assist in the education process. I would like to thank Dean Weidner for his willingness to meet with us and listen to our concerns. Hopefully all of us came away with a sense that the Section and FSU's law school will benefit from a strengthened relationship.

The Section has already benefitted from the relationship with FSU's law school through its willingness to help sponsor the Pat Dore Administrative Law Conference. The conference was held October 24-25 in Tallahassee, and was a wonderful success. Not only did the law school help host the conference, including use of the school's rotunda for Thursday night's reception, but the new Pat Dore Professor, Mark Seidenfeld, was one of our speakers Friday afternoon. Although many hands worked to pull this mammoth event together, special thanks must go to Patrick "Booter" Imhof, our Continuing Legal Education Chair. As usual, there were a variety of speakers with a variety of perspectives. The conference examined administrative practice from the view of both the bench and the bar; the state and federal acts; the bureaucrat and the lobbyist; and the practitioner, both public and private. Booter's efforts to put together an interesting, informative conference resulted in a truly educational experience.

Although we have been busy, there is much to be done. I thank those who have responded to our request for input on information that would be helpful from agencies, and we hope that by the next issue of the newsletter, this project will be up and running. Requests have been made for another "Practice Before DOAH" seminar, and Booter is hard at work recruiting to get this CLE prepared. Cathy Sellers and Seann Frazier are hard at work promoting the law school writing contest and we wait with bated breath to see what the next legislative session will bring. In the meantime, I encourage everyone to get involved in the Section so that your particular perspective of the APA can be considered. The more, the merrier!

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PRO CERTIFICATION
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> within and without the profession those lawyers who have demonstrated special knowledge, skills, and proficiency in a specific field.

The Florida Bar re Amendment to Integration Rule, 399 So.2d 1385, 1386 (Fla. 1981). At the time the Florida Supreme Court made that comment, only two certification programs were under consideration, taxation and civil trial. Currently there are nineteen certification programs.[1]

Administrative law is a complex procedural area, with its own peculiar set of causes of actions and remedies. There are existing certification programs for both civil trial and appellate practice, and arguably administrative law is more specialized than either of those. The fact that administrative law certification would be somewhat of an umbrella category applicable to multiple areas of government regulation is beneficial. In the "Guidelines for New Certification Area Proposals" developed by the Florida Bar, the first guideline is: "That a certification area be as broad as possible and practical." In discussing the requirement for an examination to be developed, the Guidelines state: "We have found that examinations can be tailored to fit the broadest of categories, with optional questions for sub-specialty areas."

In terms of improving the "competency of the bar," there are already excellent CLE programs available to administrative law practitioners. The annual Pat Dore Administrative Law Conference, for example, presents topics applicable to all types of state agencies.[2] In addition, administrative law is often a subject within education programs tailored to specific areas of practice, such as environmental and land use law. Certification would provide more incentive not only to attend but to create more administrative law CLE.

The benefit of a certification program to those outside the profession is easily illustrated. Imagine for a moment that a state agency has delivered something by mail to a potential client that says she has twenty-one days to take action to protect her livelihood, like a professional license or an operation permit. Would this client want the opportunity to be represented by an attorney who, at a minimum, has "demonstrated special knowledge, skills, and proficiency" with respect to the Administrative Procedure Act ("APA"), the Uniform Rules of Procedure, and proceedings both at the Division of Administrative Hearings and before agencies? Of course. Remember that she knows nothing about any of these subjects, though. How is she going to find someone with those qualifications? If she knew what questions to ask, she might spend days trying to interview attorneys about their knowledge and experience. A much simpler and more reliable way would be to look for those certified in administrative law.

If there were administrative law certification, it certainly would not mean that every certified lawyer would be competent to handle every type of administrative matter. The same is true for lawyers certified in such specialized areas as tax, real estate, and international law, not to mention civil trial and appellate practice. Conversely, the absence of a certification program today does not prevent lawyers from practicing administrative law even if they have only a basic understanding of the field.

There is also a potential benefit to those within the profession. If membership in the Administrative Law Section is any indication, from a statewide perspective administrative law is not a well-known or well-understood area of practice. Although there are approximately one thousand two hundred lawyers who belong to the Administrative Law Section of the Florida Bar, nearly half live in Tallahassee. It is sometimes hard for those who eat, drink and breathe administrative law to fathom that some lawyers do not understand what they do for a living, much less appreciate it. Certification would raise awareness among the Bar's membership as to the complexity of representing a client in a matter involving agency action.[3]

To be sure, setting up a certification program for administrative law would not be easy. The criteria for lawyers to be certified must be developed, as well as the examination. Will some lawyers who think of themselves as administrative law practitioners not be qualified for certification? Probably. Will some lawyers who could be certified not bother with it? Probably. Are these valid reasons not to have such a program? No.

It takes a long time to develop an appreciation and understanding of administrative law. Lawyers who spend most of their career practicing administrative law should be able to hold themselves out to the public as having "special knowledge, skills, and proficiency" in this area. Potential clients and attorneys trying to refer clients should have some starting point for finding those lawyers, other than word of mouth and the yellow pages. Certification will also help establish administrative law as a recognized area of specialization, and thereby attract new lawyers to the field, and perhaps to agency employment.[4] Simply put, show me the downside.

Endnotes:

[1] To view a list of all specialties, go to the Florida Bar website Certification Index within the "Member Services" drop-down menu.

[2] Ironically, the 2002 Conference is worth 7.0 hours of credit toward the City, County & Local Government certification program.

[3] To underscore this point, my personal experience among lawyers outside the state capital has been that many have never even heard of the Florida Administrative Code, or have never looked at any part of it. Actual comments about administrative law which I have heard are that DOAH is a "kangaroo court" that does whatever the agency tells it to do (this was said before an audience at a CLE session), and that administrative litigation is "litigation light." A friend with a civil trial practice in a statewide law firm has asked me several times to "sit down and tell him what he needs to know" in order to develop an administrative law practice. If I am the only lawyer who has heard these types of comments I would be very surprised.

[4] Anyone who wonders whether today's law students are engaged by administrative law should know that last year the Section's writing contest drew one entrant.

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possible. It is also incumbent on every one of us to practice only in areas in which we are actually competent. The truth of "specialization" efforts is that they are usually and predominantly an advertising and marketing issue rather than a competency issue. It seems to me that strengthening the regulatory emphasis on appropriate continuing education and increasing regulatory efforts to discipline practitioners who do not practice with a reasonable level of skill and competence would do much more to assure the competency of the bar than creating artificial designations of specialty status.

Specialty recognition in the medical profession has fostered volumes of cases discussing the meaning and impact of the First Amendment, more volumes of cases initiated by regulatory agencies based on complaints of inappropriate advertising, additional volumes of cases weighing the appropriate standard of performance for specialists as opposed to other physicians, and maybe most significantly, does not appear to have had any helpful impact on reducing the number of lawsuits brought against physicians for failing to practice with the appropriate level of skill. In fact, some might argue that the proliferation of specialties, with its concomitant raising of the expectations of patients, may have actually contributed to the explosion of malpractice litigation in this country. There is also a very reasonable argument that specialization has contributed significantly to the crushing rise in health care costs in this country.

The creation of a specialty certification in the area of administrative law would be both artificial and possibly misleading. As all practitioners in the field would agree, the practice of administrative law encompasses numerous aspects of other specialty areas. Many administrative law practitioners are routinely required to utilize those skills usually associated with civil trial practice or appellate practice. Invariably, in order to deal with client needs before government entities, practitioners in the area of administrative law are also required to exhibit knowledge in any number of substantive areas that may or may not fall within the traditional scope of already designated areas of specialty practice, including for example: city, county & local government law, elder law, health law, labor & employment law, and workers' compensation. Even more significant than the overlap with already existing specialties, there is the issue of how specialty designation would fairly distinguish between the wide variety of skill sets that exist within the generally acknowledged scope of administrative law. Licensing, license discipline, rulemaking, bid protests, and administrative litigation are some of the easily identifiable subsets of administrative law. Is the state's leading disciplinary defense attorney to be excluded from specialty certification because he or she does not have sufficient knowledge or experience with regard to bid protests or the rule development and adoption process? Is the state's leading environmental attorney to be excluded from specialty certification because his or her practice is limited solely to that substantive area? What would the umbrella designation of administrative law specialization be intended to communicate to the public?

Specialty certification in administrative law would invariably create a relatively small "elite" class of lawyers anointed with the recognition of advanced status and presumably greater skills than the majority of lawyers who practice administrative law, but for one reason or another have either not qualified for the specialty designation or have simply chosen not to seek such status. It is unreasonable to presume that restricting or limiting advertising as an administrative law practitioner to a handful of designated practitioners that may or may not actually be the best practitioners in the area, will in any way benefit the general public in efforts to select a qualified lawyer to represent their specific issue.

Commonly accepted standards for continuing specialty competence require the periodic completion of continuing education courses that are more advanced than the continuing education taken by attorneys who are not certified specialists. Other Sections that have pursued and created specialty designations for their practice areas have had to deal with the hardships of developing and presenting a sufficient number of continuing education courses each year that are designated at a sufficiently advanced level to be appropriate for continued maintenance of specialty status. The increased focus on advanced courses can often result in the related drop-off of general courses available to the vast majority of practitioners in the area who will not be specialty certified.

The fact that there are lawyers in this state who do not know about the elements of good practice in administrative law is not in itself a reason to create specialty certification. The public and our profession will be much better served by supporting efforts to raise the general standard for professionalism and responsibility within the bar and by increasing regulatory responses to practitioners who fail to provide competent representation. The Administrative Procedure Act was initially promulgated for the purpose of assuring public access to the opportunity to challenge government action. One of the cornerstones of the original Act was the guarantee of a simplified process that would provide persons whose substantial interests are affected by government action or intended action a navigable avenue by which to address their concerns and challenge the government's decision. Although over the years the Legislature has in fact complicated the Administrative Procedure Act, it would be particularly ironic and maybe even antithetical for us to imply the necessity of a specialist by creating a specialty certification in administrative law. Instead, let us continue to foster responsible and competent practice. Let us continue to provide informative and instructive continuing education for all administrative law practitioners. Let us continue to support protection of citizens' rights established in an Administrative Procedure Act that was and should be intended to simplify and increase public access to governmental decisions and rulemaking. Let us continue to be reasonable rather than elitist.

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APPELLATE CASE NOTES

by Mary F. Smallwood

Licensing

Fowler v. Department of Health, 27 Fla. L. Weekly 1735 (Fla. 1st DCA 2002)

Fowler, a licensed optometrist, appealed a final order of the Department of Health revising the recommended penalty of the administrative law judge and imposing a $1000 penalty. The administrative law judge had found that Fowler violated the statutory prohibition against an optometrist engaging in the practice of optometry with a corporation. The factual findings were that Fowler, who leased space from a J.C. Penney optical store, occasionally allowed a receptionist at the store to make appointments for him. However, Fowler always confirmed those appointments on his own, which the administrative law judge found mitigated the violation. The recommended penalty was a reprimand.

In the final order, the Department adopted the findings of fact and the conclusions of law but imposed a monetary penalty, stating that the recommended penalty was too mild. On appeal, the court reversed. It held that the Department had failed to comply with Section 120.57(1)(j), Fla. Stat., in that it did not state with specificity the reasons for increasing the penalty.

Kasdaglis v. Department of Health, 27 Fla. L. Weekly 2112 (Fla. 4th DCA 2002)

Kasdaglis appealed a final order of the Department of Health disciplining his license as a clinical social worker. Kasdaglis had treated a 15 year old child of divorced parents relating to significant drug abuse. He informed the mother of the patient that he believed the child was a danger to himself and recommended intensive therapy. However, the mother rejected this recommendation. Subsequently, Kasdaglis was contacted by the father and communicated his conclusion to him. The father sought modification of the custody agreement, based at least in part on the information provided by Kasdaglis.

Both the mother and the Department requested copies of the child's records. In both cases, Kasdaglis refused to provide the records until he received written authorization from the patient. The Department initiated disciplinary action against Kasdaglis, charging that he had failed to protect the patient's confidences by discussing his case with the father, that he had violated statutory requirements that he provide copies of tests, reports, or documents to his patient and to the Department, and that he failed to meet minimum standards of performance regarding record keeping, billing and testimony to the agency in the disciplinary proceeding.

At the final hearing, appearing *pro se*, Kasdaglis requested a brief continuance because of major dental surgery the day before the hearing. The administrative law judge denied the request and proceeded with the hearing even though it was apparent that Kasdaglis had difficulty speaking.

After the hearing before the Board of Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling (the Board) on the recommended order, the Board verbally directed Kasdaglis to cease teaching at Florida International University until he had completed a course on ethics conducted by one of the Board members. However, the final order in the matter was not entered until almost nine months after the hearing. That order concluded that Kasdaglis had violated certain statutory provisions and required that the remedial ethics course be taken.

On appeal, Kasdaglis argued that the administrative law judge erred in denying him a continuance, that the delay of nine months in entering a final order was prejudicial to him, and that the Department erred in finding that he violated any statutory provisions. The court agreed on all grounds and remanded the case with instructions that the proceedings be dismissed and Kasdaglis' license be restored.

The court recognized that the decision to grant or deny a continuance is generally with in the discretion of the judge. However, in this case, it found that the respondent's physical condition manifestly impaired his ability to defend himself. Moreover, in light of the lengthy delay in entering a final order, the court found that the Department did not have any argument that delaying the administrative hearing created any type of emergency situation.

In addition, the court held that the nine-month delay in entering the final order had impaired the fairness of the proceeding. It noted that Kasdaglis had been unable to renew his malpractice insurance, had been barred from continuing his teaching duties and had lost significant revenues as a result of the Board's verbal order. Citing *Department of Business Regulation v. Hyman*, 417 So. 2d 671 (Fla. 1982), the court found that the delay justified reversal of the final order.

With respect to the conclusion of the Department that Kasdaglis had violated his patient's confidentiality by discussing the case with the father, the court reversed. It noted that Section 490.0147(3), Fla. Stat., allows a licensee to disclose confidential communications to an "appropriate family member" where there is a probability of physical harm to the patient. In this case, the court held that the father was an appropriate family member, although the child lived primarily with the mother, noting that Section 61.13(2), Fla. Stat., provides that access to a minor child's medical records shall not be denied to a nonresidential parent. Moreover, the court held that the disclosure of the licensee's conclusions to the father was not a disclosure of a confidential communication.

Likewise, the court rejected the Department's contention that Kasdaglis violated Section 491.009(1), Fla. Stat., by failing to provide the patient's records to the mother or the Department. With respect to the mother, the court noted that the statue only required provision of

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records to the patient. With respect to the Department, the statute required provision of records relevant to an investigation of the licensee's background. In both cases, the court found that the patient records did not have to be provided without the patient's written authorization.

The court held that the only viable basis for finding that Kasdaglis had failed to meet minimum standards of performance related to record keeping requirements. The court noted that the Department's conclusions in this regard were based on the testimony of its expert who stated that the written records lacked an assessment and diagnosis of the patient. However, she further testified that she was unable to read the licensee's handwriting on the records. The court recognized that Department rules contained certain minimum record keeping requirements. However, it found that the limited number of sessions between Kasdaglis and the patient were not conducive to a conclusion regarding assessment and diagnosis. In fact, the patient and his mother specifically rejected the recommendation of treatment made by the licensee.

Finally, the court held that the Board erred in increasing the penalty to require that Kasdaglis take an ethics course taught for compensation by one of the Board members, finding it violative of due process and fraught with the appearance of conflict of interest.

Adjudicatory Proceedings

Charlotte County, Florida v. IMC-Phosphates Co., 27 Fla. L. Weekly 1917 (Fla. 1st DCA 2002)

Charlotte County challenged the issuance of a permit by the Department of Environmental Protection to IMC-Phosphates to conduct phosphate mining activities. After a four week hearing, the administrative law judge issued a recommended order recommending issuance of the permit. On the same day as the recommended order was issued but prior to filing of exceptions or issuance of a final order, the Secretary of the Department issued a press release regarding the administrative law judge's order. It praised the employees of the Department involved in the permitting action and stated that the Department's issuance of the permit was consistent with state statutes and rules.

Charlotte County moved to disqualify the Secretary from issuing the final order in the case, arguing that the press release indicated bias and prejudice. The Department denied that motion, and the County sought a writ of prohibition.

The majority concluded that issuance of the press release was sufficient evidence of bias and prejudice and that the motion should have been granted. It recognized the various roles played by an agency head, including a political role. However, the court held that the timing and content of the press release were inconsistent with the Secretary's role as adjudicator which he assumed upon issuance of the recommended order. It concluded that based on the press release, a reasonable person could conclude that the Secretary believed the issuance of a final order in the matter to be just a formality.

Judge Kahn dissented. He drew a distinction between disqualification of a judge and an agency head acting in an administrative capacity. Judge Kahn seemed particularly persuaded by the fact that the agency head has very limited authority to modify or reject either findings of fact or conclusions of law under the Administrative Procedure Act. He concluded that the appropriate test to determine whether an agency head should be disqualified for bias or prejudice is whether the litigants have been deprived of due process. He noted that Legislature specifically declined to adopt a statutory provision that would have made agency heads subject to disqualification for the same causes for which a judge could be disqualified. Finally, Judge Kahn suggested that the press release was no more a sign of bias or prejudice than the original notice of intent to issue the permit.

Accardi v. Department of Environmental Protection, 27 Fla. L. Weekly 1943 (Fla. 4th DCA 2002)

The Accardis filed a petition challenging a coastal construction permit issued to an adjacent property owner. The petition was received more than 21 days after the Department of Environmental Protection issued its notice of issuance of the permit; however, the Accardis alleged that they had not received written notice from the Department and that the permittee had never published notice. The Department dismissed the petition with leave to amend on the grounds that it was untimely and that it failed to state with specificity disputed issues of material fact. In its order of dismissal, the Department asserted that it had mailed notice of the permit to the Accardis; it further asserted that pursuant to Rule 62-110.106(3), Fla. Admin. Code, the Accardis were presumed to have received notice.

The Accardis filed an amended petition, which the Department dismissed with prejudice on the same grounds. In addition, in dismissing the amended petition, the Department asserted that the Accardis lacked standing and that they were not entitled to a formal hearing because they had stated that there were no disputed issues of fact.

The court reversed and remanded. It held that whether the petition was timely was a factual issue to be determined below. It found no provision in the rules creating an irrefutable presumption that mailing of notice constituted receipt of notice. Accordingly, it must be determined by the finder of fact whether the Accardis actually received notice. With respect to the Accardis' standing, the court held that the Department erred in dismissing the petition with prejudice since they were never given a chance to amend to cure that issue. However, the court went further in finding that the petition contained sufficient allegations of standing as submitted. Finally, the court held that the petition adequately alleged the specific rules or statutory provisions requiring modification of the proposed action even though no section numbers of rules or statutes were cited in the petition. The fact that the petition identified the substance of the regulatory provisions was sufficient.

Renick v. State Retirement Commis-
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sion, 27 Fla. L. Weekly 1970 (Fla. 5th DCA 2002)

Mrs. Renick sought to have a final order of the State Retirement Commission reversed on grounds that the final order was not issued within the 90 day time-frame specified in Section 120.569(2)(l), Fla. Stat. Her deceased husband had challenged a decision of the Division of Retirement revoking his "special risk" classification in the state retirement system. After a hearing, the Commission ruled orally against Renick; however, it did not enter a written final order until over 600 days later, on the same date as his retirement from the state.

The court affirmed the final order, finding that there was no prejudice to Renick in the delay as Mr. Renick was still a state employee during the period of the delay. It noted that Section 120.569(2)(l) contains no sanction against the agency for failure to meet the deadline. Mrs. Renick had argued that, despite his continued employment, the delay affected his ability to make important decisions about when to retire. Despite upholding the final order, the court expressed grave concerns about the extensive, apparently unjustified, delay and suggested the Legislature should consider enacting sanctions provisions.

Foley v. Department of Health, 27 Fla. L. Weekly 2029 (Fla. 4th DCA 2002)

The Department of Health served an administrative complaint on Foley seeking to revoke his paramedic's license. When DOH had not received an election of rights form nearly a month later, its counsel filed a Motion for Default. Foley alleged that he had filed the form one day before the motion was filed, seeking an evidentiary hearing to assert mitigating factors. Counsel for DOH withdrew the motion; however, the agency head, *sua sponte*, entered a final order revoking Foley's license on the grounds that the filing of the election of rights was untimely.

On appeal, the court reversed and remanded. It held that DOH acted too quickly in finding the election of rights untimely since service was apparently effected on an individual with a different first name. Accordingly, the court held that Foley was entitled to an evidentiary hearing to determine whether he received notice of the proposed revocation.

Rule Challenges

Florida Fish & Wildlife Conservation Commission v. McGill, 27 Fla. L. Weekly 1800 (Fla. 1st DCA 2002)

The Commission took an interlocutory appeal to the First District of an order of the administrative law judge in a rule challenge case requiring the Commission to pay the costs of a transcript in the proceeding. During the pendency of this appeal, a final order in the rule challenge case was issued, and two appeals were filed in the Fifth District by unsuccessful challengers. The First District issued an order requiring the Commission to show cause why the interlocutory appeal should not be treated as a premature appeal of the final order. The Commission argued that it could not cross-appeal the award of costs because it was not contained in the final order.

The court denied the petition. It held that the issue of costs merged into or was an inherent part of the final order appealed to the Fifth District. Moreover, it opined that, although the time for filing a cross-appeal had expired, the appellants would have a difficult time demonstrating any prejudice were the Commission allowed to file an untimely cross-appeal since the parties were on notice of the Commission's desire to appeal the issue. The petition was denied without prejudice to allow the Commission to seek review in the Fifth District.

Frandsen v. Department of Environmental Protection, 27 Fla. L. Weekly 2039 (Fla. 1st DCA 2002)

Frandsen challenged a rule of the Department of Environmental Protection providing that a park manager at a state park could determine the suitability of "free speech activities" within the park based on such factors as visitor use patterns and concurrent visitor activities. The statutory authority for the rule was cited as Sections 258.004 and 258.007(2), Fla. Stat. Those sections provide that DEP had the authority to adopt rules to carry out its specific duties, including the duty to "supervise, administer, regulate, and protect all parks and recreation areas held by the state." Sec. 258.004, Fla. Stat. The administrative law judge held that the rule was a valid exercise of delegated legislative authority. On appeal, Frandsen also argued that the rule was an unconstitutional restriction of free speech.

The court affirmed. It held that the rule implemented the specific grant of authority in Section 258.004, Fla. Stat. It further held that the rule did not violate the appellant's right of free speech as it did not control the content of the speech. Instead, it simply regulated the operation of the park system.

Government-In-The-Sunshine

Homestead-Miami Speedway, LLC v. City of Miami, 27 Fla. L. Weekly 2143 (Fla. 3d DCA 2002)

Homestead-Miami Speedway ("Speedway") appealed from a summary order of the trial court holding that the City of Miami did not violate the Government-in-the-Sunshine Act in approving a lease with another entity to allow use of the City's waterfront property for racing. Speedway argued that the negotiations between the City and the third party were not open to the public prior to the final Commission meeting where the lease was approved.

The court affirmed the trial court's order. It found that the negotiations between the City Manager and the lessee were noticed and open to the public on multiple occasions; in fact, during at least two such meetings, public comment on the lease was allowed. The court held that there was no requirement that all such meetings be open to the public.

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Energy, Telecommunications and Utility Law Update

by Natalie B. Futch, Chair, Public Utilities Law Committee

A February, 2003, PULC CLE in Tallahassee is coming to fruition. Commissioner Braulio Baez, Esq., of the Florida Public Service Commission will speak. In addition, a one-hour segment regarding ethical issues in PSC practice is planned.

Thank you to those of you who have agreed to help in planning this course. We will distribute more specific date, time and location information as it becomes available.

Recent Cases

Among the significant opinions issued in 2002 in the area of energy, telecommunications and public utilities law are two Florida Supreme Court opinions issued in January – *Verizon Florida, Inc. v. Jacobs*, 810 So. 2d 906 (Fla. 2002) and *Panda Energy International v. Jacobs*, 813 So. 2d 46 (Fla. 2002).

Verizon Florida, Inc. v. Jacobs – This case relates to the treatment of revenues collected by non-regulated affiliates of regulated utilities. For the purpose of calculating the regulatory assessment fees it owed to the PSC, Verizon, a local exchange carrier (LEC), requested a declaratory statement from the PSC that it was not required to pay regulatory assessment fees on revenues billed and collected by a telecommunications company, but earned and booked by the company's corporate affiliate. Section 364.336, Florida Statutes, requires telecommunications companies to pay a fee of up to .25 percent of their gross operating revenues derived from interstate business [similar provisions for electric and water and wastewater companies]. The PSC disagreed with Verizon and imputed the revenues to Verizon for purposes of calculating regulatory assessment fees. On appeal, the Florida Supreme Court reversed the PSC's decision and held that yellow pages advertising revenues that Verizon collected for an affiliated publisher were not its gross operating revenues and, therefore, could not be imputed to Verizon for purposes of calculating the assessment fee. It found that a LEC that had elected to cap its rates for basic services, as Verizon had, was exempt from the Section 364.037, Florida Statutes, requirement that the PSC consider revenues derived from advertising in telephone directories when establishing rates for telecommunications services.

Panda Energy International v. Jacobs – This case was a sequel to the seminal decision by the Florida Supreme Court in *Tampa Electric Co. v. Garcia*, 767 So. 2d 428 (Fla. 2002). In *Tampa Electric*, the Court determined that the PSC lacked statutory authority to grant a determination of need for an electrical power plant to a non-regulated, out-of-state power producer ("merchant") where only 30 megawatts of the proposed 514-megawatt capacity had been committed by contract to be sold to a regulated Florida utility. The *Tampa Electric* Court said the "need" standard required the utility to demonstrate a specific committed need for all the electrical power to be generated at the proposed plant. In *Panda*, the Florida Supreme Court held, in part, that the PSC applied the need standard correctly in determining that Florida Power Corporation demonstrated a "need" for its proposed 530-MW Hines 2 electrical power plant, even though not all of the proposed output of the plant was committed. The Court declined to revisit the *Tampa Electric* decision. It found that the PSC appropriately considered such factors as FPC's willingness to maintain a 20 percent reserve margin and to replace demand side management with more firm assets, and that FPC was expected to grow into the capacity provided by Hines 2.

Further, the *Panda* Court held that FPC properly applied the PSC's bid rule, Florida Administrative Code Rule 25-22.082, which required FPC to issue a request for proposals for its proposed capacity addition. Panda Energy, a merchant, submitted a proposal in response to the RFP. The *Panda* Court held that the PSC was correct in concluding that FPC conducted its RFP process in conformance with the bid rule's directives in determining that its own proposal to build the plant was superior to Panda's.

Proceedings to Monitor

On October 3, 2002, the Office of Public Counsel filed a notice of administrative appeal to the Florida Supreme Court of PSC Order No. PSC-02-1199-PAA-EI (Docket No. 020233-EI), in which the PSC provisionally approved the proposed GridFlorida Regional Transmission Organization. *Citizens of the State of Florida v. Jaber*, Case No. SC02-2159. OPC's notice of appeal operated as an automatic stay of the PSC's proceedings in this matter pending disposition of the OPC's appeal. The OPC takes issue, in part, with the PSC's authority to approve the RTO proposal, claiming that the PSC would divest itself of its jurisdiction over retail transmission assets in Florida.

Natalie B. Futch *is the chair of the PULC. She is an associate with Katz, Kutter, Alderman, Bryant & Yon, P.A., in Tallahassee. She can be reached at (850)224-9634, or via e-mail at nfutch@katzlaw.com.*

Minutes of Administrative Law Section Executive Council Meeting - September 6, 2002

[not yet reviewed or approved by Executive Council]

I. Call to Order:

The meeting was called to order at 9:15 a.m. by Executive Council Chair Li Nelson.

Present: Donna Blanton, Dave Watkins, Bobby Downie, Charlie Stampelos, Linda Rigot, Mary Smallwood, Cathy Lannon, Li Nelson, Elizabeth McArthur, Clark Jennings, Mary Ellen Clark, Natalie Futch, Debby Kearney and Jackie Werndli.

Absent: Allen Grossman, Booter Imhoff, Paul Rowell, Rick Ellis, Seann Frazier, Chris Moore, Bill Willliams

II. Preliminary Matters

A. The minutes of the June 21, 2002, meeting were approved.

B. Debby Kearney gave the Treasurer's report. The Section is financially sound.

C. Li Nelson gave the Chair's report. Li introduced Natalie Futch as the new Public Utilities Law Committee Chair. Li deferred other matters for discussion during the meeting.

III. Committee Reports

A. The Pat Dore Conference brochure was distributed, with the note that a DEP representative is still being sought for the Variance and Waiver panel. It was discussed that a representative from another agency that has dealt with a significant number of variance or waiver requests may be invited, instead.

B. The Publications report was given by Debby Kearney. She reported that Larry and Cathy Sellers had co-written an article for the Journal, and that the article would be cosponsored for publication by the Section and the Environmental and Land Use Law Section. Elizabeth McArthur reported that the next Newsletter needs additional material. There was discussion about preparing a questionnaire for agency general counsels.

C. Linda Rigot gave the Legislative report. Since the Legislature is not in session, there is nothing happening on that front.

D. Natalie Futch gave the PULC report. She discussed an article for the Newsletter designed to boost Committee membership, a CLE that is in the planning phase, and a possible name change to the "Energy and Telecommunications Committee."

E. The Membership report is that there are over 1,200 Section members. A new membership brochure is being designed.

F. Cathy Sellers has indicated that she will be working with Seann Frazier on the Section's student writing contest. There was general discussion regarding increasing participation by students.

G. Bobby Downie reported that he will be attending the Council of Sections meeting on September 14, 2002, in Tampa.

H. Webpage - a "draft" of the website is up and open for comment by the Council. Over the coming months substantive material will be added, with an expected opening of the site after that time. Bobby Downie will write a small article for the Newsletter updating the membership on the site's progress.

I. Clark Jennings reported that a possible spring 2003 CLE was being planned with the Environmental and Land Use Law Section.

IV. Old Business

Li Nelson gave an update on the proposed amendment to Florida Bar Rule 4-4.2. The Section sent a letter opposing the amendment on June 26, 2002. Mary Ellen Clark stated that she is a member of the Rules Committee, which is meeting next week to discuss the amendment. Mary Ellen discussed her understanding of the initial reasons for the amendment, and relayed the reaction the Bar had received from individual members and other sections and committees. After general discussion, Mary Ellen was asked to represent to the Rules Committee that the Section prefers no change to the existing rule, but if the rule is changed, the amendment needs better definition of terms.

V. Informational

The 2002-03 Committee List was included in the meeting agenda.

VI. Time and Place of Next Meeting: The date tentatively decided upon is January 10, 2003.

VII. Adjournment

The meeting was adjourned at 12:05 p.m.

LONG RANGE PLANNING MEETING

I. Call to Order:

The meeting was called to order at 1:30 p.m. by Executive Council Chair-Elect Donna Blanton.

Present: Donna Blanton, Dave Watkins, Bobby Downie, Charlie Stampelos, Linda Rigot, Cathy Lannon, Li Nelson, Elizabeth McArthur, Clark Jennings, Mary Ellen Clark, Natalie Futch, Debby Kearney and Jackie Werndli.

II. Retreat Discussion:

A. New Pat Dore Chair at FSU Law School: Don Weidner, Dean of the Florida State University College of Law, addressed the Council at 9:30 a.m. on this subject. He announced that FSU has recently been ranked among the top nine law schools nationally in the area of Administrative Law. He shared resumes of Professors David Markel, J. B. Ruhl, and Mark Seidenfeld, and stated that he had chosen Professor Seidenfeld for the Pat Dore Chair. Dean Weidner gave a brief history of the creation of the Chair, and discussed the thought process that went into selecting Professor Seidenfeld.

Linda Rigot voiced some concerns about the professor in the Chair not being involved in Florida Administrative Law. Dean Weidner responded by stating that the Chair professor

continued...

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will work closely with the Section, but may or may not be pursuing Florida (as opposed to Federal) Administrative Law as his chosen area of academic study. He mentioned that Professor Seidenfeld's Administrative Law course would be expanded from three to four hours to accommodate teaching Florida law as part of the curriculum. Donna Blanton pointed out that it appeared that fewer students were interested in taking the Florida Administrative Law course, and suggested that a regular instructor, as opposed to rotating adjunct instructors, may help build a following for the subject among the students. She emphasized the importance as potential employers to ensure development of this interest and expertise in law students.

Mary Ellen Clark and Elizabeth McArthur expressed similar concerns. Mary Smallwood asked what the Section could do to foster a good working relationship with Professor Seidenfeld. Dean Weidner stated that including Professor Seidenfeld as a speaker at the Pat Dore Conference was a good start, and mentioned possible Section involvement in presenting Administrative Law topics directly to students. Natalie Futch suggested making the Florida Administrative Law course three hours, again.

B. Legislative Positions: Li Nelson recommended keeping the same Legislative positions as last year. This recommendation was accepted. Linda Rigot noted that the positions were the same the year before that, as well.

C. Certification in Administrative Law: Bobby Downie presented a brief review of the reasons he raised Certification as a point for discussion during the Long Range Planning Meeting. First, Administrative Law is a specialized area of practice, and potential clients should be able to identify practitioners skilled and experienced in that area. Second, in response to the idea that Administrative Law is procedural, and therefore too general for Certification, Bobby pointed out that Civil Trial Law is also procedural in nature and has a Certification program. Bobby then opened the meeting for general discussion.

Linda Rigot discussed the previous reasons the Section had rejected the idea of Certification. First, lay people are allowed to be qualified representatives. Second, there are too many subject matters practiced by those who could be certified.

Li Nelson questioned whether suitable criteria could be designed, and discussed the problems of recertification. She also mentioned some of the difficulties facing the Appellate Law Certification program with respect to recertification.

After more general discussion, Mary Ellen Clark moved that the Section further explore the idea of Certification. Cathy Lannon seconded. The vote was 6-6, and the motion failed.

It was decided that Bobby would present the "pro" point of view and Li Nelson would ask Allen Grossman if he would present the "con" point of view on Certification for the next newsletter.

D. National Association of ALJs Conference: Linda Rigot reported that FAMU's new law school had pulled out of helping organize and host the conference. She mentioned that Cathy Sellers is working to get the University of Florida involved. At this point, it is not clear what the Section may be able to sponsor at the conference, or how much sponsorship will cost. Expected attendance will be 300-400. The Section can help plan the presentations. The Florida Bar may also help with organizing the event. The proposed fee is $200, less than usual, and will be lower for students. The conference is also looking for corporate sponsors, and has Lexis on board, so far. Jackie Werndli recommended placing a line item expense for the Section's contribution in the proposed budget for 2003-04. After discussion, it was decided by the Section to include a line item expense of $15,000. There was some further discussion of the exposure the Section could expect for sponsoring an event at the conference.

E. Revision to the Uniform Rules: Donna Blanton reported that last year there were no responses by the membership to the question of whether the Uniform Rules needed amending. Cathy Lannon mentioned that some changes appear necessary to clear up confusion of unclear or conflicting rules. Li Nelson will contact the Governor's office to determine whether there is interest in addressing this issue. Chris Moore will head up an ad hoc committee to study the issues further. David Watkins and Cathy Lannon agreed to assist Chris.

III. Adjournment:

The Long Range Planning Meeting was adjourned at 3:15 p.m.

Respectfully submitted,
Robert C. Downie, II
Secretary

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