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State Agency Contracts, "Agency Action" and the A.P.A.

by Richard M. Ellis, Senior Attorney, Agency for Health Care Administration

Preface

The Florida Statutes often indicate that an agency is to undertake rulemaking to achieve a particular regulatory objective or implement a given program.[1] Other legislation may itself very specifically provide the requirements for and manner in which a program is to be implemented, such that rulemaking need not precede agency determinations affecting a party's substantial interests.[2]

Where the statutes provide for implementation by rulemaking, or allow for agency action without rulemaking, the application of the Administrative Procedure Act (APA) is generally clear. But what of instances where the statutes authorize an agency to enter into contracts to achieve a given regulatory objective or implement a program?[3] Should the contract itself, or determinations made under it, be subject to the APA? What consequences follow if this is so?

Statutes and cases

The APA defines "agency action" substantially as a "rule or order, or the equivalent".[4] "Equivalent" leaves open possible applications of Section 120.569, F.S. (formerly Section 120.57) to determinations made under agency contracts. "Rule" is itself defined in the APA,[5] and in a manner broad enough by its terms so as to conceivably include agency contracts—particularly "form" contracts entered into repeatedly by an agency with various parties with little or no variation from one agreement to the next.[6]

What little case law we have in this area understandably does not undertake the academic inquiry of whether agency contracts and determinations made thereunder generally should or should not be subject to the APA. Instead, the cases are fact-specific, thus raising more questions than they answer.

Graham Contracting, Inc. v. Department of General Services, 363 So.2d 810 (Fla. 1st DCA 1978) appears to be the first case to deal with an agency contract and APA issues, following the 1974 amendments to the APA.[7] In *Graham*, the agency denied certain claims under the contract, and then denied the contractor's request for proceedings under (then) Section 120.57. The

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From the Chair: Making Government Work Better

by M. Catherine Lannon

In the last few years, there has been much discussion, and much activity, directed toward making government work better. And much of the discussion and activity focused on changes to the Administrative Procedures Act (APA) as a way to accomplish that goal.

But after the issues and problems that led to the various studies and bills are analyzed, one really has to ask, "Is the APA the problem?"

The APA is about **procedure**: about **process**. Much of the testimony before the committees, however, was about results. When the issues are carefully scrutinized, the complaints all too often were not really about the way in which the agencies granted or denied requests. They were not really about the process.

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First DCA found that the agency's denials of the contractor's claims amounted to "agency action" as the equivalent of an administrative "order", and the matter was remanded with instructions to accord the contractor a proceeding under Section 120.57(1) or (2). ("Order" was a separately defined term in the APA at the time of Graham, and remained so until repealed by the 1996 amendments to the APA,[8] along with former Section 120.59, entitled "Orders".)

In *Fasano v. Sch. Bd. of Palm Beach*, 436 So.2d 201 (Fla. 4th DCA 1983), the Fourth DCA considered a matter in which the School Board of Palm Beach entered an agency final order substantially enforcing its own contract for construction of a high school. The Fourth DCA held that agencies lack subject matter jurisdiction to administratively adjudicate claims made under their own contracts, declared the final order "a nullity", and found the contractor "at liberty to pursue his cause of action in the appropriate judicial forum." The court recognized the conflict posed by the First DCA's decision in Graham, but distinguished Graham on the purported ground that the contract there provided for administrative hearings.

In *State of Florida, Dept. of HRS v. E.D.S. Federal Corp.*, 631 So.2d 353 (Fla. 1st DCA 1994), the contractor sued HRS in circuit court for breach of contract. HRS moved to dismiss on the ground that the agency contract provided for an alternative dispute resolution procedure. The First DCA found that HRS had express authority to enter into the contract under Section 402.34, F.S., and consequently found that the agency could bind the contractor to the disputes clause in the contract.[9] The court remanded the case to the circuit court with instructions to dismiss the counts for breach of contract against the agency.

From *Graham*, *Fasano*, and *E.D.S.*, two questions naturally arise. The first is whether state agencies, generally, do or do not have subject matter jurisdiction to enter final orders interpreting and adjudicating their own contracts (whether directly, or by adopting a DOAH recommended order).[10] And, relatedly, if state agencies do not have that subject matter jurisdiction, how is it that an agency could, by a dispute clause in its contract, confer subject matter jurisdiction upon itself?[11] The inquiry is further complicated by the First DCA's decision in *Peck Plaza Condominium v. Div. of Fla. Land Sales*, 371 So.2d 152 (Fla. 1st DCA 1979); there, the court found the Division of Land Sales to lack subject matter jurisdiction to interpret and enforce a condominium declaration. The First DCA has not explicated its holding in *Peck Plaza*,[12] but it may be that the case means merely that state agencies do not have subject matter jurisdiction to interpret and enforce third-party contracts in the manner of a court of general jurisdiction, rather than that state agencies cannot interpret and enforce any contracts.

It is suggested that the law in this area is as follows: (1) That there is no inherent lack of subject matter jurisdiction to prohibit a state agency from entering a final order interpreting and adjudicating its own contract; and (2) that if a state agency has delegated legislative authority to contract upon given subject matter, the agency can contract so as to provide for (a) administrative proceedings, (b) arbitration, or (c) circuit court proceedings, for resolution of disputes arising under the contract. Stated as such, the law would not conflict with either Graham (which mandated administrative proceedings), Fasano (which mandated circuit court proceedings, as being available under statute), or E.D.S. (which dismissed circuit court proceedings in favor of alternative dispute resolution, under a "freedom of contract" rationale).

Arguments against "agency action" and general application of APA to agency contracts

The law on state agency contracts and application of the APA is, as shown, one part "agency action" and one part subject matter jurisdiction. Addressed next is the extent to which agency contracts, and determinations made thereunder, can or should be considered to be "agency action".

First, it may be queried analytically as to whether an agency contract is an unpromulgated administrative "rule" within the meaning of Section 120.52(15), F.S. After all, the contract may certainly appear to be a statement of general applicability (particularly if a "form" contract is entered into with numerous contractors), and may certainly implement law or policy. Why, then, is a contract either not a "rule", or arguably exempt from the definition of "rule"?

One answer may be that considering a contract as an unpromulgated "rule" can lead to absurd results not intended by the legislature either under Section 120.52 or under any substantive statute authorizing the contract in question. Consider that "agency action" taken pursuant to an unpromulgated "rule" is invalid.[13] "Agency action" is defined neutrally in Section 120.52(2); that is, it includes "orders" which both benefit, as well as adversely affect, a party.[14] It follows thus that an agency contract deemed an unpromulgated "rule" would entitle the agency to discontinue its performance under the contract outright. In other words, just as the agency could not deny the payment of claims (as administrative "orders") under the contract, neither could it honor claims for payment

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(which would likewise be administrative "orders").

Consider further the many agency contracts which are made subject to appropriations for the purpose by the Florida Legislature.[15] An agency contract is superior to an administrative rule for the payment of appropriated funds. The reason is this: If an agency provides for a payment methodology (or, worse, an actual rate of payment) in rule, and appropriations are reduced, the agency cannot legally reduce the disbursements in question until it has amended the rule accordingly. While plodding through the rule amendment process under Section 120.54, F.S., including any litigated delay, the agency would be obliged to continue disbursements as though appropriations had never been reduced.[16]

Moreover, it may be that many, if not most, agency contracts are not statements of general applicability, upon inspection.[17] That is, the term, compensation, and obligations under contracts may vary from one contract to the next; this would indeed be reasonably expected where contracts are individually negotiated.

The case can also be made that determinations made under agency contracts are not the "equivalent" of an administrative "order", or should otherwise be exempted from Section 120.52(2). Consider an example of a denied claim for a monthly payment due under an agency contract.[18] Assume that the contractor responds by filing a petition for formal administrative hearing with the agency. Assume further that the dispute resolution clause in the contract does not particularly address the possibility of administrative proceedings, leaving the application of Graham, supra in doubt. Should the agency duly refer the petition to DOAH, thereby making the denial merely "preliminary" agency action? If so, what is the agency's legal obligation concerning the preliminarily denied payment? Paying the claim may be flatly contrary to the terms of the contract, depending upon the facts; on the other hand, it is not clear how the agency is authorized to withhold the payment, when the denial is merely "preliminary", rather than by agency "final order".[19] Further, query as to what would become of the parties' ongoing obligations under the contract. Would either party be entitled to discontinue its performance during the months that the matter may take to be resolved administratively?

It is suggested that, in the absence of a binding arbitration clause, the superior forum for such a dispute is clearly the circuit court. No dilemma is posed by "preliminary" versus "final" agency action in circuit court; the parties would simply have at it in the manner of a purely private contract dispute. Further, circuit court jurisdiction is designed for expedited injunctive relief in the event that a party's remedy at law is inadequate.[20]

Conclusion

Especially in light of the 1996 amendments to the APA, now may be a good time for state agencies to consider their contracts made to carry out specific regulatory obligations and programs, and the statutes which bear upon those contracts. If challenged by the filing of an administrative petition, the agency may need to carefully distinguish its contracts from unpromulgated "rules", and its contract determinations from administrative "orders". Failure to persuade upon those points may lead to absurd results indeed.

Endnotes:

[1] Section 409.9124(1), for example, requires the Agency for Health Care Administration to adopt by rule a methodology for reimbursing managed care plans.

[2] The content of an application for licensure may be specific enough in statute that an agency's only rulemaking will be to incorporate a form licensure application. *See, e.g.*, Section 400.071 (application for nursing home license). By contrast, denial of an application for an environmental permit may require rulemaking. *See, e.g.*, Section 373.107.

[3] The Department of Children and Family Services (DCF) is an example of a state agency with a variety of contracting powers specifically provided for by statute, from community-based mental health services to foster care and child protective services. *See* Sections 394.457, 409.1671. The Agency for Health Care Administration administers the Medicaid program largely by voluntary contracts, which my be non-negotiable (provider agreements, Section 409.907) or heavily negotiated (managed care contracts, Section 409.912).

[4] Section 120.52(2).

[5] Section 120.52(15).

[6] *See, e.g.*, Section 409.907, concerning Medicaid provider agreements.

[7] Laws of Florida, Ch. 74-310.

[8] Laws of Florida, Ch. 96-159.

[9] On alternative dispute resolution (specifically arbitration), *see also Paid Prescriptions, Inc. v. Dept. of HRS*, 350 So.2d 100 (Fla. 1st DCA 1977).

[10] DOAH has declined at least one administrative petition in the belief that it lacked subject matter jurisdiction, where the dispute arose under a contract. *See, e.g., Armstrong v. Dept. of HRS*, HRS-96-092-FOF-OLC; DOAH Case No. 95-5050 (not reported in F.A.L.R.).

[11] An agency only has the powers conferred upon it by statute. Grove *Isle, Ltd. v. Dept. of Environmental Regulation*, 454 So.2d 571, 573 (Fla. 1st DCA 1984).

[12] The court was recently given the opportunity, but substantially passed it up. *See Physicians Health Care Plans, Inc. v. Agency for Health Care Administration*, 19 F.A.L.R. 4716 (AHCA 1997); *per curiam aff'd, ___So.2d ___ (Fla. 1st DCA 1998; Case no. 97-2422).*

[13] *McCarthy v. Dept. of Insurance*, 479 So.2d 135 (Fla. 2d DCA 1985); *Amos v. Dept. of H.R.S.*, 444 So.2d 43 (Fla. 1st DCA 1983).

[14] On this point, it may be noted that "substantial interests" is not a defined term under the APA; to learn its meaning, we refer to cases such as *Agrico Chemical Company v. DER*, 406 So.2d 478 (Fla. 2d DCA 1981). Further, *Agrico* and like cases on third-party standing teach that "agency action" which is favorable to one party can adversely affect another's substantial interests. *See also Phibro Resources Corp. v. State, DER*, 579 So.2d 118 (Fla. 1st DCA 1991).

[15] *See, e.g.*, Section 394.74, which provides that the Department of Health, "when funds are available for such purposes, is authorized to contract for the establishment and operation of local alcohol, drug abuse, and mental health programs with any hospital, clinic, laboratory, institution, or other appropriate service provider." It may be noted further that Section 287.0582 requires a clause reading, "The State of Florida's performance and obligation to pay under this contract is contingent upon an annual appropriation by the Legislature", in each state or executive branch contract with a term exceeding one fiscal year.

[16] It is hornbook administrative law in Florida that a proposed rule (or proposed rule amendment) is not effective unless and until validated by DOAH final order, if challenged, and then not until 20 days following its filing with the Department of State. *See* Section 120.56(2)(e).

[17] On "general applicability", *see, e.g., Winter Park Healthcare Group, Ltd. et al. vs. Agency for Health Care Administration*, 18 F.A.L.R. 4648, note 6 (DOAH 1996); *Citifirst Mortgage Corp. vs. Dept. of Banking and Finance*, 15 F.A.L.R. 1735 (DOAH 1993); *Department of Commerce, Div. of Labor v. Matthews Corporation*, 358 So.2d 256 (Fla. 1st DCA 1978).

[18] The Agency for Health Care Administration's contracts for managed medical care of Medicaid beneficiaries provide for monthly payments to the managed care provider.

[19] Section 120.52(7).

[20] Fla. R. Civ. P. 1.610.

Case Notes, Cases Noted and Notable Cases

by Seann M. Frazier

Supreme Court of Florida

The Supremes offered their own *avatar* of the non-delegation doctrine in *Avatar Development Corporation and Amikam Tanel v. State of Florida*, 23 Fla. L. Weekly S552 (Fla. 1998). Avatar was charged with violating Section 403.161(1)(b), Florida Statutes, for failing to comply with a pollution condition of its dredge and fill permit. The statute made a violation of a permit a first degree misdemeanor.

A county court dismissed the charges by declaring Section 403.161 unconstitutional as an invalid delegation of legislative authority and as a violation of the due process clause, but certified the questions to the Fourth District Court of Appeal. The District Court reversed and upheld the statute. On review, the Supremes agreed with the Fourth District in an opinion that confirmed the importance of the non-delegation doctrine in Florida, but ultimately found no violation of the doctrine in this case.

It is clear that our State Constitution prohibits the delegation of powers from members of one branch to the members of other branches of government. Art. 1, § 18, and Art. 2, § 3, Fla. Const.; see *Askew v. Cross Key Waterways*, 372 So.2d 913, 924 (Fla. 1978); *State v. Atlantic Coast Line Railroad Co.*, 56 Fla. 617, 631, 47 So. 969, 974 (Fla. 1908). Avatar claimed that the statute violated the doctrine by granting the Department an unfettered ability to set conditions on permits, and to then make violations of those permits a crime, thereby giving it the power to define the elements of crime - an act which should be in the purview of the Legislature.

The Supreme Court disagreed, finding that the statute still subjected the Department to express legislative control and guidance in the exercise of its authority. The Supremes decided that the Department, rather than the Legislature, was better able to utilize its expertise to prevent pollution by creating permit conditions in the infinite variety of situations which might threaten Florida's natural environment, but that doing so did not violate the non-delegation doctrine. The Court also found Avatar was not denied due process because the permit expressly warned of the potential misdemeanor. In support of its ultimate conclusion that the doctrine was not violated, the Court cited examples such as *Bailey v. Van Pelt*, 78 Fla. 337, 82 So. 789 (1919); *State v. Cumming*, 365 So.2d 153 (Fla. 1978); *Rosslow v. State*, 401 So.2d 1107 (Fla. 1981); and *Marine Industries Association of South Florida, Inc. v. Florida Dep't of Environmental Prot.*, 672 So.2d 878 (Fla. 4th DCA 1996).

District Courts of Appeal
First District

With a little culture and the correct burden of proof, a Board's licensure rules will be valid in *Agency for Health Care Administration, Board of Clinical Laboratory Personnel v. Florida Coalition of Professional Laboratory Organizations, Inc.*, 23 Fla. L. Weekly D 2041 (Fla. 1st DCA 1998). The Board once established a "general" licensing provision for laboratory technicians but, in 1995, adopted more particular "specialty" licenses. Later, the Board decided to return to a "general" license. A coalition of laboratory organizations objected and instituted a rule challenge against the proposed new rules, though not against the existing "specialty" licensing scheme.

Nevertheless, the ALJ declared that the Board had failed to demonstrate that its *existing* rules were arbitrary, capricious or based upon a flawed rational so as to justify repealing or amending them. The District Court reversed that hypothesis. The Court found that although the ultimate burden of persuasion to show that the proposed rule was valid rests with the Agency (see *St. John's River Water Management Dist. v. Consolidated - Tomoka Land Co.*, 23 Fla. L. Weekly D1787 (Fla. 1st DCA 1998)), an agency does not bear the burden of proving its *existing* rules are arbitrary, capricious or otherwise explain itself when it seeks to repeal or amend the existing rules. The Court held that the definition of an "invalid exercise of delegated legislative authority" relates solely to rules that are actually subject to a challenge. In this case, the Coalition had only challenged the proposed rules returning to "general" licensure. So, the Board's burden of persuasion was to show that the proposed rules were valid, not to make any showing with regard to the existing, soon-to-be-repealed rules. This ruling accords with the right of an agency to change its mind and still comport with Chapter 120. See *Key Haven Associated Enters., Inc. v. Board of Trustees of the Internal Improvement Trust Fund*, 400 So. 2d 66, 73 (Fla. 1st DCA 1981) (footnote omitted), approved in part and disapproved in part, 427 So. 2d 153 (Fla. 1982).

* * *

The First District found that complaints about a rule's vagueness and reach beyond statutory authority were little more than fish stories in *State of Florida v. James Leon Conner*, 23 Fla. L. Weekly D2172 (Fla. 1st DCA 1998). The case involved a challenge to an administrative rule, Rule 46-31.035, which implemented the net ban constitutional amendment. Art. 10, §16, Fla. Const. The rule prohibited nets of a certain size used in "near shore and in-shore Florida waters" defined as some nautical miles from the territorial sea-base line. When Mr. Conner was alleged to have violated that prohibition, he cast a rule chal-

lenge and argued that the constitutional amendment itself was vague because a "territorial sea-base line" is impossible to detect. He also challenged the rule because the Constitution's use of the word "mile" was interpreted in the rule to be a larger "nautical mile."

After clarification, the Circuit Court found that the rule was invalid, but certified questions regarding whether the rule was vague and whether it exceeded statutory and constitutional authority by using the term "nautical mile." The District Court found that Mr. Conner's arguments held less water than the mesh net in question. The rule placed fishermen on notice as to where the prohibitions applied and was not vague. *State v. Kirvin*, 23 Fla. L. Weekly, D2173 (Fla. 1st DCA 1998) And the Constitution's use of the word "mile" should be commonly understood to mean "nautical mile" in this instance. Mr. Conner's claims were tossed back.

* * *

If an Agency wishes to deny a Petition for Determination of Invalidity of a Non-Rule Policy, it must first adopt a rule prior to implementing the policy, or publish notice of a proposed rule prior to the entry of a final order. *Savona D. O. v. Agency for Health Care Administration*, 1998 W.L. 658395 (Fla. 1st DCA 1998); §120.56(4)(e), Fla. Stat.

* * *

Appellants could take some pride in a partial victory in *Seapride Industries, Inc. v. Dep't of Banking and Finance, Div. of Financial Investigations*, 23 Fla. L. Weekly D2199 (Fla. 1st DCA 1998). Though the First District upheld a finding that the appellant violated various provisions of Florida law, the case was remanded for reconsideration of a penalty. The Department imposed a $50,000 penalty, though the ALJ recommended no penalty. Because the Department failed to state with particularity the reasons for its penalty, and to provide record citations and support thereof, that portion of the case was remanded for additional findings. § 120.57(1)(j), Fla. Stat.

* * *

The actuaries stood poised and ready for battle and, when one didn't occur, they tried to pick a fight anyway in *Florida Commission on Hurricane Loss Projection Methodology v. State, Dep't of Insurance and Treasurer*, 716 So. 2d 345 (Fla. 1st DCA 1998). The Commission is an advisory panel which was established to project hurricane losses. After the Commission made such a projection, the Department filed a petition challenging the Commission's findings pursuant to the APA.

The Commission referred the petition to DOAH and then filed a motion to dismiss on two grounds. The Commission argued for dismissal first because the Department lacked standing, and also because the Commission was not an administrative "agency" subject to Chapter 120. The ALJ found that the Department lacked standing, but offered *dicta* suggesting that the Commission *was* an agency.

Though happy with the outcome, the actuaries of the Commission attempted appeal from the *dicta*. The District Court projected that some Recommended Orders may be reviewed if review of the final Agency decision would not provide an adequate remedy. § 120.68, Fla. Stat.; *State, Department of Community Affairs v. Div. of Admin. Hearings*, 588 So. 2d 272, 274 (Fla. 1st DCA 1991). However, because the Recommended Order was favorable, the Court found that the actuaries essentially sought an advisory opinion. The District Court was unwilling to expand its jurisdiction to cover such orders. *Department of Revenue v. Markham*, 396 So. 2d 1120, 1121 (Fla. 1981); *Santa Rosa County v. Administration Comm'n*, 661 So. 2d 1190, 1193 (Fla. 1995).

In a concurring opinion, Judge Booth noted that once he determined that the Department lacked standing, the ALJ lacked jurisdiction to make any other findings. *Rogers and Ford Constr. Corp. v. Carlandia Corp.*, 626 So. 2d 1350, 1352 (Fla. 1993); *Grand Dune, LTD v. Walton County*, 25 Fla. L. Weekly, D1228 (Fla. 1st DCA 1998).

* * *

The Florida Real Estate Commission was reversed after it attempted to put the screws to a licensed instructor in *Phillips, P.H.D. v. Department of Business and Professional Regulation, Division of Real Estate*, 23 Fla. L. Weekly D1888 (Fla. 1st DCA 1998). The instructor had once received approval for a course he offered and had received no notice that it had become disapproved over the years. The District Court found that approval of the course constituted a "license" which required notice and due process requirements before being withdrawn. § 120.52(9) and § 120.60(5), Fla. Stat. So, when the Commission filed an administrative complaint for teaching an unapproved course (because it had not been recently approved), it was without a legal basis and the Final Order did not comply with essential requirements of law. *State ex. rel. Williams v. Whitman*, 116 Fla. 196, 156 So. 705, 708 (1934).

* * *

A majority of the First District refused to "give the dog a bone" in *Department of Children and Families v. Mormon d/b/a Pattycake Nursery*, 715 So. 2d 1076 (Fla. 1st DCA, 1998). The ALJ had offered the bone by dismissing one charge from an Administrative Complaint *sua sponte* because the Administrative Complaint did not allege which particular employees had violated a rule regarding training. The Agency disagreed, as did a majority of the District Court which noted that the complaint sufficiently alleged training violations and allowed for a meaningful defense. *Libby v. Department of State*, 685 So. 2d 69, 71 (Fla. 1st DCA 1996).

However, this case occasioned an interesting debate over the meaning of § 120.57(1)(j), Florida Statutes (formerly § 120.57(1)(b)(10), Fla. Stat.). The law was amended to allow an agency to reject or modify "the conclusions of law and interpretations of administrative rules *over which it has substantive jurisdiction*" rather than "*in the Recommended Order*" as was previously found in the statute. In a concurring opinion, Judge Ervin found the "over which it has substantive jurisdiction" language to apply only to "interpretation of administrative

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rules", and not to "conclusions of law." So, the Agency need not have substantive jurisdiction over a subject, like the adequacy of pleadings, in order to reject or modify a conclusion of law. Judge Ervin felt that the 1996 amendments were not intended by the legislature to restrict an agency's appellate powers to only those conclusions over which it had substantive jurisdiction, thus providing the statute with its traditional interpretation. Cf. *State ex. rel. Szabo Food Servs., Inc. of N. C. v. Dickinson*, 286 So. 2d 529 (Fla. 1973).

In dissent, Judge Benton argued that the determination of a pleading's sufficiency had nothing to do with the Department's expertise and thus was not within its substantive jurisdiction. Under his interpretation of the amended statute, the Department's substituted conclusions should have been rejected. The dissent would construe the APA so as to allow Administrative Law Judges to stand as neutrals in administrative proceedings, and to remove perhaps partisan agencies from matters beyond their jurisdiction.

* * *

The burden of proof in rule challenge proceedings was tested in *Board of Clinical Laboratory Personnel v. Florida Association of Blood Banks*, 23 Fla. L. Weekly D1851 (Fla. 1st DCA 1998). Here, new rules relating to licensure requirements for blood banking were challenged. The ALJ assigned a burden of proof which required the Agency to establish "by a preponderance of the evidence" that the proposed rules were not invalid. § 120.56(2), Fla. Stat. The District Court found that burden inappropriate and found the rules valid.

Comment:

The opinion notes that §120.56(2) now places a "burden" on an agency to prove that a challenged, proposed rule is not invalid. The opinion finds that such a burden imposed "by a preponderance" is inappropriate, but does not explain why. Perhaps the burden is only an uncalibrated "burden of persuasion" where challengers still must establish the factual basis for its objections, and the agency does not bear the burden of disproving each objection. *St. John's River Water Management Dist. v. Consolidated Tomoka Land Co.*, 717 So. 2d 72, at 76-77 (Fla. 1st DCA 1998).

Second District Court of Appeal

An administrative rule rolled over and played dead after the Second District Court's analysis in *St. Petersburg Kennel Club v. Dep't of Bus. and Professional Reg., Div. of Pari-Mutuel Wagering*, 23 Fla. L. Weekly D2046 (Fla. 2nd DCA 1998). The rule would define "poker" and was the basis of an order which denied an application for approval of particular card games. The Second District found that the statute governing card rooms failed to provide a definition for authorized games, including poker. So, the Division's definition of poker was found to be an invalid exercise of delegated legislative authority pursuant to Section 120.536, Florida Statutes, which requires an agency to provide direct reference to the statute each particular rule implements, so-called "map-tacking".

The Court distinguished the case of *PPI, Inc. vs. Department of Business and Professional Regulation, Division of Parimutuel Wagering*, 698 So.2d 306 (Fla. 3rd DCA 1997), which upheld a rule requiring surveillance devices in card rooms because a Florida Statute allowed the Division to "monitor" card rooms. They could find no such direct authority for the definition of poker challenged in *St. Petersburg*.

Comment:

Compare *St. John's River Water Management Dist. v. Consolidated Tomoka Land Co.*, 717 So. 2d 72 (Fla. 1st DCA 1998) where the First District employed a "functional test" of rulemaking authority based upon "the nature of the power or duty at issue and not the level of detail in the language of the applicable statute." *Id.*, 717 So. 2d at 80. Does the Second District take a more strict interpretation of rulemaking authority than does the First District?

* * *

Though hearsay evidence may be quite attractive and even admissible in some instances, it failed to make the sale in *Wark vs. Home Shopping Club, Inc.*, 715 So.2d 323 (Fla. 2nd DCA 1998). In this unemployment compensation hearing, an employer presented summaries of attendance records for the purpose of proving the truth contained therein. The documents were hearsay, but because no other evidence was admitted to prove the same facts as the attendance record summaries, they were not sufficient in themselves to support a finding. § 120.57(1)(c), Fla. Stat. The employer also failed to establish that the documents were business records, thereby meeting the exception to the hearsay rule, so they should not have been admitted. *Tallahassee Hous. Authority v. Florida Unemployment Appeals Comm'n*, 483 So.2d 413 (Fla. 1986). The case was reversed and remanded to award unemployment benefits.

Third District Court of Appeal

A pilot fought to keep his wings in *Nordheim v. Department of Environmental Protection and Public Employees Relations Commission*, 23 Fla. L. Weekly D129 (Fla. 3rd DCA 1998). The pilot had once wrecked a plane while conducting surveillance and unfortunately received serious injuries. In 1997, the pilot was in a subsequent accident when he failed to lower his landing gear "because he was trying to accomplish too many tasks at one time." The Department attempted to discharge the pilot and he appealed to PERC. The assigned hearing officer applied the mitigation criteria of Section 447.208(3)(d), Florida Statutes, and would have upheld the discharge. PERC, however, reduced the discipline to a ninety (90) day suspension based on its review of the mitigation criteria. Specifically, PERC found that prior employees of the Florida Marine Patrol involved in similar accidents

were not discharged.

The Third District Court of Appeal reversed in large part because PERC refused to consider its own order in *Jackson v. Department of Juvenile Justice*, 12 F.P.E.R. ¶ 163 (1997) which held that a new agency (the department was created in 1993) is not bound by the prior disciplinary actions taken by the agency which it succeeded (the FMP). PERC did not consider the *Jackson* case because it viewed that as tantamount to reopening the record since it was not raised below. The District Court disagreed in an effort to enforce the statute which requires that agency actions be consistent with officially stated policy or prior practice. § 120.68(6)(e)3., Fla. Stat.

* * *

Failure to file petition in twenty-one (21) days may not constitute a complete waiver of one's rights, at least according to the Third District in *Unimed Laboratory, Inc. v. Agency for Health Care Administration*, 23 Fla. L. Weekly D1760 (Fla. 3rd DCA 1998). AHCA issued a demand letter to Unimed for nearly $200,000 in alleged Medicaid overpayments. The letter provided notice that that demand could be contested within twenty-one (21) days. Unimed contested the demand, but not until after thirty (30) days. AHCA then issued an order to show cause why it should not dismiss the petition for untimely filing and when no response was received, entered a final order demanding payment.

Unimed sought relief from the Third District based on an affidavit that an employee's error caused the untimely filing and caused Unimed to be unaware of the order to show cause. AHCA's Final Order declared that the failure to timely file constituted a complete waiver. *Lamar Adver. Co. v. Dept. of Trans.*, 523 So.2d 712, 713 (Fla. 1st DCA 1988); *Mohican Valley, Inc. v. Division of Florida Land Sales and Condominiums*, 441 So.2d 1126, 1128 (Fla. 1st DCA 1983); *City of Punta Gorda v. Public Employees Relations Comm'n*, 358 So.2d 81, 82 (Fla. 1st DCA 1978). But the Third District remanded for a hearing as to whether Unimed's untimely filing was the result of excusable neglect. *Philip v. University of Florida*, 680 So.2d 508, 509 (Fla. 1st DCA 1996); *Castillo v. Dep't of Admin., Division of Retirement*, 593 So.2d 1116 (Fla. 2nd DCA 1992) (21 day notice is not jurisdictional, and is subject to equitable considerations).

Fourth District Court of Appeal

A School Board attempted to fire a teacher without cause, but the teacher would not be tamed in *Tieger v. School Board of Palm Beach County*, 23 Fla. L. Weekly D2142 (Fla. 4th DCA 1998). The District Court found that there were disputed issues of material fact, specifically regarding whether the teacher was still under probationary period which allowed termination without cause. Thus, Section 120.569(1) entitled the teacher to a formal hearing, since disputed issues appeared to be involved. *Sublett v. District Sch. Bd. of Sumter County*, 617 So.2d 374, 377 (Fla. 5th DCA 1993).

Fifth District Court of Appeal

Whether disputed issues of fact were involved was also the key issue in *Wasser v. Dep't of Bus. and Prof'l Reg.*, 23 Fla. L. Weekly D2208 (Fla. 5th DCA 1998). The majority found that a Florida Real Estate Commission denial of payment from the Florida Real Estate Recovery Fund was appropriate. In the proceedings below, an informal hearing was held pursuant to Section 120.57(2) without transcript and without an evidentiary record. The Commission and the Court found that recovery from the Fund was barred because the broker was involved in the transaction as a purchaser rather than in an official capacity as broker or salesman (and for which recovery from the Fund might be available).

A dissent by Judge Sharpe suggested that disputed issues of fact were involved as to whether the party in question was acting as broker in the transaction.

Seann Frazier *is an attorney with the Tallahassee offices of Greenberg Traurig, P.A., where he practices administrative litigation with an emphasis in health law. He is available for your slings and arrows: fraziers@gtlaw.com*

1999 Midyear Meeting

January 20-23, 1999

Wyndham Hotel • Miami-Biscayne Bay, FL

Airline Information: Refer to Gold File Number 54650858

Plan on joining us at the Administrative Law Section Executive Council Meeting:

Friday, January 22

8:30 a.m. - 11:30 a.m.

"The Clocks at DOAH Are 3 Minutes Fast": A True Story

Kent Wetherell, Hopping Green Sams & Smith, P.A.

The following story is based upon actual events described in sworn affidavits filed with the Division of Administrative Hearings (DOAH) last year. The affidavits were attached to the response to my one-page motion to strike an untimely Proposed Recommended Order (PRO) filed by a state agency. The affidavits were executed by the agency attorney and the attorney for a private party aligned with the agency.

The names, dates and case number have been changed to protect the identity of the affiants. Minor editorial changes have been made to enhance the flow of the story; however, the substance of the story has not been modified.

Response to Motion to Strike

As discussed in the attached affidavits, the Agency's Proposed Recommended Order was not untimely; it was only perceived as untimely because of the early closure of the DOAH clerk's office, based upon an incorrect time clock.

Affidavit of Joe Smith, Agency Attorney

BEFORE ME, the undersigned authority personally appeared JOE SMITH, who, being first duly sworn, deposes and says:

1. My name is Joe Smith and I am a member in good standing of the Florida Bar. I am an attorney representing the Agency in the case styled *ABC Corp. v. Agency and XYZ Corp.*, DOAH Case No. 1234.

2. On Thursday, August 21, 1997, I personally delivered to the DOAH clerk's office, at 1230 Apalachee Parkway, Tallahassee, Florida, a PRO prepared by me on behalf of the Agency in the above referenced case.

3. On the way to the clerk's office, I was listening to the local public radio station. The afternoon news show, "All Things Considered," which begins at 5:00 p.m., had not yet begun when I arrived at DOAH. I parked in the parking place immediately outside the main door at DOAH and entered the front door which was not locked.

4. After arriving at the clerk's office, I waited by the glass enclosure for a brief period and determined that no one was in the clerk's office to accept the Agency's PRO. After waiting that brief period, I observed that the wall clock behind the glass enclosure read approximately 5:03 p.m. Having no alternative, I then left the PRO in the drop box. Apparently, the Agency's PRO was stamped in the following morning, August 22, at 8:00 a.m.

5. Based on the confirmation of time from the radio broadcast, the wall clock in the Clerk's office at DOAH on August 21 was at least three minutes fast. Further support for the proposition that the clock time at DOAH was inaccurate on that day is found in the affidavit of John Doe.

FURTHER AFFIANT SAYETH NAUGHT.

/s/
JOE SMITH

Affidavit of John Doe, Private Attorney

BEFORE ME, the undersigned authority personally appeared JOHN DOE, who, being first duly sworn deposes and says:

1. My name is John Doe, and I am a member in good standing of the Florida Bar. I am an attorney with the law firm of Doe & Doe, and I represent XYZ Corporation in the case styled *ABC Corp. v. Agency and XYZ Corp.*, DOAH Case No. 1234.

2. On Thursday, August 21, 1997, I personally filed at the DOAH clerk's office at 1230 Apalachee Parkway, Tallahassee, Florida, a PRO prepared by me on behalf of XYZ Corporation. Upon arrival at the Clerk's office, the sole employee present in the Clerk's office was preparing to leave for the day. According to my watch, the time was 4:57 p.m.

3. When I handed the original and one copy of my PRO to the employee in the Clerk's office at 4:57 p.m. for filing, she promptly stamped in the original and one copy for DOAH, and also stamped in a third copy, for my files. The copy for my files showed a time of 5:00 p.m. The DOAH employee then left the Clerk's office immediately after I exited the building.

4. After receiving my stamped copy, I immediately returned to my office and confirmed that the time on my watch was consistent with the time on the computer system at the offices of Doe & Doe, and was also consistent with the time recording obtained locally by calling 844-1212.

5. On Monday, September 1, 1997, I received by mail ABC Corporation's Motion to Strike Agency's Proposed Recommended Order as untimely. On that morning, I called the U.S. Naval Observatory Master Clock at (202) 762-1401 to confirm the accuracy of my watch and the Doe & Doe computers. The precise time announcement given by the U.S. Naval Observatory Master Clock recording, which is a source of undisputable accuracy, confirmed that the time shown on my watch and on the computers at Doe & Doe is correct. Neither my watch nor the Doe & Doe computers have been reset since the August 21 filing of proposed recommended orders.

6. Further, on Tuesday, September 2, I telephoned the DOAH clerk's office to inquire as to the time then shown on the date stamp clock. DOAH employee Sally Jones informed me that a document just stamped in at that moment bore the time 11:21. Immediately after hanging up from that telephone call, I called the U.S. Naval Observatory Master Clock, which reported the time as 11:18.

7. Based on the confirmation of time from four different sources (my watch, my firm's computers, the local time telephone records, and the U.S. Naval Observatory Master Clock), the date stamp machine in the Clerk's office at DOAH on August 21 (and on September 2) was approximately three minutes fast; that is, the time stamped on documents filed with the DOAH clerk's office was three minutes later than the actual time.

FURTHER AFFIANT SAYETH NAUGHT.

_____/s/

JOHN DOE

Postscript

My motion to strike was denied without any reference to the affidavits and the case ultimately settled. It is unknown whether DOAH has reset its clocks to "actual time."

Administrative law practitioners should govern themselves accordingly!

Kent Wetherell *is an associate with Hopping Green Sams & Smith, P.A. in Tallahassee. His practice focuses on land use and administrative law and legislative lobbying.*

* * * * * * *

FROM THE CHAIR

from page 1

They were not really about delegation of authority. They were often about policy choices.

If the real issue is about policy choices, then the real question is: was the **process** the agency used to make its policy choice the problem? If so, then maybe the APA needs to be changed.

Sometimes, however, the laws that are passed are so general that the agencies have to "fill in a lot of blanks" to implement them. Why is this? A number of reasons. One reason may be that the legislators recognize the subject matter expertise of the executive branch and, for that reason, put only the broad policy outlines in the law. Another way may be that the legislators recognize that there is a problem in a particular area and they are under pressure to do something about it. So they pass a bill with only general directory guidelines and hope it works.

Is it really the agency's fault when it "fills in the blanks" in a way that is not agreeable to everyone? And would more changes to the APA really solve this problem?

Another reason may be a bit more cynical, but may have some basis in reality. Sometimes a legislator knows exactly what he or she wants a law to do, but it is impossible to pass all the details of the bill—the votes are not there because other legislators refuse to support one or more of the specific provisions. The result is a bill in which important details are amended out. The agency is then left with the very difficult task of implementing a law that does not quite provide the guidance that was initially intended.

Is it really the agency's fault when it does so in a manner that is not agreeable to everyone? And would more changes to the APA really solve this problem?"

On the other hand, many laws are very clear and detailed and, as the agency is implementing them, the toes of some constituent get stepped on. It may be that those toes were the very ones upon which some weight was supposed to be applied, or it may be that the toes were stepped on because of an oversight in the preparation of the law. But the constituent blames the agency. Often, the legislator lets the constituent do so without acknowledging the legislature's role in the problem.

Would more changes to the APA really solve this problem?

Sometimes the very lawmaker who today is criticizing an agency for not following "the letter of the law" is tomorrow writing a memorandum of explanation to the agency as to why, although the law says one thing, he or she meant another and the agency should interpret the law in light of the "legislative intent." What is an agency to do? Whatever the agency does, it is likely to be criticized.

Would more changes to the APA really resolve the problem?

One of the overriding feelings arising from the APA reform rhetoric is that when one branch refers to what is wrong with "government," it means the other branches of government, not itself. And that is a big part of the problem. And changing the APA won't really solve the problem.

The solution begins with all these branches of government treating each other respectfully and acknowledging each other's rightful role in the process. The legislature can write laws more clearly and thoughtfully. The executive branch can carry them out with more diligence and more recognition of the overall statutory scheme.

And the judicial branch can give due deference to the clear meaning and intent of the laws as enacted and due deference to the executive branch's special expertise and authority in implementing the laws.

The need, in my view, is not more changes in the APA, nor more rhetorical volume, but more attention by all facets of the process to performing their part well. Just as with fights between people and wars between countries, the most difficult thing to do is to get one of the participants to stop first, then step back and with honesty and good will acknowledge their role in the hostilities . . . and then to redirect their focus on their own conduct and responsibilities for making the process work.

(This is an adaptation of an article I published in this Newsletter three years ago. Because of the changes in the law and the great influx of new members to the Section, the gist of the article seemed worth repeating.)

Share your newsletter and this application with a non-attorney colleague.

Affiliate membership in the Administrative Law Section is open to members of administrative boards, agency staff, law students, legal assistants, members of the legislature and legislative staff, and other administrative personnel. This membership will help keep you up to date in administrative law and processes.

To be considered for affiliate membership, please complete the application below, enclose a resume of your professional experience and your check for $20 or $25 made payable to The Florida Bar.

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I understand that all privileges accorded to members of the section are accorded affiliates, except that affiliates may not advertise their status in any way, nor vote, or hold office in the Section or participate in the selection of Executive Council members or officers.

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Note: Membership dues are $25.00 (Law Students - $20.00). Membership in the section will expire June 30. The Florida Bar dues structure does not provide for prorated dues. Your application, resume and check should be mailed to Jackie Werndli, Section Administrator, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300.

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Listed below is the information you need to contact your section officers or your newsletter editor.
Please let us hear from you!

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