Administrative Law Section Newsletter

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From the Chair

by Dan R. Stengle

If you're like me, you've grown weary of columns pontificating on the challenges that we face for the millennium. In our daily lives, it is an effort to conquer challenges that arise week-to-week or case-to-case; it becomes pretty daunting to bite off challenges in hundred-year or thousand-year chunks. The perennial challenges of the legislative process and the Legislature's relationship to the Administrative Procedure Act are about to become more daunting, and the millennium doesn't have a thing to do with it.

For those interested in the long view, the struggle over the legislative effort to rein in government through the Administrative Procedure Act is as old as the Act itself. In a recent conversation, a state administrative lawyer lamented that, in the past few years, the APA had become the focus, and indeed the battleground, for those dissatisfied with government. The view propounded by the state lawyer, and one that I have heard many times, is that the Act is a procedural act, and the process it establishes is neutral. He opined that there is no place in the debate to take on government the way that the private sector has done through legislative changes to the APA in recent years, with help from their friends both in the Legislature and (he said accusingly) in the Governor's Office.

You may agree or not with the state lawyer's premise that the process-establishing APA is an inappropriate place for pro-government and anti-government forces to battle. But is fair to say that the legislative initiatives to modify the Act to attend to perceived woes caused by government are only of recent vintage? I think not. The APA being used as the perceived battleground between anti-government and pro-government forces was not invented in the 1990s. The Act was born of controversies over governmental decision-making and bureaucratic processes, as was most dramatically and succinctly demonstrated by then-Senator Dempsey Barron's broadside on "phantom government" in articulating the need for the Act's 1994 legislative adoption.

There seems to be some misguided view recently that, for many years after the enactment of the APA, a legislative effort to revise the APA did not exist. Perhaps that is more a reflection of short memories than it is of reality. I recently reviewed a number of Florida Bar publications relating to topics in administrative law which spanned the two and a half de-

continued, page 2

An Exception to the Exception?

Judicial Interpretation of the Waiver and Variance Provision

by Seann M. Frazier

"No rule is so general, which admits not some exception." Robert Burton

In response to some criticism[1] that Florida's Administrative Procedure Act[2] had become overly rigid with its requirements for rulemaking, the Florida Legislature adopted Section 120.542, Florida Statutes, in 1996.[3] This new section introduced flexibility to the administrative process by allowing for the waiver of, or variance from, promulgated rules when rigid application would impose a substantial hardship or violate principles of fairness. A very unscientific evaluation of the use of this law indicates that those who have sought waivers and variances obtained relief more often than not.[4] However, a recent

continued, page 3

INSIDE:

FROM THE CHAIR
from page 1

cades of the life of our present APA. From that review, and from legislative history research that I have done in Florida administrative law, I am struck by the number of legislative initiatives to revise the Act, sometimes in very dramatic ways, that have been filed over the years.

Almost from the infancy of the APA, bills were introduced in the Legislature to impose stricter guidelines for rule adoption and to increase agency adherence to statutory intent, to increase legislative committee oversight in the area of rule adoption, and even to impose statutorily or constitutionally a system for the "legislative veto" of agency rules. As in recent years, some passed, most didn't, and some were vetoed by governors. Whether you believe that these efforts were appropriate or not, the Legislature adopted the Act in an effort to rein in government, and it has been using the Act to rein in government ever since.

For those of us who are a bit longer in the tooth, we remember that, for a number of years following its passage, the initial "fathers" of the Act, those who cared enough to participate in its drafting and its long-term mission, remained in the Legislature. To name but two important figures, Buddy MacKay and Curt Kiser were central to guiding the legislative view of the new Act and ushering it into maturity, at least until their legislative service ended. From among its initial founders, Curt Kiser was the last true "champion" of the Act in the legislative ranks until his departure from the Florida Senate in 1994.

For many years, as well, the "mother" of the Administrative Procedure Act, the late Professor Pat Dore, helped to guide the legislative view of the Act and brought keen interest, tremendous knowledge, and refreshing objectivity to her work with the Legislature. As *St. Petersburg Times* editorial writer Martin Dyckman said at the memorial service marking her untimely death in 1992, Pat's insights were "profound, instructive, helpful, and objective."

Since Pat Dore's passing and the departure from the Legislature of the Act's founders, the Administrative Law Section has grappled with the proper forum for introducing legislators to the APA, and fostering legislative interest in guiding its development. In fact, there are those who believe that the Section (or any section of The Florida Bar, for that matter) should take no role in legislative activity. The Administrative Law Section has rejected that position, however, believing that it has a role to play in the legislative process. But what role should it play?

In answering that question, the Section engages in a perennial struggle — perhaps particularly more so in the Administrative Law Section than in other Bar sections — to identify those issues that are embraced both by governmental administrative law practitioners and those who are in the private sector. The Section therefore has grappled, in its advocacy, to identify ways in which the Section can advocate not on behalf of a particular issue or proposed statutory change working its way through the Legislature, but on behalf of sound and reasoned processes that form the basis of the Administrative Procedure Act. Professor Pat Dore was lauded for her objectivity in providing information and assistance to the Legislature on the administrative processes, and the Section best serves its members when it does likewise. Its active but objective advocacy in evaluating and suggesting revisions to the drafts that led to the extensive 1996 rewrite of the Act, in my view, were not only appropriate, but were profoundly helpful to the Legislature, to administrative practitioners, and to the Act itself.

The Section will continue to reach out to legislators, as it has done in the past, in the "Year 2000 Pat Dore Administrative Law Conference." That is always an opportunity, limited though it is, to foster a dialogue with legislators — and key legislative staff — about issues important to administrative practitioners, both from the public and private perspective.

But the Section's role in fostering effective legislative relationships will become increasingly important, and even more difficult, when the "eight is enough" legislative term limitations commence in advance of the 2001 legislative session. The worthy endeavor of showing how the Administrative Law Section can assist the Legislature, particularly one comprised of a significant number of members who may never have even heard of the Act, cannot possibly be accomplished in a seminar, or in one legislative session.

It must be the responsibility of the Section's membership, both public and private, to reach out, to inform, and to guide the legislative view of the APA. I believe that it is naive to think that the Legislature somehow will be disabused of the notion that it shouldn't rein in government through revisions to the Administrative Procedure Act. Instead, with the profound and unprecedented turnover that is now constitutionally required in the legislative ranks, the struggle for the next many years will be the most effective means of participating in what has historically been the most important "process" relating to the Administrative Procedure Act: the legislative one. That is our challenge not for the millennium, but for today, tomorrow, and every day.

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

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AN EXCEPTION TO THE EXCEPTION?

from page 1

decision of the First District Court of Appeal may limit the availability of this provision.

In *Mariner Properties Development, Inc. v. Board of Trustees of Internal Improvement Trust Fund*, 24 Fla. L. Weekly D2125A (Fla. 1st DCA Sept. 14, 1999), a majority of the First District Court of Appeal found that a state agency was entitled to dismiss a petition for a variance or waiver without an evidentiary hearing because the agency was exercising a *proprietary*, rather than a *regulatory*, power. The Board of Trustees of Internal Improvement Trust Fund is charged by the Florida Legislature with the duty to protect and maintain sovereignty submerged lands. Sect. 253.03(1), Fla. Stat. That duty is, in turn, derived from Article X, Section 11 of the Florida Constitution, which generally provides for the protection of sovereignty lands. Because the Board acted in its capacity as trustee for state lands, which is a proprietary function, the majority reasoned, it was not required to comply with Section 120.542, which governs only regulatory functions.[5]

Judge Benton dissented, arguing that "regulation" is a broader concept than suggested by the majority. Rules adopted by a state agency should not be immune from variance and waiver, Judge Benton argued, whether they regulate state lands or some other subject. In the end, an agency's rules simply regulate an area of law like any other, and a petition for waiver or variance seeking relief from those rules should be decided on the merits. The dissent noted that this incursion into the scope of the variance and waiver provision might create uncertainty and confusion as to when waivers and variances will be available.

Judge Benton may have a point. The First District once described the varied remedies available under the APA as an "impressive arsenal."[6] When exceptions to those remedies are made, the effectiveness of the APA is undermined. In this case, the flexibility provided to regulated persons by waivers and variances is removed when a state agency's exercise concerns "proprietary" duties. If additional exceptions to Section 120.542 are created, say for state lottery rules or fish net regulation (which, like the "proprietary" powers, are also powers derived from the Florida Constitution[7]), then it may become difficult to determine when the relief afforded by variances or waivers will be available.

Endnotes:

[1] For an excellent history of the 1996 revisions to Florida's APA, see "The 1996 Revised Florida Administrative Procedure Act: A Rulemaking Revolution or Counter-Revolution?," Jim Rossi, Admin. Law Review, Spring 1997.

[2] Chapter 120, Fla. Stat., interchangeably referred as the "APA."

[3] For a comprehensive review of the history of the variance and waiver provision, and what that law requires, see Donna E. Blanton and Robert M. Rhodes, "Loosening the Chains that Bind: the New Variance and Waiver Provision in Florida's Administrative Procedure Act," Florida State University Law Review, Winter 1997; Blanton and Rhodes, "Flexibility, Flexibility, Flexibility, the New Variance and Waiver Provision," 71 Fla. Bar J. 35, March 1997.

[4] The evaluation was based on an informal review of agency records filed with the Speaker of the House of Representatives, October 1, 1999, pursuant to Section 120.542(9), Florida Statutes, which requires annual reports of the type and disposition of petitions for variances and waivers.

[5] The majority also noted that Section 120.542 should be construed strictly because the Board's authority is circumscribed by common law doctrine regarding sovereignty lands. *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So.2d 339 (Fla. 1986), *cert. denied*, 479 U.S. 1065 (1987).

[6] *Department of General Services v. Willis*, 344 So.2d 580, 589 (Fla. 1st DCA 1977)(comment made in the context of emphasizing the need to exhaust administrative remedies in order to give deference to the legislative scheme of the APA).

[7] Article X, Section 15 of Florida Constitution addresses state-operated lotteries; Article X, Section 16 of the Florida Constitution addresses marine fish netting.

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Appellate Case Notes

by Mary F. Smallwood

Adjudicatory Proceedings

A recurring issue under the Administrative Procedure Act is the authority of the agency head to modify findings of fact or conclusions of law contained in recommended orders. Generally, the agency may only reject a finding of fact when it determines, after a review of the complete record, that there is no competent substantial evidence to support the administrative law judge's finding. Agencies have historically had greater authority to modify or reject conclusions of law. However, under the 1999 amendments to the APA, the Legislature made it clear that the agencies' flexibility in this regard is limited to conclusions of law "over which the agency has substantive jurisdiction." Fla. Stat. 120.57(1) (1) . Several recent cases have addressed these issues.

In *Pillsbury v. Department of Health and Rehabilitative Services*, 24 Fla. L. Weekly 1889 (Fla. 2d DCA 1999), a question arose as to the characterization of the findings in the recommended order. The Department of Health and Rehabilitative Services had attempted to revoke Pillsbury's license as a child day care provider, alleging repeated violations of standards. In a prior appeal, the appellate court had reversed and remanded the matter, holding that the Department had improperly rejected findings of fact without a complete review of the record. On remand, the Department reviewed the record and entered another final order revoking the license. Specifically, the agency rejected three "conclusions of law" in the recommended order: (1) that the evidence did not show consistent failure by the licensee to address deficiencies, (2) that the respondent had cooperated to correct violations, and (3) that past violations could not be considered in the revocation proceeding. Despite the judge's and the agency's characterization of the findings as conclusions of

continued...

APPELLATE CASE NOTES
from page 3

law, the court held that the first two statements were actually findings of fact that could not be rejected by the agency without a determination that there was no competent substantial evidence to support them. The court determined that the Department had rejected the "findings" because of a "simple disagreement" with the administrative law judge. With respect to the third conclusion of law, the court held that the record demonstrated that the administrative law judge had clearly considered past violations even though there was a conclusion of law that they need not be considered. The decision does not address whether the third conclusion of law is one that is within the substantive jurisdiction of the agency. While the cases are clear that an agency may not reject a finding of fact which has been mischaracterized as a conclusion of law, it can often be difficult to determine which category applies.

In a similar vein, the question of when a determination is so infused with policy considerations that the agency's interpretation should prevail was addressed in *South Florida Cargo Carriers Assoc., Inc. v. Department of Professional and Business Regulation*, 24 Fla. L. Weekly 1449 (Fla. 3d DCA 1999). That case involved a final order of the Pilotage Rate Review Board increasing the rates that carriers must pay to the Port Everglades Pilots' Association. The administrative law judge had recommended decreasing the rates. On appeal, the Pilots' Board argued that setting rates was a quasi-legislative policy decision that had been delegated to the Board and not to the administrative law judge. The Third District characterized the issue as whether "the case falls on the fact-finding rather than the policy-making side of the divide described in *McDonald v. Department of Banking and Finance*, 346 So. 2d 569 (Fla. 1st DCA 1977), between those administrative decisions in which the administrative law judge's *nisi prisi* role predominates and those in which the expertise of the reviewing agency should prevail." Relying on *McDonald* and *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951), the Third District came down on the side of the agency's expertise. The court made no attempt to distinguish in its decision between reversal of findings of fact and conclusions of law.

Likewise, where a reversal of an administrative law judge results from an interpretation of the findings of fact to reach an ultimate determination, the agency's construction may well prevail. In *Rawls v. Public Employees Relations Commission*, 24 Fla. L. Weekly 2248 (Fla. 4th DCA 1999), PERC overturned a decision of the hearing officer concluding that the Department of Corrections had inappropriately suspended Rawls from work for five days. The hearing officer found that the Department had subjected Rawls to disparate treatment since two other employees had received only a written reprimand or a one-day suspension for conduct the hearing officer deemed to be more egregious. PERC rejected that determination, holding that there was no basis for comparing the different cases. Rawls was being disciplined for rude behavior to a judge in an open courtroom while the other two employees were involved in physical assaults on co-employees which occurred in a private office. On appeal, Rawls argued that PERC had improperly rejected the hearing officer's findings of fact as to the comparative harshness of the penalties. The court, however, agreed with PERC that the circumstances were so different that a comparison of the cases was not warranted. It held that PERC was not rejecting the findings of fact but simply interpreting them to reach an "ultimate legal conclusion." *Id.* at 2249.

Loeffler v. Department of Business and Professional Regulation, 24 Fla. L. Weekly 1856 (Fla. 1st DCA 1999), presented a different twist on the same issue. In that case, the Construction Industry Licensing Board filed an administrative complaint against Loeffler alleging three violations of Chapter 489, Fla. Stat., including failure to satisfy the terms of a civil judgment against a licensee or business organization qualified by the licensee. The civil action by homeowners dissatisfied with home renovation work conducted by Loeffler's corporation, Loeffler Building and Design (LBD), resulted in a judgment against the company, but not against Loeffler, personally. When LBD failed to pay the judgment, the homeowners obtained restitution from the Construction Industry Recovery Fund. The administrative law judge found Loeffler guilty of two violations, including contracting under the name of LBD when it was not qualified. Since LBD was not a "qualified business organization" and the judgment was not against Loeffler personally, the administrative law judge concluded that there was no violation of the requirement that the civil judgment be satisfied. The Department filed exceptions, arguing that Loeffler was "collaterally estopped" from taking the position that LBD was not qualified since he represented himself as the "qualifier" for LBD in seeking building permits for the work in dispute. The Board adopted the exceptions, increased the proposed penalty of $250 to $1000, and ordered Loeftler to reimburse the Fund. On appeal, the Department conceded that the doctrine of collateral estoppel did not apply to the proceeding; however, it urged the court to reach the same result based on equitable estoppel. The court rejected this argument, holding that the exceptions clearly relied on the doctrine of collateral estoppel. Accordingly, the rejection of the administrative law judge's findings was overturned.

In *Johnson v. Department of Children and Families*, 24 Fla. L. Weekly 1871 (Fla. 3d DCA 1999), both the administrative law judge and the agency agreed that Johnson had attempted to defraud the Department by submitting a timesheet indicating he had worked an eight-hour day even though he admittedly left work two hours early to deal with a family emergency. However, the court disagreed. It found that the recommended order contained inconsistent findings, noting that the administrative law judge found that Johnson had not intended to deceive the Department since he had told his supervisor about the discrepancy before the timesheet was submitted. Despite this finding, the recommended order held that there was an attempt to defraud. The court apparently concluded that an attempt to defraud could not exist in the absence of an intent to deceive.

The timeliness of a petition for hearing was at issue in *Jancyn Manufacturing Corp. v. Department of Health*, 24 Fla. L. Weekly 2232 (Fla. 1st DCA 1999). In 1996, Jancyn was issued a "stop

sale" order by the Department of Health, requiring it to cease selling a septic tank cleaning product known as Drainz on the grounds that the product contained illegal substances. The company negotiated a settlement with the Department which required it to reformulate the compound. A subsequent stop sale order was issued in 1997, alleging that the product still contained unacceptable substances. The order required Jancyn to stop selling the product by a certain date or file a petition for hearing. Upon request of Jancyn's counsel, several extensions of that deadline were granted to allow review of additional information by the Department as to the specific formulation of the product. Ultimately, Jancyn's counsel withdrew from representation after notifying the Department of that fact. Counsel's notification stated that the company president was aware of both the deadline for filing a petition and the necessity of supplying additional information. The required information was submitted, but no petition for hearing was filed. The Department then issued a final order requiring immediate compliance with the stop sale order and holding that Jancyn had waived its right to a hearing. On appeal, Jancyn argued that the doctrine of equitable tolling should apply to avoid waiver of the right to a hearing, noting that it was continuing to discuss a possible settlement with the Department. However, the court held that Jancyn had not been lulled or misled by the Department's actions into believing that its right to a hearing would not be waived. Withdrawal of counsel, by itself, does not constitute extraordinary circumstances sufficient to invoke the doctrine of equitable tolling. Although Jancyn was still submitting information for the Department's review, the company president admitted in an affidavit that he had been informed by prior counsel that he must request an extension of time or file a petition by the deadline.

A petitioner's right to formal proceedings was at issue in *Aguilera v. Department of Health*, 24 Fla. L. Weekly 2356 (Fla. 3d DCA 1999). Generally, a petitioner may waive the right to a formal proceeding, even where there are clearly disputed issues of material fact. However, the Department of Health announced at the commencement of informal proceedings on Aguilera's right to licensure by examination that it would forward the matter to DOAH if factual issues arose during the course of the hearing. The substance of the hearing was whether Aguilera's degree was comparable to a doctoral degree from an accredited school program. The court, on appeal from denial of the license, held that this issue was one of mixed law and fact. Accordingly, it remanded for a formal hearing.

Agency Rulemaking

A number of issues involving the rulemaking provisions of Chapter 120, Fla. Stat., were raised in *Department of Revenue v. Novoa*, 24 Fla. L. Weekly 2358 (Fla. 1st DCA 1999). The agency policy at issue was a provision of the Department's Code of Conduct for its employees that prohibited them from preparing tax returns for others during their nonworking hours. It was challenged by several employees as an unpromulgated rule. The administrative law judge concluded that the policy met the definition of a rule and was not exempt as an "internal memorandum." The First District reversed.

Judge Padovano's decision turned on the determination that the employees had no right that was being violated by the Department's policy. The court recognized that the employees had a property right in continued employment; however, it held that the policy did not impair that right. In reaching its decision, the court specifically distinguished this case from *Department of Highway Safety and Motor Vehicles v. Schluter*, 705 So. 2d 79 (Fla. 1st DCA 1998) [employment policies contrary to the Police Officer's Bill of Rights], *Reiff v. Northeast Florida State Hospital*, 710 So. 2d 1030 (Fla. 1st DCA 1998) [policy in violation of statute on nondiscrimination in providing hospital privileges], and *Florida State University v. Dann*, 400 So. 2d 1304 (Fla. 1st DCA 1981) [procedure for awarding merit raises]. *Schluter* and *Reiff* were distinguished on the grounds that there were specific statutory provisions in each case which created a right. *Dann* was distinguished on the grounds that the procedure for awarding raises was self-executing, while the Department of Revenue's policy did not establish a mechanism for implementing a disciplinary action.

The decision also emphasizes the fact that the legislature did not specifically authorize agencies to adopt regulations governing employee discipline. In a passage that clearly invokes recollections of the controversy raised by the First District's decision in *St. Johns River Water Management District v. Consolidated Tomoka Land Co.*, 717 So. 2d 72 (Fla. lst DCA 1998), the court stated:

> When a dispute arises over the mandatory rulemaking provisions of Section I 20.54(1)(a), the court must protect the legislative power to regulate rulemaking, but the court must also ensure that the definition of a rule is not applied so broadly that it includes executive branch functions within its scope.

Although the case nominally ad-

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APPELLATE CASE NOTES
from page 5

dressed only the issue of when an internal agency policy must be adopted as a rule, it raises larger issues about the authority of agencies to adopt rules. Read in context with the discussion of the "nature of the governmental power vested in the Department of Revenue" and the separation of power provisions of the Florida Constitution, the opinion suggests that the First District may apply a clear separation of powers test in future cases involving the extent of rulemaking authority.

Licensing Proceedings

A party's compliance with the terms of a consent order entered into in a license discipline case was addressed in *Kennedy v. Department of Business and Professional Regulation*, 24 Fla. L. Weekly 1917 (Fla. 4th DCA 1999). Kennedy, a yacht broker, was convicted on federal tax evasion charges, and the Department moved to revoke his license. The agency agreed to reinstate the license pending the outcome of Kennedy's appeal of the conviction, and the parties entered into a consent order which provided that Kennedy would notify the Department of the result of the appeal within five working days of the issuance of an order by the appeal court. He was also afforded the right to request an informal hearing within that five-day time frame, should the conviction be affirmed, to present mitigating factors. Kennedy failed to give the required notice, and the Department independently learned that the conviction had been affirmed approximately four months after the entry of the court order. A final order was then entered revoking the license. On appeal, Kennedy argued that the timeframe in the consent order should be liberally construed. The court disagreed, noting that even under a liberal construction of the terms of the consent order, a four- month period to provide notification was not contemplated. The decision recognized that parties are permitted by Chapter 120 to make "informal disposition" of administrative proceedings by entering into a consent order. Kennedy was thus bound by the terms of that order.

A similar result was reached in *Kwastel v. Department of Business and Professional Regulation*, 24 Fla. L. Weekly 1580 (Fla. 5th DCA 1999), where the respondent entered into a stipulation with the Department to resolve alleged violations involving his teaching of a real estate course for which the course approval had expired and his failure to report test grades. The stipulated penalty was revocation of Kwastel's license for a two-year period and relinquishment of the school's permit for two years. The stipulation also provided that the respondent would waive any rights to "challenge the validity" of the stipulation or final order. Following entry of the final order, Kwastel asked the Commission to reconsider its approval of the penalty because it had imposed a lesser penalty on other persons for substantially similar acts. The Commission refused to reconsider its order, and Kwastel appealed. On appeal, the order was affirmed. While the court appeared to be sympathetic to Kwastel's argument that the penalty was too harsh in light of the Department's actions in other cases, it concluded that he was bound to his agreement in the stipulation.

In *Holmes Regional Medical Center, Inc. v. Agency for Health Care Administration*, 24 Fla. L. Weekly 1748 (Fla. 1st DCA 1999), the applicant attempted to withdraw its application for a certificate of need after the close of the administrative proceeding and entry of a recommended order. AHCA entered an order dismissing the petition as moot. Adopting the reasoning of the Fifth District in *Middlebrooks v. St. Johns River Water Management District*, 529 So. 2d 1167 (Fla. 5th DCA 1988), the court reversed and remanded for entry of a final order on the recommended order. The court also noted that AHCA had no rule authorizing a voluntary dismissal under such circumstances.

Appeals

In a decision construing the effect of the adoption of the Uniform Rules of Procedure, the First District held that the Uniform Rules, by operation of law, superseded agencies' procedural rules unless an agency had sought and received an exception. In *Department of Corrections v. Saulter*, 24 Fla. L. Weekly 1951 (Fla. 1st DCA 1999), the Department had filed a motion for reconsideration of an order issued by the Public Employees Relations Commission in favor of Saulter. The motion relied upon Rule 38D-15.005, Fla. Admin. Code, which authorized such motions in PERC proceedings. The Department's subsequent appeal was filed more than 30 days after entry of the final order but less than 30 days after entry of an order on the motion for reconsideration. Saulter moved to dismiss the appeal as untimely, noting that the Uniform Rules did not provide for a motion for rehearing or reconsideration. The Department argued that it had been misled by the fact that PERC had not repealed its own procedural rule. Agreeing with Saulter, the appellate court held that the time for filing the appeal runs from the entry of the final order. Since PERC had not sought an exception, the Uniform Rules controlled.

Medina v. Department of Children and Families, 24 Fla. L. Weekly 1669 (Fla. 1st DCA 1999), involved a determination of when an unauthorized agency action constitutes harmless error. Medina had applied to the Department for food stamps and WAGES benefits. She was denied because she failed to adequately explain a $1000 withdrawal from her checking account shortly before submission of her application. In addition, the Department barred her from reapplying for a 90 day period. The administrative law judge determined that the denial was correct because the withdrawal was unexplained. With respect to the bar on reapplication, the administrative law judge found that it was inappropriate because there was insufficient evidence of an intentional violation. However, since Medina had not tried to reapply in that time period, the administrative law judge concluded that the error was harmless. While upholding the denial of benefits, the court held that the bar on reapplication was not harmless error since it would be a part of her record and could have a prejudicial effect on future applications.

Bid Protests

In *GTECH Corporation v. Department of the Lottery*, 24 Fla. L. Weekly 1740 (Fla. 1st DCA 1999), the Department issued a request for proposals for computerized gaming systems and related services. GTECH and Automated Wagering International (AWI) were the only companies submitting proposals.

The RFP provided that a six-person committee would evaluate and score the proposals based on a 100-point scale. The Secretary could reject the committee's recommendation only if she determined that the entire process was inadequate. Up to 20 points could be earned based on the price of the bid, which was sealed until the committee completed its evaluation of other factors. AWI received the best score, both on the price of the bid and on the committee's scoring. GTECH filed a bid protest. During the administrative proceeding, several members of the committee testified regarding their scoring of the proposals. The administrative law judge entered an order recommending that the matter be remanded to the evaluation committee for further review as he found that the original scoring was inconsistent with the RFP. After reconsideration, the committee again scored AWI higher than GTECH. A second administrative proceeding was held to consider the rescoring of the proposals. The administrative law judge entered a recommended order finding that the members of the committee had not been biased in their reevaluation of the proposals and recommending award of the contract to AWI. GTECH appealed, arguing that the remand to the same committee was an abuse of discretion and violated its due process rights. The court held that the remedy for errors in the contract award process is within the discretion of the agency. It rejected GTECH's argument that the process was inherently flawed since the committee members, upon remand, had knowledge of the amount of the two bids, which was to be sealed under the terms of the RFP. The court noted that any members of a new committee would also have access to that information. Recognizing that the Department had a number of options available to it to resolve original errors in scoring, including rejecting all bids, the court held that remand to the original committee was reasonable. Likewise, the court held that GTECH had not been deprived of its due process rights. The court rejected GTECH's arguments that the committee members were biased as a result of being required to testify in the first proceeding and that these biased members controlled the decision. In fact, when the matter was referred to DOAH, the decision was no longer in the hands of the committee members. Instead, an impartial administrative law judge was responsible for making findings of fact. Moreover, the court noted that the administrative law judge had heard evidence regarding the potential bias of committee members and had determined that they were capable of making an impartial evaluation. Judge Miner dissented, concluding that it was not possible for the process to be fair when the same committee conducted the reevaluation.

Government in the Sunshine

The applicability of the Government in the Sunshine Act and Public Records Act to private entities is becoming an issue more and more frequently as governmental functions are delegated to those private entities or "privatized." In *News and Sun Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992), the Florida Supreme Court established a list of factors to be considered in determining when a private entity providing public services or performing public functions is subject to the Public Records Act. Those factors included the extent of public funding, whether there is commingling of funds, whether the services being provided are integral to the agency's decision-making process, whether publicly owned property is involved, the extent of the public agency's control over the private entity, and similar considerations. In *Putnam County Humane Society Inc. v. Woodward*, 24 Fla. L. Weekly 2006 (Fla. 5th DCA 1999), Woodward sought access to records maintained by the Humane Society regarding an investigation of possible animal abuse that resulted in animals either being seized or voluntarily turned over to the Society. The investigation was conducted under the authority of Section 828.073, Fla. Stat., which authorizes either law enforcement officers or any association for the prevention of cruelty to animals to take such action. The Humane Society argued that it was not an agency under Chapter 119, Fla. Stat. The circuit court held that the records were public; however, it denied a request for attorney's fees on the grounds that the Society acted in good faith. On appeal, the Fifth District rejected the Society's reliance on the test in *News and Sun Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.* The court noted that it had previously held that such an analysis is not required where it is clear that the private entity has been delegated governmental responsibility, citing *Stanfield v. Salvation Army*, 695 So. 2d 501 (Fla. 5th DCA 1997). In the *Stanfield* case, the Salvation Army had contracted with the local government to provide all misdemeanant probation services. The court found no difference where, as in this case, the private organization is acting pursuant to specific statutory authority instead of the terms of a contract.

Agency Precedent

As a general rule, an agency is required to follow prior precedents unless it fully explains the reasons for its deviation. *Coastal Petroleum Company v. Florida Wildlife Federation*, 24 Fla. L. Weekly 2321 (Fla. 1st DCA 1999), involved a statutory interpretation of the Department of Environmental Protection. Coastal had applied for a permit to conduct offshore drilling for oil. The Department's intent to issue the permit was challenged by a number of environmental protection groups. The administrative law judge recommended issuance of the permit; however, the challengers filed exceptions to the recommended order. In particular, the challengers objected to the Department's interpretation of Section 377.241, Fla. Stat., which established criteria for permit issuance. Historically, the Department had construed the statute to establish a checklist of criteria which the applicant either met or did not meet. The challengers argued that the correct interpretation of the statute required the agency to weigh the extent of compliance with a particular criterion against the environmental dangers of allowing drilling activities. In the final order, the Department accepted the exceptions and reweighed the evidence under the new construction of the statute. It then found that Coastal had not met the permitting criteria when a balancing test was used. Coastal appealed, arguing, *inter alia*, that the Department could not change its mind about its interpretation of the statute without giving notice and engaging in rulemaking. The court disagreed, affirming the final order. The First District concluded that the De-

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CASE NOTES
from page 7

partment had adequately explained its reasons for the changes in construction and that Coastal had notice and opportunity to be heard on that issue.

Attorney's Fees

Gaston v. Department of Revenue, 24 Fla. L. Weekly 2410 (Fla. 1st DCA 1999), raises several issues regarding the award of attorney's fees. Gaston sought attorney's fees after the Public Employees Relations Commission (PERC) held that the Department had improperly terminated Gaston's employment. The administrative law judge recommended an award of fees, finding that an hourly fee of $200.00 was reasonable, but found that fees should not be awarded for time spent in responding to exceptions or litigating attorney's fees. PERC issued a final order reducing the hourly rate to $150.00 and accepting the recommendations on other issues. Gaston appealed. The court affirmed the order as to PERC's interpretation of the statutory provisions that no fees were appropriate for litigating the award, itself. However, the order was overturned on the other two issues. With respect to a reasonable hourly fee, the court noted that PERC has no authority to reject a finding of fact which is supported by competent substantial evidence. Moreover, the court held that fees were appropriate for preparation of a response to exceptions filed by the Department. PERC had determined that the request must be denied because its rules did not authorize the submission of such a response, despite the fact that the Uniform Rules specifically recognize such a submission. The issue revolved around the applicability of the Uniform Rules to this proceeding. The court rejected PERC's argument that the Rules did not become effective until July 1, 1998, citing the language of Section 120. 54(5)(a) which provided that the Uniform Rules became effective upon filing with the Secretary of State.

Public Service Commission

In *Palm Coast Utility Corporation v. Florida Public Service Commission*, 24 Fla. L. Weekly 2269 (Fla. 1st DCA Sept. 28, 1999), the Court granted the Florida Public Service Commission's Motion for Clarification, and a Corrected Opinion was issued which specified that on remand for an explanation by the agency of its change in policy, additional evidence could be taken. *Palm Coast Utility Company* was the third in a triad of cases decided by the First District where a water and wastewater utility company appealed a Florida Public Service Commission ("PSC") final order setting utility rates. *See Florida Cities Water Company v. Florida Public Service Comm'n*, 705 So. 2d 620 (Fla. 1st DCA 1998); *Southern States Utilities v. Florida Public Service Comm'n*, 714 So. 2d 1046, 1057 (F1a. 1st DCA 1998); and *Palm Coast Utility Company v. Florida Public Service Comm'n*, 24 Fla. L. Weekly 1182 (Fla. 1st DCA May 10, 1999). In each case, certain issues involved in rate-making were remanded to PSC because the record lacked an adequate basis for the PSC's departure from prior agency policy. Essentially, the PSC was directed on remand to provide explanation, with record support, for the changes in agency policies. In each of the three cases on remand, controversy arose between the PSC and the utility regarding the appropriate scope of proceedings on remand. Following remand of the first case, *Florida Cities Water Company*, the utility filed with the First District a petition for review of non-final agency action and for an interlocutory order to preserve the interests of a party pending further proceedings or agency action, pursuant to Sections 120.68(l) and (6)(b), Fla. Stat. The petition challenged the PSC's decision to take additional evidence at hearing. The court denied the utility's petition on case authority standing for the proposition that there existed an adequate remedy on appeal from the remand. In the second case, *Southern States Utilities*, the utility filed a Motion to Enforce Mandate with the First District, arguing, essentially, that on remand the PSC issued orders addressing matters beyond the scope of the mandate. The court denied the utility's motion. In the third case, *Palm Coast Utility Company*, the PSC, citing the controversies between the parties which had arisen in the first two remands, filed a Motion for Clarification of the Court's decision, arguing, *inter alia*, that clarification was necessary to establish that the scope of the remand included further evidentiary proceedings. By Order of the Court the PSC's motion was granted, and, without discussion, the Court corrected its opinion to specifically authorize the taking of additional evidence on remand.

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from page 1

On the Move

Dan R. Stengle, who served as General Counsel to the late Governor Lawton Chiles, entered private law practice in Tallahassee by joining the Tallahassee law firm of Hopping Green Sams & Smith, P.A., as a shareholder in the firm.

Mr. Stengle, the Chair-elect of the Administrative Law Section of The Florida Bar, will represent clients on matters relating to land use, facility siting, general administrative law and legislative representation.

He has an extensive background in the Executive and Legislative branches of state government on various issues associated with land use regulation, natural resource regulation and wildlife protection.

Mr. Stengle received his law degree from the Florida State University College of Law in 1982 and his bachelor's degree from the University of South Dakota in 1978.

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from page 1

continued, page 10

Stephen T. Maher is a Miami lawyer and legal educator who has practiced and taught law for the past twenty-three years. He now practices with Stephen T. Maher, P.A. and serves as Director of Attorney Training at Shutts & Bowen, the oldest law firm in Miami. He has written numerous articles on legal education, on technology and the law, and on administrative law. He has also been active in the organized bar. He is a past chair of the Administrative Law Section and past chair of the Council of Sections of The Florida Bar. He also trains lawyers throughout the United States through his consulting company, The Practical Professor Incorporated, pracprof@usual.com <http://www.usual.com>

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