Administrative Law Section Newsletter

Vol. XXVI, No. 2 **Elizabeth W. McArthur, Editor** **December 2004**

Unsafe At *This* Speed: Is There An Exhaustion Requirement For Presidential Elections?[1]

by Lawrence E. Sellers, Jr.

The Florida Supreme Court recently reversed the trial judge's order enjoining Secretary of State Glenda Hood from certifying Ralph Nader and Peter Camejo as candidates for the Florida 2004 presidential ballot. *Reform Party of Florida v. Black*, Case No. SC04-1755, __ So.2d __ (Fla., Sept. 17, 2004). As the case involved a challenge to administrative action—here, the certification by the Secretary of State—administrative lawyers probably wonder: why weren't the plaintiffs first required (or allowed) to exhaust their administrative remedies before seeking judicial review?

The Challenged Administrative Action.

On August 31, the Reform Party State Executive Committee submitted papers to Secretary of State Glenda Hood seeking to qualify Ralph Nader and Peter Camejo as presidential and vice-presidential candidates for the Reform Party of the United States on the Florida ballot for the general election scheduled for November 2. The pertinent statute provides as follows:

> A minor party that is affiliated with a national party holding a national convention to nominate candidates for President and Vice President of the United States may

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From the Chair

by Robert C. Downie, II

The Executive Council had a productive retreat September 30 – October 1 at a Florida Panhandle hotel, the Watercolor Inn. Watercolor is located about 20 miles east of Destin, and sustained some storm damage from Ivan. Although the Inn was up and running, it still had some repair work left to be done. I had been in Orlando the day before, and had also seen some lingering effects from Charley, Frances and Jeanne there as well. Made me count my blessings that Tallahassee was (so far) spared the worst this season. Our thoughts and prayers are with those who were not so fortunate.

At the retreat, the Council spent the most time on two topics – Uniform Rules revisions and certification. Last year, the Section was asked to take a look at the Uniform Rules and recommend suggested changes to the Governor's Office. Council member Chris Moore valiantly took on the job, and various lawyers in the public and private sector were enlisted to assist her and us with the rewrite. The second day of the retreat was devoted to reviewing all of the suggestions, and fine-tuning them. The primary focus of the revision effort was to update the Uniform Rules to conform to statutory changes and case law. From here, the suggested changes will be sent to the Governor's Office for review. The Council's working draft of the revisions are posted on the Administrative Law Section website. Thanks to

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Chris Moore for her hard work and patient cat herding.

As for certification, on September 20, 2004, the Government Lawyers Section sent us a draft set of rules setting up a program for certifying lawyers in Administrative and Government Law. The draft rules were thoughtfully created, and gave us a good starting point for discussion. We have posted the draft rules on the Administrative Law Section website. During the retreat, what became evident was that the Council had more questions than could be answered, and so it was decided that we would appoint a four-member committee to communicate our questions, comments, and concerns to the Government Lawyers Section. The members of the committee are Donna Blanton, Mary Ellen Clark, Dave Watkins, and Seann Frazier. The committee will report back to the Council as it has information or needs additional guidance. I may read like a broken record, but again I ask that members interested in this subject let us know their thoughts.

One other topic I need to mention is the potential for a member dues increase. As some of you may know, the Bar is evaluating the financial relationship it has with the Sections. At $20, the Administrative Law Section has the lowest membership fee, and due to careful use of that money, the Section has done just fine. Currently the Bar retains $10, and the Section keeps $10. During the year, the Bar covers the costs of all overhead expenses, though. Inflation being what it is, that $20 is not going as far as it used to, and a dues increase is probable. The Board of Governors will meet to determine what direction to take, and the Council will respond accordingly. The Council will, of course, keep the increase as low as fiscally responsible.

Happy holidays, everyone.

ACT

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Florida Attorney's Charitable Trust (ACT) is a 501(c)(3) disaster relief fund that offers Florida's attorneys an avenue for making donations to victims of disasters, including members of The Florida Bar. ACT seeks to provide aid and assistance when a disaster has caused the disruption of legal processes and court systems or which result in reduced citizen access to the legal system and the pursuit of justice. ACT may also support other charitable organizations that assist in providing aid and other assistance to persons on a charitable basis. Please mail donations to Florida Attorney's Charitable Trust, 651 East Jefferson St., Tallahassee, FL 32399-3200.

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APPELLATE CASE NOTES

by Mary F. Smallwood

Rule Challenges

Ortiz v. Department of Health, 29 Fla. L. Weekly 1676 (Fla. 4th DCA 2004)

Ortiz, a certified registered nurse anesthetist, challenged a rule of the Board of Medicine which required the presence of a licensed M.D. or D.O. anesthesiologist, in addition to the surgeon, for level III surgery in an office setting. The administrative law judge found that the rule was not an invalid exercise of delegated legislative authority, and Ortiz appealed.

On appeal, the court reversed, noting that review of the final order was *de novo*. The Board had relied on Section 458.331(1)(v), Fla. Stat., as authority for the rule. That provision authorized the Board to establish standards of practice for physicians in specific practice settings, including "anesthetics" and "assistance of and delegation to other personnel." However, the court relied on Section 458.303(2) in finding the rule to be an invalid delegation of legislative authority. That section states that Section 458.331 must not be construed to prohibit a registered nurse from providing any service so long as the service is performed under the supervision and control of a licensed physician. The court rejected the Board's argument that the rule did not specifically regulate registered nurses, concluding that it indirectly regulated those persons. Ortiz had provided evidence at the rule challenge hearing that the rule effectively eliminated the need for nurse anesthetists as they performed the same function as an anesthesiologist. The court held that the rule violated Section 120.52(8)(c) in that by requiring supervision by an anesthesiologist, it improperly modified the provisions of Section 458.303(2), which only required the supervision of a "licensed physician."

Betts v. McKenzie Check Advance of Florida, LLC, 29 Fla. L. Weekly 1837 (Fla. 4th DCA 2004)

Betts, a plaintiff in a class action lawsuit against the defendant, alleged that the defendant's check cashing operations occurring prior to 2001 had engaged in usury. The allegations arose from transactions known as deferred presentment and rollover transactions whereby the check cashing operation cashed Betts' check, retaining a fee for that service, and agreed to defer presentment of the check for a certain period of time. Betts could redeem the check within that timeframe with cash or elect to extend (rollover) the transaction. The trial court granted summary judgment in favor of the check cashing operation, concluding that the operations were covered by the "Money Transmitters' Code," Chapter 560, Fla. Stat., and regulations adopted pursuant thereto.

In 1997, the Department of Banking and Finance had adopted regulations expressly approving deferred presentment transactions subject to certain conditions. The authority cited for these regulations was Section 560.105(3), Fla. Stat., to adopt rules "to interpret and implement the provisions of the code." McKenzie Check argued that the transactions could not be considered usurious as they were specifically approved by Department rule.

On appeal, the court reversed. Chapter 560 was initially adopted in 1994 and amended in 2001 to include a new section of the Code specifically addressing deferred presentment transactions. McKenzie Check argued that the 2001 amendments to the Code were merely a clarification of the Code and recognition that the 1994 act intended to cover deferred presentment transactions. The court disagreed. It concluded that the 2001 amendments were a new and entirely separate part of the Code. While recognizing that a subsequent amendment of a statute can sometimes be construed as a clarification, the court held that it was inappropriate to interpret an amendment adopted many years after the original enactment of the statute as a clarification.

With respect to the rules, the court found that the Department did not have sufficient authority under Chapter 560 to adopt the 1997 rules. Specifically, the court relied on Section 560.102 which provided that the Department had "[o]nly such rulemaking power and administrative discretion … as necessary, in order that the supervision and regulation of money transmitters may be flexible and readily responsive to changes in economic conditions." Because the 1994 act did not address deferred presentment transactions, the court concluded that the Department lacked the statutory authority to approve such transactions by rule.

Adjudicatory Proceedings

Malave v. Department of Health, Board of Medicine, 29 Fla. L. Weekly 1976 (Fla. 5th DCA 2004)

Malave appealed a final order of the Board of Medicine revoking his license to practice psychiatry for exercising influence over a patient for the purpose of engaging in sexual activity. At the time of the final administrative hearing, Dr. Malave declined to testify on his own behalf or call any witnesses because there were criminal proceedings pending relating to the same alleged actions. He had requested a third continuance of the administrative proceeding to allow the criminal matter to be resolved; however, the administrative law judge denied that request. When the criminal trial ended in an acquittal, the administrative law judge reopened the administrative proceeding to allow Malave to testify, but denied his request to call other witnesses. On appeal, Malave argued that the administrative law judge abused her discretion.

The court affirmed. It recognized that there is no absolute right to a continuance in an administrative proceeding pending the outcome of a parallel criminal proceeding and that parties subject to disciplinary proceedings may be required to choose between giving testimony and remaining silent. Although the court noted that there might be disagreement between judges over whether to grant a continuance under the cir-

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cumstances, the denial was not an abuse of discretion. Likewise, the denial of Malave's request to call other witnesses when the administrative proceeding was reopened was not an abuse of discretion. The court agreed with the administrative law judge that Malave waived that right by not calling those witnesses at the original hearing.

Packer v. Orange County School Board, 29 Fla. L. Weekly 2087 (Fla. 5th DCA 2004)

Packer, a teacher in the Orange County school system, was dismissed for physically confronting a student. The School Board had previously issued a directive to Packer requiring him to report any incidents of physical confrontation and prohibiting him from intimidating students. The administrative law judge found that Packer had pushed a student away when the student refused to obey his instructions and continued to try and grab candy that Packer was handing out to a class. The judge further found that the student was not injured although he was pushed back several steps into some lockers. Finally, the judge concluded that Packer had not acted unreasonably or illegally. Accordingly, the recommended order recommended that Packer be reinstated.

The School Board rejected the findings in the recommended order that the student and other class members were disruptive and that the student was not injured, based on testimony from other students, despite the fact that the judge had specifically found that testimony not credible. The School Board also added a finding of fact to the final order to the effect that Packer had admitted he had wrongly touched the student. The Board also held that its policies requiring it to protect students in the school system justified its overruling of the findings of fact. The final order terminated Packer's employment.

The court reversed and remanded with directions to the School Board to adopt the recommended order. The court held that the Board had improperly rejected findings of fact in the recommended order, as those facts were susceptible to ordinary methods of proof and not infused with policy considerations. The court rejected the Board's reliance on a number of cases where a school board had been upheld in rejecting the recommendation of an administrative law judge. It noted that in each of those cases there was no dispute regarding the action of the teacher who was subject to discipline. In this case, however, the administrative law judge had found that Packer had not engaged in actions that were unjustified or illegal.

Standing

Memorial Health Care Group, Inc. v. Agency for Health Care Administration, 29 Fla. L. Weekly 1758 (Fla. 1st DCA 2004)

Memorial Hospital of Jacksonville challenged a Certificate of Need (CON) application filed by St. Vincent's Hospital for 10 neonatal intensive care unit (NICU) beds. That application was dependent on the delicensure of 10 NICU beds at St. Luke's Hospital which was the subject of a separate CON application. The administrative law judge held that Memorial lacked standing under Section 408.039(5)(c), Fla. Stat., and *Agrico Chemical Co. v. Department of Environmental Protection*, 406 So. 2d 478 (Fla. 2d DCA 1981). He found that approval of the CON would not result in any new service and denial of the CON would not result in termination of service.

On appeal, the court reversed and remanded the case for further proceedings. Specifically, the court noted that Memorial had alleged that it would be affected by the CON in three ways – the provision of "new" NICU services, changes in payor mix at its own facility, and its ability to retain staff. Since the recommended and final orders only addressed the first argument, the court remanded for a factual determination as to the remaining two allegations.

Bid Protests

Consultech of Jacksonville, Inc. v. Department of Health, 29 Fla. L. Weekly 1646 (Fla. 1st DCA 2004)

Consultech and Information Systems of Florida ("ISF") were the only respondents to a Request for Proposals by the Department of Health for the design, implementation, and maintenance of a system for tracking continuing education units ("CEUs") for healthcare professionals. A department review panel awarded ISF 573.5 points out of a possible 650 and awarded Consultech 298 points. Upon DOH's notice of intent to award the bid to ISF, Consultech submitted a timely formal protest. Consultech's petition alleged that the proposals had been improperly scored and that DOH had failed to properly consider the relative costs of the proposals.

After a formal hearing, the administrative law judge entered a recommended order concluding that the award to ISF was not clearly erroneous, contrary to competition, or arbitrary or capricious. The recommended order found that Consultech did not have successful experience in providing CEU tracking systems or similar systems. Its response to the Request for Proposals did not identify a single such project that it had developed or implemented. In addition, the administrative law judge noted that a witness that Consultech had identified as a reference testified at the hearing that he was not comfortable that Consultech could deliver the required services. With respect to the cost argument, the administrative law judge rejected Consultech's interpretation of Section 456.003(5) to include costs paid by healthcare providers using the CEU system. That statute provided that DOH's policies must ensure that all "expenditures" are made in a manner that maximizes competition and minimizes licensure costs. The administrative law judge accepted DOH's interpretation of the statutory provision that the expenditures at issue were those funds paid out by DOH. In this case, the judge found that no DOH funds were involved in the award to ISF. DOH adopted the recommended order and awarded the bid to ISF.

On appeal, Consultech argued that it was entitled to the award because of the superior quality of its staff and the lower cost estimate for development of the system. The court rejected both arguments. It held that there was competent substantial evidence to support the findings of fact in the recommended order and refused to reweigh the evidence. In addition, it held that the agency's interpretation of the statute was entitled to great weight.

Finally, the court determined that ISF was entitled to attorney's fees on appeal because the appeal by Consultech was an abuse of the appellate process. The court noted that Consultech had essentially used the appeal to reargue the facts presented in the administrative proceeding.

Immediate Final Order

Moses v. Department of Health, 29 Fla. L. Weekly 1809 (Fla. 1st DCA 2004)

Moses, a licensed chiropractor, received a "Pre-Notice Advisory" from the Department of Health pursuant to Section 456.074(4), Fla. Stat., regarding non-payment of student loans. That advisory stated that Moses might "in the future" receive a notice from the Department and the Department would be checking the payment status again. No further notice was ever provided; however, the Department subsequently issued an emergency final order suspending Moses' license.

Section 456.074(4) provides that the license of a health care practitioner may be suspended for non-payment of such loans if the practitioner does not provide proof with 45 days of receipt of certified mail notice that new payment terms have been agreed to.

On appeal, the court held that the Pre-Notice Advisory was not sufficient to invoke the provisions of Section 456.074(4). Moreover, the court held that, absent the provisions of Section 456.074(4), nonpayment of a student loan could not be considered an "immediate serious danger to the public health, safety, or welfare" under Section 120.60(6), Fla. Stat., adequate to justify the issuance of an emergency final order.

Government-in-the-Sunshine

Dascott v. Palm Beach County, 29 Fla. L. Weekly 1732 (Fla. 4th DCA 2004)

Dascott, an employee of Palm Beach County, was terminated from employment after a closed door meeting in which the department head made the decision. The county filed affidavits to the effect that no vote was taken of other county employees who were in the meeting. Since the decision was made by the department head alone, the county argued on appeal that the meeting was not subject to the Government-in-the-Sunshine requirements.

On appeal, the court rejected the county's arguments. It noted that the affidavits stated that the employees in the closed door meeting gave the department head advice on the matter of whether to terminate Dascott. Accordingly, the court distinguished this case from *Cape Publications, Inc. v. City of Palm Bay*, 473 So. 2d 222 (Fla. 5th DCA 1985), where the meeting was purely a fact-finding and no decision was made. The court also distinguished *Knox v. District School Board of Brevard County*, 821 So. 2d 311 (Fla. 5th DCA 2002, where an advisory panel reviewed applications for a principal position and sent recommendations to the superintendent. In the *Knox* case, the advisory board made no decision as to the final appointment.

The court also declined the county's request that the court certify the question of the applicability of the Sunshine Act to the Supreme Court as one of great public importance, finding that its decision was limited in nature and did not bring all consultations with staff by county decision-makers within the ambit of the Sunshine Act.

Writ of Prohibition

Department of Health v. Barr, 29 Fla. L. Weekly 2111 (Fla. 1st DCA 2004)

Barr, a dentist, filed a petition for a writ of prohibition in circuit court to prevent the Department from proceeding with a disciplinary action. The Department then filed its own petition for writ of prohibition with the District Court arguing that the circuit court lacked jurisdiction to act on the petition.

The appellate court granted the writ of prohibition holding that the circuit court had no authority to issue an extraordinary writ where it had no appellate jurisdiction over the administrative proceeding. Instead, the district court was the appropriate venue to seek a writ of prohibition.

Declaratory Statements

Lennar Homes, Inc. v. Department of Business and Professional Regulation, 29 Fla. L. Weekly 2158 (Fla. 1st DCA 2004)

Lennar Homes, a residential developer, sought a declaratory statement from the Department (Division of Land Sales, Condominiums and Mobile Homes) as to the validity of a mandatory arbitration provision in its condominium sales agreements. The Division issued a declaratory statement finding broadly that requiring mandatory arbitration was invalid under certain provisions of Chapter 718, Fla. Stat., that provide remedies for condominium purchasers against the seller. On appeal, Lennar raised certain constitutional arguments in challenging the declaratory statement.

Without reaching those constitutional arguments, the court held that the Division lacked the authority to issue the declaratory statement because it was a broad policy pronouncement. The court distinguished the facts of this case from *Chiles v. Department of State*, 711 So. 2d 151 (Fla. 1st DCA 1998), where it had held that the Secretary of State could issue a declaratory statement that affected persons other than the individual requesting the declaratory statement. Here the court found that the Division was announcing a broad agency policy applicable to all sales of condominiums in Florida. Accordingly, the court concluded that this situation was unlike that in *Chiles* where a limited number of individuals would be affected. The court also distinguished the case from *Department of Business and Professional Regulation v. Investment Corp. of Palm Beach*, 754 So. 2d 374 (Fla. 1999). In that case, the agency had announced its intention to initiate rulemaking proceedings to apply the announced policy more broadly to entities other than the one requesting the declaratory statement.

In addition, the court held that the Division had no authority to interpret and declare void an entity's contract provisions as that jurisdiction is vested solely in the judiciary.

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> have the names of its candidates for President and Vice President of the United States printed on the general election ballot by filing with the Department of State a certificate naming the candidates for President and Vice President and listing the required number of persons to serve as electors. Notification to the Department of State under this subsection shall be made by September 1 of the year in which the election is held. When the Department of State has been so notified, it shall order the names of the candidates nominated by the minor party to be included on the ballot and shall permit the required number of persons to be certified as electors in the same manner as other party candidates.

§103.021(4)(a), Fla. Stat. (2004).

Governor Jeb Bush certified the Reform Party's slate of presidential electors to Secretary of State Glenda Hood, who in turn certified that the names of Nader and Camejo be placed on the 2004 Florida presidential ballot.[2]

The Challenge to the Administrative Action.

On September 2, two separate complaints were filed in the circuit court, seeking a reversal of the certification and the removal of Nader's and Camejo's names from the ballot. The complaints alleged that Nader and Camejo are not minor party candidates affiliated with a "national party" as provided in Section 103.021(4)(a), but rather are independent candidates who use the name "Reform Party of Florida" to claim affiliation with the national Reform Party where no affiliation actually exists.

Following a hearing, the circuit court granted the requested preliminary injunctive relief. The trial court determined that the Reform Party failed to comply with the requirements of Section 103.021(4)(a). The circuit court based its conclusion on a number of findings, including: that the Reform Party of the United States is not a "national party," that candidates Nader and Camejo were not nominated in a "national convention," and that the Reform Party of Florida is not affiliated with the Reform Party of the United States. Subsequently, the trial judge conducted a final hearing on and granted the plaintiffs' request for permanent injunctive relief. The trial court entered a final declaratory judgment finding that Nader and Camejo are not legally qualified under Florida law to appear on the final ballot as candidates for President and Vice President.

The circuit court also permanently enjoined the Secretary of State from certifying Nader and Camejo on Florida's ballots, from instructing the county Supervisors of Elections to include their names on the ballot, and from mailing any ballots pending further order.[3]

The Florida Supreme Court's Decision.

The Florida Supreme Court reversed the trial judge's final declaratory judgment and vacated the permanent injunction "because Section 103.021(4)(a), Florida Statutes, is not sufficiently clear to put the Reform Party of Florida on notice that it could not qualify under its provisions." The Court noted that the statute does not outline standards or definitions for the critical terms, including "national party" and "national convention," and that, as such, the Reform Party of Florida was not on notice that these terms were to be interpreted in accordance with any specific criteria and certainly not the criteria used by the trial court. After a thorough review of the statute, related Florida statutes, the legislative history, statutes in other states, and federal statutes and standards, the Florida Supreme Court concluded that it was unable to ascertain whether the Florida Legislature intended for these terms to have a strict or broad interpretation. Accordingly, it held that, in the absence of more specific statutory criteria or guidance from the Legislature, it is not able to conclude that a statutory violation occurred.[4]

The Exhaustion of Administrative Remedies Requirement.

By the Administrative Procedure Act (APA), the Legislature has vested the power to review administrative action with the district courts of appeal. However, the circuit courts retain their power to issue injunctions. This general power of the circuit courts is subject to judicial restrictions upon its use that require prior resort to and exhaustion of administrative remedies when they are available and adequate. In this regard, Florida courts generally require that a litigant exhaust its administrative remedies before seeking judicial review.[5]

The doctrine of exhaustion of administrative remedies precludes judicial intervention in executive branch decision-making where administrative procedures can afford the relief a litigant seeks.[6] It is improper, if administrative remedies are adequate, to seek relief in the circuit court before the remedies are exhausted.[7]

The doctrine attempts to avoid premature interruption of the administrative process and to promote judicial efficiency by allowing the agency the chance to correct its own mistakes.[8] Its purpose is to ensure that an agency responsible for implementing a statutory scheme has a full opportunity to reach a "sensitive, mature, and considered decision upon a complete record appropriate to the issue."[9]

Was There an Available Administrative Remedy?

Florida courts have long recognized that the APA provides "varied and abundant remedies for administrative error."[10] Under the APA, any person whose "substantial interests" are affected by "agency action" may petition the pertinent agency for a hearing. *See* §120.569, Fla. Stat. In this case, the trial court determined that the plaintiffs' substantial interests were affected by the Secretary of State's certification that the names of Nader and Camejo be placed on the presidential ballot. The Secretary's certification appears to constitute "agency action" (although the Secretary asserted that her function was purely ministerial). Accordingly, it appears that these plaintiffs could have requested an administrative hearing to challenge the Secretary's

decision. Following an appropriate hearing, the Secretary could have issued a final order determining whether to certify Nader and Camejo. The final order could have addressed the issues raised by the plaintiffs and explained the Secretary's interpretation of key statutory terms, including "national party" and "national convention." The final order then would have been subject to judicial review.

Exceptions to the Exhaustion Requirement.

There are exceptions to the requirement that a litigant must first exhaust its administrative remedies. Whether circumstances warrant judicial intervention by a circuit court is ultimately a question of policy.[11] Florida courts have identified the following circumstances in which a complainant need not exhaust its administrative remedies and may invoke the jurisdiction of the circuit court in such cases: (1) the complaint must demonstrate some compelling reason why the APA does not avail the complainants in their grievance against the agency; or (2) the complaint must allege a lack of general authority in the agency and, if it is shown, that the APA has no remedy for it; or (3) illegal conduct by the agency must be shown and, if that is the case, that the APA cannot remedy that illegality; or (4) agency ignorance of the law, the facts, or public good must be shown, and, if any of that is the case, that the APA provides no remedy; or (5) a claim must be made that the agency ignores or refuses to recognize related or substantial interests and refuses to afford a hearing or otherwise refuses to recognize that the complainant's grievance is cognizable administratively.[12]

The Supreme Court's opinion does not mention the exhaustion requirement (although Justice Lewis, in his dissenting opinion, states that "there is no administrative remedy afforded under these circumstances"), but it appears that two of these exceptions might have been considered by the parties.

Too Little, Too Late?

Administrative remedies may be considered inadequate when they offer "too little, too late." If the agency's errors are "so egregious or devastating that the promised administrative remedy is too little or too late," the parties will not be required to resort to administrative remedies.[13] No doubt, the very short time period between the date on which the Reform Party submitted its papers for certification (on August 31) and the date by which county elections supervisors are required by law to mail certain absentee ballots (September 18), suggests that any administrative remedy indeed would be "too little, too late." However, the filing of a timely request for administrative hearing usually renders the agency's action ineffective until the proceedings are concluded,[14] so it appears that the plaintiffs would not have been compelled to seek judicial intervention in the form of injunctive relief.

The Agency Refuses to Afford a Hearing.

The Secretary of State asserted that her function is purely ministerial and that she therefore had no basis to look behind the certificate to determine whether the Reform Party met the statutory criteria.[15] Accordingly, the plaintiffs may well have thought that they were not required to exhaust their administrative remedies because the agency would have refused to afford a hearing or to otherwise recognize that their grievances are cognizable administratively. In addition, nothing in the record suggests that the Secretary offered any clear point of entry.[16] However, the party seeking to bypass administrative channels usually has the burden to demonstrate that no adequate remedy is available under the APA,[17] and the Court's opinion does not indicate whether any such showing was made.

What If The Plaintiffs Had Been Required (or Allowed) to Exhaust Their Remedies?

The stated rationale for the doctrine of exhaustion of administrative remedies is to avoid premature interruption of the administrative process and to promote judicial efficiency by allowing the agency the chance to correct its own mistakes. "Its purpose is to ensure that an agency responsible for implementing a statutory scheme has a full opportunity to reach a sensitive, mature, and considered decision upon a complete record appropriate to the issue; and that requirement produces an authentic decision by the executive which then may be reviewed comprehensively, on all appropriate issues, in a single judicial forum."[18]

So what if the plaintiffs had been required (or allowed) to exhaust their administrative remedies? In this case, it seems unlikely that the Secretary would have changed her mind following an administrative hearing. Even after two hearings in the trial court and a contrary decision by the trial judge, the Secretary argued on appeal that she "takes no position as to whether the facts of record compel placement of Ralph Nader and Peter Camejo on the ballot," but that the circuit court's final judgment should be reversed because it did not provide a clear, unambiguous and workable standard to establish compliance with the statute and because it failed to acknowledge federal constitutional limits on the question of access to Florida's ballots.[19]

The Secretary also expressed a concern for the proper legal construction of the state election laws to (1) limit the litigation in this case, (2) advise other minor parties what is necessary to comply with the statute, and (3) prevent disruptive and politically calculated litigation in future presidential election years between the date of ballot certification and the mailing of advance absentee ballots.[20]

The administrative process could have provided the Secretary with an opportunity to enter a final order that addressed these concerns and set out her own view of a workable and constitutional interpretation of the statute.[21] Her interpretation then would have been subject to judicial review.

In this case, the Florida Supreme Court clearly struggled with how to interpret the statute, and particularly key statutory terms. If the Secretary had a full opportunity to reach a "sensitive, mature, and considered decision upon a complete record,"[22] perhaps her interpretation would have been helpful to the Court. Indeed, it would have been interesting to see if the Florida Supreme Court

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would have afforded any deference to the Secretary's interpretation of the statute. Although nothing in the APA especially requires a court to defer to the agency's interpretation, the Florida Supreme Court often has said that an agency's interpretation of a statute it is charged with enforcing is entitled to great deference.[23] Instead, in this case the Florida Supreme Court decided that the trial court's order was subject to full, or *de novo*, review on appeal.[24]

Conclusion.

The by now famous (or infamous) litigation resulting from the 2000 presidential election involved challenges to decisions by the Secretary of State, yet there appears to have been no mention in any of the reported decisions of the doctrine of exhaustion of administrative remedies.[25] By the time you read this, the 2004 presidential election will have been held. Hopefully, we will know the results (at least in Florida), and administrative lawyers won't (again) be wondering whether the litigants should first be required to exhaust their administrative remedies or whether there is some unstated exception for presidential elections.[26]

Endnotes:

[1] Of course, this title is borrowed from Ralph Nader, *Unsafe at Any Speed: The Designed-In Dangers of the American Automobile* (1965).

[2] *Reform Party of Florida v. Black*, Slip Op. at 2.

[3] *Id.* at 10. The pleadings and orders filed in the circuit court are available online at *www.clerk.leon.fl.us* by selecting "View High Profile Cases."

[4] *Id.* at 23.

[5] *See, e.g., State v. Willis*, 344 So. 2d 580 (Fla. 1st DCA 1977).

[6] *Key Haven Associated Enterprise v. Bd. of Trustees of the Internal Improvement Trust Fund*, 427 So. 2d 153, 157 (Fla. 1982).

[7] *Communities Fin. Corp. v. Dep't of Envtl. Regulation*, 416 So. 2d 813, 816 (Fla. 1st DCA 1982); *Marine Fisheries Comm'n v. Pringle*, 736 So. 2d 17 (Fla. 1st DCA 1999).

[8] *E.g., Florida High Sch. Athletic Ass'n v. Melbourne Cent. Catholic High Sch.*, 867 So. 2d 1281 (Fla. 5th DCA 2004).

[9] *Dep't of Health v. Curry*, 722 So. 2d 874, 878 (Fla. 1st DCA 1999) (quoting *Dep't of Revenue v. Brock*, 576 So. 2d 848, 850 (Fla. 1st DCA), *review denied*, 584 So. 2d 997 (Fla. 1991)).

[10] *See Willis*, 344 So. 2d at 590.

[11] *Communities Fin. Corp.*, 416 So. 2d at 816, n. 1; *Gulf Pines Mem'l Park, Inc. v. Oakland Mem'l Park, Inc.*, 361 So. 2d 695, 699 (Fla. 1978); *South Lake Worth Inlet Dist. v. Town of Ocean Ridge*, 633 So. 2d 79, 87 (Fla. 4th DCA 1994).

[12] *Willis*, 344 So. 2d at 591; *Communities Fin. Corp.*, 416 So. 2d at 816.

[13] *Communities Fin. Corp.*, 416 So.2d at 816; *Willis*, 344 So. 2d at 590.

[14] An agency must offer substantially affected parties a "clear point of entry," within a specified time after some recognizable event in free-form proceedings, to formal or informal proceedings under Section 120.569, Florida Statutes. Until such proceedings are had satisfying Section 120.569, or an opportunity for them is clearly offered and waived, an agency is powerless to take final action. *Capeletti Bros. v. Dep't of Transp.*, 362 So. 2d 346, 348-49 (Fla. 1st DCA 1978).

[15] *Reform Party of Florida v. Black*, Slip Op. at 16.

[16] The APA requires notice to each party. § 120.569, Fla. Stat. (2004). The notice must inform the recipient of any administrative hearing that is available, must indicate the procedure that must be followed to obtain the hearing, and must state the time limits that apply. *Id.*

[17] *E.g., Gulf Pines Mem'l Park, Inc.*, 561 So. 2d at 699; *Key Haven*, 427 So. 2d at 157; *Willis*, 344 So. 2d at 591; *Dep't of Envt. Regulation v. Falls Chase Special Taxing Dist.*, 424 So. 2d 787, 802 (Fla. 1st DCA 1982) (Smith dissenting) (The decisive question is whether the litigant seeking circuit court intervention has shown convincingly that Chapter 120 remedies cannot in good order and in a reasonable time resolve the issue.).

[18] *See, e.g., Key Haven*, 400 So. 2d at 69.

[19] *See* Brief of Glenda Hood, Florida Secretary of State (filed September 16, 2004). The briefs and other pleadings filed in the Florida Supreme Court are available online at *www.flcourts.org/pubinfo/summaries/briefs/04/04-1755/index.html*.

[20] *See id.* at p. 7. The Secretary also argued that the question of whether the Reform Party or any party is a "national party" is a nonjusticiable political question. *Id.* at p. 19.

[21] For example, at oral argument, counsel for the Secretary suggested this workable standard as a definition for "national party:"

> . . A national party would be any group of citizens organized for the general purposes of electing persons and determining public issues under democratic processes. . . . with membership or organizations in two or more states and extending beyond a single region of the country.

Transcript of oral argument, *Reform Party of Florida v. Black*, Case No. SC04-1755 (September 17, 2004).

[22] *See* note 9.

[23] *Level 3 Communs., LLC v. Jacobs*, 841 So. 2d 447 (Fla. 2003); *BellSouth Telecomms., Inc. v. Jacobs*, 834 So. 2d 855 (Fla. 2002); *Verizon Fla., Inc. v. Jacobs*, 810 So. 2d 906 (Fla. 2002); *BellSouth Telecomms., Inc. v. Johnson*, 708 So. 2d 594, 596 (Fla. 1998). In the cases arising out of the 2000 presidential election, the Florida Supreme Court recognized this principle of deference, but declined to defer to the Secretary's interpretation of an election statute. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1228 (Fla. 2000).

[24] *Reform Party of Florida v. Black*, Slip Op. at 15.

[25] *E.g., Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273 (Fla. 2000) (involving a challenge to the Secretary's certification of returns from the 2000 presidential election in Florida); *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla. 2000).

[26] Florida law expressly authorizes the filing of a complaint in circuit court to contest the certification of election or nomination of any person, but only *after* the certification of the results of the election being contested. § 102.168(2), Fla. Stat. (2004).

Larry Sellers *is a partner with Holland & Knight LLP, in the firm's Tallahassee office. He received his J.D., with honors, from the University of Florida College of Law.*

Minutes — Administrative Law Section Executive Council Meeting and Long-range Planning Retreat

September 30 - October 1, 2004

CALL TO ORDER: Executive Council Chair Bobby Downie called the meeting to order at 10:15 a.m.

Present: Andy Bertron, Donna Blanton, Mary Ellen Clark, Bobby Downie, Rick Ellis, Seann Frazier, Debby Kearney, Cathy Lannon, Elizabeth McArthur, Chris Moore, Linda Rigot, Charlie Stampelos, Dave Watkins, Bill Williams, and Jackie Werndli

Absent: Natalie Smith, Allen Grossman, Booter Imhof, Clark Jennings, Li Nelson, and Cathy Sellers

PRELIMINARY MATTERS: The minutes of the June 25, 2004 Annual Meeting were approved. Andy Bertron gave the Treasurer's Report. Jackie Werndli reported on the status of the prospective increase in amounts each bar section will be assessed to cover general section operations. The September Council of Sections meeting at which this was to be discussed was cancelled due to the hurricanes. Jackie noted that there will likely be both an increase in amounts the Bar retains for each section membership and an increase in the operation costs that the Section will have to absorb. Currently the Bar retains $10 per membership in the Administrative Law Section; it may likely be increased to $14 or $15; and it may be that the Section will have to begin paying overhead costs for printing, graphic arts and other expenses.

COMMITTEE REPORTS:

Continuing Legal Education Committee: Andy Bertron raised the issue of whether to move the Pat Dore conference to a location outside of Tallahassee and the consensus view was not to do so. It was reported that the comments on the last CLE the Section conducted, Practice Before DOAH, were largely favorable and the Council was interested in repeating the CLE in the future. Linda Rigot suggested that we videotape this CLE next time.

Bar Journal: Seann Frazier reported that we need to produce more articles for the *Journal*. Seann asked that each Council member suggest topics for two articles.

Newsletter: Elizabeth McArthur is also looking for articles for the newsletter. The "Agency Snapshots" feature of the newsletter is going well. The next agencies to appear will be the DMS (Andy Bertron), possibly the PSC (Natalie Futch), Agency for Persons with Disabilities (Paul Flounlaker), and DCA (Debby Kearney).

Legislative: Bill Williams reported that it appears there will be an APA bill this year, perhaps emanating from the joint committee. Bill has been working with a group (on his own, not as a Section representative) on a provision relating to excusable neglect to be included in the bill.

The Public Interest Law and Family Law Sections forwarded to other sections, including the Administrative Law Section, a proposal to allow the Public Interest Law and Family Law Sections to lobby in favor of repealing the prohibition against adoptions by homosexuals and seeking support for permission by the Board of Governors to lobby this issue. After some amount of discussion is was agreed that Bobby Downie would respond to the Public Interest Law and Family Law Sections that the subject was outside the jurisdiction of the Administrative Law Section and for that reason we respectfully declined to take a position.

Membership: Charlie Stampelos reported that the Section has approximately 1200 members. He proposed creating a law school affiliate membership, which led to a discussion on how to interest law students in the area of administrative law. Rick Ellis and Mary Ellen Clark are going to look into some of the possibilities, including estimating the cost of sponsoring a mock administrative trial, and speaking with the placement and internship-externship program directors at Florida State University College of Law.

Webpage: A test page for the Section's new webpage has been launched.

TIME AND PLACE OF NEXT MEETING: Second week of January 2005 in Tallahassee. More specific time and place to be announced.

ADJOURNED and began Long-Range Planning Retreat.

LONG RANGE PLANNING RETREAT

Certification: A draft of a certification plan for government and administrative law was reviewed and discussed. A number of the board members expressed the need to flesh out the draft and to take the time to better understand it. Bobby Downie appointed a committee of four members, Donna Blanton, Mary Ellen Clark, Dave Watkins and Seann Frazier, to work on more clearly defining the program and working with the Government Law Section to see whether the skills for each practice can be woven together successfully into one certification area. The committee will report to the Chair as progress is made.

Uniform Rules of Procedure: The Council reviewed the latest draft of the Uniform Rules of Procedure and adopted the changes and explanations of the changes as its working draft. Chris Moore will make the changes and provide a current draft of the document.

Agency Snapshots

Department of Management Services

With responsibilities for everything from managing state facilities to administering state retirement plans to maintaining the state's fleet of aircraft, the Department of Management Services ("DMS") is a jack-of-all-trades agency. DMS sees its primary responsibility as efficiently managing the "business costs" associated with running Florida's government.

Head of the Agency:
William Simon, Secretary
4050 Esplanade Way, Suite 250
Tallahassee, Florida 32399-0950
(850) 488-2786

Agency Clerk:
Debbie Shoup
DMS, Suite 260
Tallahassee Florida 32399-0950
(850) 921-4787
Hours: 8:00am – 5:00 pm, Monday thru Friday.

General Counsel:
Alberto L. Dominguez
DMS, Suite 260
(850) 487-1082

DMS has 13 attorneys on staff. Al Dominguez has been General Counsel at DMS since November 2003. Prior to coming to DMS, Dominguez served as an Assistant State Attorney in the Second Judicial Circuit and worked in the Governor's Office of Policy and Budget. Dominguez has also served as legislative affairs director for the Department of Corrections and as a governmental consultant for the Florida League of Cities. Dominguez received his bachelor and JD degrees from Florida State University.

Kinds of Cases:

About fifty percent of the cases handled by DMS involve the use of the APA. APA cases focus primarily on bid protests, labor and employment issues, retirement benefits and health insurance claims, and the administration of programs such as the Florida State Employees Charitable Campaign. Non-APA matters at DMS include contract litigation, collective bargaining, employment discrimination and fair labor practices.

How does Chapter 120 affect the mission of the Agency?

The APA is the backbone of agency authority and the context in which that authority may be exercised. As a "customer service" agency, the Department of Management Services strives to always apply the APA in a manner that protects the public's interest.

How does the rulemaking process affect the Agency?

As the administrative and operations arm of executive state agencies, the Department of Management Services is given broad rulemaking authority in many circumstances. Whether establishing general procurement, human resource, or facility management rules, the impact of the agency's rulemaking affects the day to day operations of virtually every state agency. The Department fields daily inquiries on the application of certain rules to specific circumstances. Consistency in application, with a historical perspective on the rules, is critical to providing sound guidance.

What changes to the APA are desirable?

As the size and scope of government is reduced in favor of outsourcing traditional government functions, the APA must evolve to address this trend. A proactive effort should be undertaken to preserve the spirit of the APA as services and decision-making are contracted to the private sector.

What Changes to the Uniform Rules are desirable?

No changes to the uniform rules are currently desirable.

The best part of being General Counsel:

The variety of the issues and circumstances in which one is required to provide legal counsel. It is also very satisfying to manage and mentor young lawyers. To see them exceed their own expectations is very gratifying.

Tips for practice before DMS:

In many situations, a simple phone call to the General Counsel can be very effective and can often avoid unnecessary delay. Many lawyers practicing before agencies feel compelled to send very lengthy, albeit well written, letters arguing their position without ever inquiring whether the agency is adverse to their situation. A phone call prior to "putting pen to paper" can go a long way towards saving time and money for clients and building a relationship with the Agency General Counsel.

Al Dominguez *appeared as a panel speaker on "Privatization and the APA" at the 2004 Pat Dore Administrative Law Conference.*

Course Books and Audiotapes Available

2004 Pat Dore Administrative Law Conference

The APA Yesterday, Today and Tomorrow: Thirty Years of Administrative Practice

Course Classification: Intermediate Level

- **Standing and the APA**
- **Points of Entry**
  Yesterday: The Days of Excusable Neglect
  Today: Deadlines are Jurisdictional?
  Tomorrow: Invitation to Change
- **The Court and the APA**
- **Caselaw Update**
- **Hearings Before the Agency: The Agency as Presiding Officer**
- **Privatization and the APA**
- **The Reach of Rules**
- **Commission on Ethics**
- **Uniform Rules**
- **Contracting with the Government: The Changing Face of Bid Protests**
- **DOAH and the APA**

Practice Before the Division of Administrative Hearings

Course Classification: Intermediate Level

- **Getting Your Case to DOAH: The Requirements of a Petition**
- **Evidentiary Issues in Administrative Proceedings**
- **Motion Practice and Prehearing Statements**
- **Helping Your Court Reporter Prepare a Good Record**
- **Opening and Closing Statements and Dealing with "Preliminary Issues"**
- **Witnesses: Who You Need, When to Use Experts and How to Find Them**
- **Preparing Your Witnesses and Conducting Direct Examination**
- **Cross Examination**
- **Expert Witnesses**

continued...

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