# Administrative Law Section Newsletter

**Vol. XXVII, No. 3** **Elizabeth W. McArthur, Editor** **March 2006**

# From the Chair

**by Debby Kearney**

One of the Section's latest projects is to take a new look at our bylaws. In working more closely with the bylaws in the past year, I came upon a number of instances in which I noticed that the bylaws did not match the Section's practices or in which the bylaws hampered rather than helped us reach our goals. A number of Executive Council members had excellent recommendations for updating this document.

At the recent Long Range Planning Retreat, the Executive Council worked through the bylaws, article by article, and made a number of recommendations for change. The bylaws require the approval of the Executive Council, publication to the members, and ultimately, approval by the Board of Governors. On February 24, 2006, the Executive Council made a few more changes and then voted to approve the bylaws amendments. The bylaws amendments as approved by the Executive Council are published in this newsletter for the section membership to review.

In Article I (Name and Purpose), the members favored adding an aspirational goal, which would read as follows: It is an aspirational goal to achieve fair balance between government attorneys and private practitioners among the executive council members of the section.

Article II (Membership), currently limits the amount of dues to $25.00 per year per member. Most sections do not have a dues cap in their bylaws. The Bar is in the process of

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# First DCA Readdresses the Rule Challenge Standard of Proof After *Cosmetic Surgery* and the 2003 APA Amendments

**by E. Gary Early**

The First District Court of Appeal has, through its opinion in *Department of Health v. Merritt,*[1] laid to rest any remaining confusion as to the role of an Administrative Law Judge in a rule challenge proceeding pursuant to Section 120.56, Florida Statutes, and the appropriate standard of proof to be applied by an ALJ in considering whether a rule or proposed rule is an invalid exercise of delegated legislative authority. The *Merritt* opinion resolved the conflict between the Court's earlier opinion in *Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc.*[2] and the 2003 amendments to the Administrative Procedure Act,[3] and confirmed that the 2003 Legislature intended to modify the *Cosmetic Surgery* standard of review. In analyzing the *Merritt* decision, a review of the circumstances leading up to the opinion is appropriate.

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**FROM THE CHAIR**
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making budget changes which will have the effect of allotting less of the collections for each membership dues payment to the Section, with a greater portion going to the Bar's general funds for overhead of section operations. The Executive Council is not recommending a dues increase at this time, but is recommending the flexibility for that eventuality should it later become necessary.

In Article III (Officers), a change is recommended to require that nominations for the Section's officers be by a nominating committee of the executive council. Nominations would continue to be accepted from the floor.

Changes to Article IV (Executive Council) include establishing minimum expected duties of Council members. Members would have the duty to attend meetings and participate in at least one committee or participate as an Executive Council liaison to other Bar committees or sections.

The Meetings article (Article V), as redrafted, would allow for special meetings of the Executive Council at the call of the Chair "upon written notice that is reasonable under the circumstances." The purpose of the meeting would have to be stated in the call and official action on business would be limited to the stated purpose. The recommended changes to this article also would tighten up attendance requirements by deeming a vacancy to exist upon the absence of a member from any two regular meetings during any fiscal year, whether or not the absence was excused by the Chair.

A significant number of changes are recommended to Article VI (Committees). The Long Range Planning Committee composition would reflect the current practice of having the Chair-Elect responsible for planning the long-range planning retreat. The 3-year terms for Legislative Committee members would be deleted in recognition of the fact that board terms are only for two years.

The Law School Outreach Committee would be established as a standing committee in the bylaws. This is one of the Section's more active committees currently and a priority of Section members. Its purpose is to stimulate students' interest in administrative law "with the goal of increasing the number of law students with an interest in administrative law."

A Nominating Committee is also made a standing committee. Its three members would be responsible for nominating a slate of candidates for any vacancy occurring during a term or at the conclusion of a term.

Some changes are also made to the Public Utilities Law Committee to make it a regular standing committee.

If you have comments or suggestions on these changes or with respect to any other changes, please contact me or any other Executive Council member.

*Deborah K. Kearney is the Chair of the Administrative Law Section. She graduated from the Florida State University College of Law and currently serves as the General Counsel of the Florida House of Representatives. Debby can be contacted at debby.kearney@ myfloridahouse.gov.*

# Editor's Note

Thanks to Administrative Law Judge Charles Stampelos for providing this update as a follow-up to his article in the December 2005 Administrative Law Newsletter on Proposed Recommended Orders:

> DOAH ALJs now use LexisNexis rather than Westlaw as a research tool. My December 2005 newsletter article states that parties should use the DOAH case number and the Westlaw cite when citing to administrative law cases and when available; now they should use the DOAH case number and the LexisNexis cite when available.

# APPELLATE CASE NOTES

by Mary F. Smallwood

**Adjudicatory Proceedings**

*Rogers v. Department of Health*, 30 Fla. L. Weekly 2425 (Fla. 1st DCA, October 18, 2005)

The Department of Health filed an administrative complaint against Rogers, an anesthesiologist and pain management specialist, alleging that (1) he failed to meet the applicable standard of care in that he did not adequately document his patient's condition or conduct a physical examination before prescribing painkillers, (2) he failed to keep adequate medical records, and (3) he improperly prescribed narcotics without conducting a physical examination or evaluating the patient's medical history. An investigation apparently was commenced when the patient's HMO contacted the Department about the patient's treatment with numerous narcotics for pain management.

Following an administrative hearing, the administrative law judge entered a recommended order recommending dismissal of counts I and III of the complaint. The judge found that the Department had proven count II with respect to failure to keep adequate records. The judge found that the weight of the evidence supported a finding that Rogers had adequately diagnosed the patient's condition, referred her to other specialists, and recommended additional testing including an MRI (which her HMO refused to pay for). With respect to count III, the judge noted that the prohibition in the statute was prescribing a legend drug "other than in the course of physician's professional practice." §458.331(1)(q), Fla. Stat. The judge found that the Department had not established that Rogers was not practicing medicine when he prescribed the drugs. The order recommended a penalty of $1000.00 and attendance of a record-keeping class.

The Department filed a number of exceptions to the recommended order addressing the recommended dismissal of counts I and III. In its final order, the Department relied on testimony by Rogers and his expert witness to conclude that a required examination was not conducted. On that basis, it rejected the judge's dismissal of count I. With respect to count III, the Department concluded that prescribing the drugs was inappropriate because no physical examination had been conducted. The Department reinstated counts I and III and placed Rogers on probation.

The court reversed and remanded. It found that the Department had erred in rejected the ALJ's findings of fact as it was reweighing the evidence presented at the hearing to reach a different conclusion about whether an examination was conducted. Since the reinstatement of count III relied on that revised finding, it was also reversed by the court.

**Timeliness**

*Payne v. City of Miami*, 30 Fla. L. Weekly 2600 (Fla. 3rd DCA, November 16, 2005)

The Durham Park Neighborhood Association and certain individuals filed a petition for administrative hearing challenging the City of Miami's approval of a small scale development amendment. The appeal was filed within 30 days of the effective date of the amendment but more than 30 days after the vote of the Commission approving it. The Department of Community Affairs dismissed the petition as untimely.

On appeal, the court reversed. It noted that Section 163.3187(3)(a), Fla. Stat., allowed an affected person to file a challenge within "30 days following the local government's adoption of the amendment." Under the City of Miami's Charter, ordinances approved by the Commission become effective upon signature by the Mayor or after 10 days if the Mayor does not veto the action. The court rejected the Department's interpretation of the term "adoption" to mean adoption by the Commission.

**Standing**

*Jacoby v. Board of Medicine*, 31 Fla. L. Weekly 104 (Fla. 1st DCA, December 29, 2005)

Jacoby challenged Rule 64B8-8.001 and the Board of Medicine's non-rule policy regarding denial of a license to a physician with a probationary license in another state. Jacoby had been put on probation by the State of New York for failure to repay student loans. The Division of Administrative Hearings dismissed his petition for lack of standing. The Board had denied Jacoby's request for a temporary certificate to practice in Florida, and that denial was the subject of a separate appeal.

The court reversed. It held that there was an immediate injury in fact as Jacoby's request for a license had been denied and he might apply again in the future. It also held that he met the zone of interest prong of the standing test because his profession was regulated by the Board and he could not practice his profession without a license.

**Licensing**

*Yeoman v. Construction Industry Licensing Board*, 31 Fla. L. Weekly 48 (Fla. 1st DCA, December 22, 2005)

Yeoman applied for an initial certified general contractor's license. His request was denied based on Section 112.011, Fla. Stat., on the grounds that he had been convicted of a felony and had not had his civil rights restored. The statute provides that "a person whose civil rights had been restored shall not be disqualified to practice … any occupation … for which a license … is required … solely because of a prior conviction for a crime. However, a person whose civil rights have been restored may be denied a license … if the crime was a felony … and directly related to the specific occupation …." The Construction Industry Licensing Board con-

*continued...*

**CASE NOTES**
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strued this language to require denial of the requested license.

On appeal, Yeoman argued that Section 112.011 only addressed a person whose civil rights had been restored, not someone whose rights had not been restored. The court agreed and reversed the final order. It noted that Chapter 489, Fla. Stat., which governed licensing of general contractors, did not specifically provide for denial of a license where an applicant had a felony conviction. Instead, it required consideration of lack of good moral character. The court further noted that the Legislature had, in the case of certain professions, enacted statutory provisions requiring denial of a license where the applicant had committed a felony.

**Rule Challenges**

*Department of Health v. Merritt*, 31 Fla. L. Weekly 135 (Fla. 1st DCA, January 5, 2006)

*See feature article.*

**Attorney's Fees**

*Jain v. Florida Agricultural and Mechanical University*, 30 Fla. L. Weekly 2456 (Fla. 1st DCA, October 20, 2005)

Jain, a professor at Florida Agricultural and Mechanical University ("FAMU"), challenged a decision by FAMU that he was not entitled to compensation for the summer semester of 2003 as he had elected to participate in the Deferred Retirement Program and thus, his employment terminated in May of 2003. The administrative law judge entered a recommended order concluding that FAMU had contracted with Jain to teach in the summer term of 2003. In his proposed recommended order, Jain had requested that attorney's fees be awarded without specifying any statutory provision justifying such an award. The administrative law judge noted the request for attorney's fees, but did not provide for such fees in the recommended order. Jain then filed "Exceptions to the Recommended Order and Motion to Administrative Law Judge for an Award of Attorney's Fees," citing Section 57.105(5), Fla. Stat.

FAMU's final order adopted the recommended order and did not award attorney's fees to Jain, concluding that Section 57.105(5) was not applicable. Jain appealed that order.

The court reversed and remanded. It held that Section 57.105(5) requires, by its terms, that the administrative law judge determine the award of attorney's fees.

*French v. Department of Children and Families*, 31 Fla. L. Weekly 145 (Fla. 5th DCA, January 6, 2006)

Sarah French suffered from severe disabilities resulting from cerebral palsy. She needed personal care assistance as a result. The Department of Children and Families ("DCF") initially determined that she was entitled to 12 hours of care a day and designated her mother as a personal care assistant. Her caseworker recommended that Sarah be enrolled in an experimental Medicaid program, and her enrollment was approved. Shortly thereafter, DCF disenrolled her and terminated her mother's designation as her personal care assistant on the grounds that she was physically incapable of handling that role. When the Frenches requested a hearing, DCF informed them that no hearing was available since there had been no loss of services. Ultimately, DCF did grant the request for a hearing and appointed a hearing officer. The hearing officer held that DCF had erred in terminating the mother as the personal care assistant and reinstated Sarah in the experimental program. The hearing officer did not order back payment to the mother for services performed. Moreover, the hearing officer did not award attorney's fees requested under Sections 120.569(2)(e) and 120.595(1)(b) and (c).

On appeal, DCF did not argue that the hearing officer's order should be overturned, so the court upheld the determination that the mother was capable of performing personal care duties and that Sarah should be reinstated. However, the court found that the Frenches were entitled to back payment under both federal and state law.

With respect to attorney's fees, the court held that the Frenches had waived their argument under Section 120.569 because they failed to provide the hearing officer with any specific pleadings or documents that were alleged filed for an improper purpose. DCF argued that attorney's fees were not warranted under Section 120.595 because that section was limited to awards by "administrative law judges" and did not extend to hearing officers. The court noted that former versions of Section 120.595 had allowed hearing officers to award attorney's fees but that the statute as presently constituted was limited to administrative law judges. However, it rejected DCF's argument that it was exempt from any award of attorney's fees under that statute as a result of the exemption contained in Section 120.80(7), which authorized DCF to use hearing officers instead of administrative law judges. Instead, the court remanded for the assignment of an administrative law

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judge to hear the request for attorney's fees. It agreed with the Frenches that to do otherwise would allow DCF to escape the consequences of its actions by choosing to avoid the Division of Administrative Hearings. The court also awarded fees on appeal pursuant to Section 120.595(5), finding that DCF grossly abused its discretion.

**Immediate Final Orders**

*Bio-Med Plus, Inc. v. Department of Health*, 30 Fla. L. Weekly 2454 (Fla. 1st DCA, October 20, 2005)

Bio-Med Plus, Inc. ("Bio-Med") appealed an immediate final order of the Department of Health suspending its permit to engage in the distribution of wholesale drugs in Florida. The basis cited for the suspension was the indictment of the company in Georgia on charges of racketeering, mail and wire fraud, money laundering, and conspiracy. Based on the charges in the indictment, the Department found that Bio-Med had acquired and resold prescription drugs outside regulated channels (resulting in those drugs being considered adulterated) and that it had concealed the source of such drugs. Accordingly, the Department concluded that Bio-Med's continued operation constituted a serious and imminent threat to the health and safety of the consuming public.

The court reversed. It rejected the Department's conclusion that the fact that Bio-Med had been charged with a felony was sufficient to justify immediate suspension of the permit to dispense prescription drugs, although the court recognized that that might provide a basis for suspension of the permit after a formal administrative hearing. The court held that there were no allegations in the order that supported the contentions that drugs being distributed would actually cause harm to the public. Finally, the court found that there was no evidence that Bio-Med would continue to engage in unlawful activities during the pendency of a hearing on suspension of its permit.

**Appeals**

*Ford v. Agency for Persons with Disabilities*, 30 Fla. L. Weekly 2701 (Fla. 4th DCA, November 30, 2005)

Ford sought to challenge a decision of the Department of Children and Families ("DCF") to terminate her residential support services under Medicaid. She appealed that decision to the Office of Appeal Hearings, a division of DCF. Before the appeal could be held, however, Ford filed a Motion to Transfer the Case to the Division of Administrative Hearings. That motion was denied, and Ford appealed.

On appeal, Ford alleged that the hearing officers in the Office of Appeal Hearings had a conflict of interest because they were employees of DCF and had numerous contacts with other DCF employees who would appear as witnesses in appeal proceedings. Ford also alleged that the non-attorney hearing officers could not adequately address legal issues raised in the proceedings and that they could not objectively weigh the testimony of agency employees because of the close relationships formed.

The court dismissed the appeal of the order because it found that there was no demonstration that the non-final order could not be adequately addressed at the time of any appeal of the final order.

**Prohibition**

*PPI, Inc. v. Department of Business and Professional Regulation*, 31 Fla. L. Weekly 144 (Fla. 1st DCA, January 6, 2006)

Petitioners sought a writ of prohibition to prevent the Department of Business and Professional Regulation from responding to a request for a declaratory statement filed by Representative Ellyn Bogdanoff. The petition for a declaratory statement asked that the Department conclude that Art. X, § 23 of the Florida Constitution, allowing slot machines in a pari-mutuel wagering facility, was of no force or effect without legislative implementation. While recognizing that the declaratory statement provisions of Chapter 120 did not allow an agency to construe a constitutional provision, the court denied the request for a writ of prohibition. It held that a writ of prohibition is correctly issued to prevent an agency from acting in excess of its jurisdiction, and it does not lie to prevent an agency from acting erroneously. In this case, the agency had the authority to act to deny the petition. The Appellants could intervene in the action before the Department and argue that the petition should be denied.

**Estoppel by Judgment**

*Glidden v. Florida Unemployment Appeals Commission*, 31 Fla. L. Weekly 163 (Fla. 1st DCA, January 10, 2006)

Glidden was dismissed as an employee of the Department of Juvenile Justice on grounds of misconduct. She filed an appeal with the Public Employees Relations Commission ("PERC") challenging that dismissal. PERC found that she was properly dismissed. Glidden then sought unemployment compensation benefits. Initially, the Unemployment Appeals Commission ("UAC") held that PERC's decision that Glidden had been involved in misconduct justifying her dismissal qualified as estoppel by judgment to prevent her from qualifying for unemployment compensation benefits. The court, in a prior appeal, reversed and remanded for a hearing on the merits of her claims. On remand, the UAC allowed Glidden to present only such evidence that may have come to light after the PERC appeal. As there was no such new evidence, the UAC again denied her claim of benefits.

On appeal, the court reversed again. It held that estoppel by judgment was not applicable where, as here, two separate agencies considered similar factual allegations but for different purposes. The court further noted that the two agencies were applying different standards in their review of the facts. The case was remanded for a full evidentiary hearing.

***Mary F. Smallwood*** *is a partner with the firm of Ruden, McClosky, Smith, Schuster & Russell, P.A. in its Tallahassee office. She is Past Chair of the Administrative Law Section and a Past Chair of the Environmental and Land Use Law Section of The Florida Bar. She practices in the areas of environmental, land use, and administrative law. Comments and questions may be submitted to* Mary.Smallwood@Ruden.com.

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# Agency Snapshots

## Department of Environmental Protection

The Florida Department of Environmental Protection was created in 1993 when the Florida Legislature merged the Department of Environmental Regulation and the Department of Natural Resources. The Department is one of fifteen state government agencies under the executive branch of the Governor. The Department is the lead agency in state government for environmental management and stewardship. Among many other things, the Department administers regulatory programs and issues permits for air, water, and waste management. It oversees the State's land and water conservation program, Florida Forever, and manages the Florida Park Service.

**Head of the Agency:**
Colleen M. Castille, Secretary
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3900 Commonwealth Blvd., M.S. 10
Tallahassee, Florida 32399-3000
(850) 245-2011

**Agency Clerk:**
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Monday – Friday 8:00 AM to 5:00 PM

**General Counsel:**
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(850) 245-2242

Greg received his Bachelor of Science degree from the United States Air Force Academy and his Juris Doctorate from the Vanderbilt University Law School. Prior to coming to the Department, Greg worked for the United States Department of Justice where he prosecuted federal criminal cases. In addition, he spent three years serving in Governor Bush's Office of General Counsel. Before becoming a lawyer, Greg was a Captain in the United States Air Force where he served as the Mission Director on the RC-135 intelligence-gathering aircraft. He became General Counsel in August of 2004.

Greg believes the best part of being General Counsel is being able to work with the professional and knowledgeable employees within the Office of General Counsel and the Department as a whole. In addition, he enjoys working on issues of importance to Florida's future and learning the ins and outs of the businesses that interact with the department.

**Number of lawyers on staff**: 65

**Kinds of Cases:**
The Department is involved in and has expertise in a wide variety of cases. Many of these cases include different facets of administrative, environmental, land use, and real property law. A sample of the types of cases the Department handles includes permit challenges, rule challenges, enforcement actions, bid protests, takings litigation, land acquisitions, property disputes, and any related appeals that might result from these cases.

**Effect of Chapter 120 on the mission of the Agency:**
Florida's Administrative Procedure Act (APA) has a substantial impact on the Department's rule-making procedures, permit challenges, as well as challenges to any initial or final agency actions of the Department. As a government agency, the Department is committed to conduct itself in accordance with the APA while providing the greatest amount of environmental protection to the citizens of Florida.

**Changes to the APA:**
While the Department is not proposing any changes to the APA during the 2006 regular legislative session, Senator Mike Bennett is sponsoring a bill proposing changes to chapter 120, F.S. Senate Bill 262 proposes numerous changes to the APA, including expanding the definition of "small business party," requiring the Department of State to publish the Florida Administrative Weekly on the internet, and codifying the principal of equitable tolling.

**Changes to the Uniform Rules:**
The Department is anticipating proposing changes to its Exceptions to the Uniform Rules contained in Chapter 62-110, F.A.C, sometime in early 2006. The scope and content of these changes has yet to be established, but all the changes will go through the formal rulemaking process.

**Tips for practice before the agency:**
The Department encourages anyone having questions regarding the Department's rules or procedures to contact an attorney within the Office of General Counsel.

***Mark Your Calendar!***

**Pat Dore Administrative Law Conference**

**October 19-20, 2006**

# Minutes

## Administrative Law Section Executive Council Meeting

## January 5, 2006 – Wakulla Springs, Florida

*Draft: not yet reviewed or approved by Executive Council*

**I. CALL TO ORDER:** Executive Council Chair-Elect Booter Imhof called the meeting to order at approximately 2:15 p.m.

Present: Booter Imhof, Seann Frazier, Andy Bertron (late), Dave Watkins, Charlie Stampelos, Mary Ellen Clark, Linda Rigot, Clark Jennings, Larry Sellers, Cathy Sellers, Cathy Lannon, and Jackie Werndli.

Absent: Debby Kearney, Chris Moore, Cynthia Miller, Rick Ellis, Elizabeth McArthur, Donna Blanton, Allen Grossman, Li Nelson, and Bill Williams.

**II. PRELIMINARY MATTERS:**

A. Minutes—October 14, 2005
The minutes of the October 14, 2005, Executive Council Meeting were approved.

B. Treasurer's Report
The Treasurer's Report was presented by Jackie Werndli and approved.

C. Chair's Report
No report was presented.

**III. COMMITTEE/LIAISON REPORTS:**

A. Continuing Legal Education
Charlie Stampelos reported on the Administrative Appellate Law seminar scheduled for April 7, 2006, reviewing the list of speakers and topics. It will be held in Tallahassee although the location has not been selected. Whether lunch will be included is still being discussed.

Jackie Werndli reported on the Public Utilities Law Committee seminar scheduled for January 27, 2006, which will be held at the Public Service Commission in Tallahassee.

B. Publications
Mary Ellen Clark reported that two additional agency snapshots were included in the December 2005 Newsletter and that Larry Sellers and Andy Bertron would submit snapshots for the March newsletter. Larry Sellers requested that Cabinet-headed agencies and the various capacities in which the Cabinet sits be included in future agency snapshots.

Charlie Stampelos updated information contained in his article on proposed recommended orders in the December 2005 Newsletter by reporting that DOAH has switched from Westlaw to LexisNexis for research.

C. Legislative
Linda Rigot reported on bills filed for the next legislative session regarding the APA, including a specific claims bill which would be referred to DOAH and a bill that would give career service certified law enforcement officers and correctional probation officers a choice of going to PERC or DOAH.

D. Public Utilities Law
No report was presented.

E. Membership
Charlie Stampelos reported that the Section has 1207 members.

F. Webpage
Cathy Lannon reported that no changes have been made to the Section's website but that Daniel Nordby has volunteered to assist her with updating the website. The Council discussed additional items to be added to the website. Seann Frazier volunteered to work with Cathy and Dan.

G. Uniform Rules of Procedure
Linda Rigot led the Council through some additional revisions to be proposed for the Uniform Rules of Procedure. The revisions were approved and will be incorporated into the draft and then transmitted to the Governor's Office.

H. Long Range Planning
Booter Imhof reminded all in attendance that the long range planning retreat will be on January 6, 2006, at Wakulla Springs Lodge.

I. Board of Governors Liaison
Larry Sellers reported that the State and Federal Government and Administrative Practice certification proposal has been approved by the Program Evaluation Committee and the Board of Governors of The Florida Bar. It is expected to be placed before the Supreme Court of Florida in March. Larry also reported that the Board of Governors is committed to improving communications with the Bar's Sections.

J. Law School Liaison
Cathy Sellers reported that she had talked to FSU about hosting a panel and cocktail reception at the Law School in conjunction with the Pat Dore Conference. The money has been budgeted. Mary Ellen volunteered to help Cathy with this project.

Regarding the speaker's bureau for law school classes, Cathy reiterated her willingness to have volunteers speak to her law school classes but suggested that the Council also consider speaking on APA issues in other substantive courses, such as environmental and health law courses. She will identify such courses. Volunteers will be sought as plans are more specific. Other law schools will be contacted. Mary Ellen, Charlie, and Dan Nordby have volunteered to assist Cathy.

K. CLE Committee Liaison
Booter advised that the next meet-

ing of the Bar's CLE Committee will be held in conjunction with the mid-year meeting. He also reported that some CLE courses are being offered on-line on the Bar's website, and the sections have begun receiving their pro rata share of proceeds. The Administrative Law Section has received just over $200 as its pro rata share of the Bar's share.

L. BLSE Liaison

Mary Ellen Clark reported that Board of Legal Specialization and Education (BLSE) has decided not to implement section liaisons. In the future, BLSE will coordinate with the sections through the Council of Sections.

M. Council of Sections

Clark Jennings reported that the Council of Sections has not met since the last meeting of the ALS Executive Council.

N. Section Liaison

1. Environmental and Land Use Law – No activities to report.
2. Health Law – No report was presented.

**IV. OLD BUSINESS**

A. State and Federal Governmental and Administrative Practice Certification

Certification was discussed during the Board of Governors Liaison report. (*See* III.I above.)

B. Uniform Rules of Procedure

The Uniform Rules of Procedure were discussed during Committee Reports. (*See* III.G above.)

**V. NEW BUSINESS**

A. 2006-07 Section Budget

Jackie Werndli gave a detailed presentation of the proposed budget for 2006-2007. Among the noted changes were: i) the Bar will now retain $17.50 of each section member's dues instead of one-half; ii) the Bar will no longer refund the cost allocation in line 86998; and iii) indirect and overhead costs will be factored into CLE costs before determining profits, which will be split 90/10 between the sections and the Bar. CLE overhead includes Jackie's time. In the past, Jackie has spent approximately 2/3 of her time on the ELUS and 1/3 of her time on the ALS. Jackie conservatively projected a loss of $5,605 for the 2006 Pat Dore Conference. The members discussed the potential need to raise the registration fees for the Conference to offset projected increases in overhead.

Charlie Stampelos made a motion to reallocate $5,000 from the line 84501, Legislative Consultant, as follows: $2,500 to new line item 84310, Law School Liaison, and $2,500 to line 84052, Meeting Travel Expense. $2,400 from 84308, Writing Contest, would also be reallocated to 84310, Law School Liaison. It was discussed that it is unlikely that the Section will retain a lobbyist next year. The members present also expressed a desire to provide increased support for the Section's renewed effort to bring speakers to law schools. The motion was seconded and passed unanimously.

Clark Jennings moved that the budget be adopted as amended. The motion was seconded and passed unanimously.

B. Administrative Subcommittee, Appellate Rules Committee

Charlie Stampelos reported that the Administrative Law Rules Subcommittee of the Appellate Court Rules Committee is seeking input from the ALS on whether Florida Rule of Appellate Procedure 9.310(b)(2), automatic stay on appeal for public bodies, should be amended. Charlie presented an informed, lengthy, and detailed explanation of the issues and the history of the automatic stay in administrative appeals. After extensive discussion, Cathy Lannon moved that the Section take no position on amending the Rule. The motion was seconded and passed unanimously.

Clark Jennings moved that the Council adjourn at 5:30.

# Minutes

## Administrative Law Section Executive Council Long Range Planning Retreat January 6, 2006 – Wakulla Springs, Florida

*Draft: not yet reviewed or approved by Executive Council*

**I. CALL TO ORDER:** Executive Council Chair-Elect Booter Imhof called the meeting to order at approximately 9:00 a.m.

Present: Booter Imhof, Seann Frazier, Andy Bertron, Mary Ellen Clark, Linda Rigot, Clark Jennings, Cathy Sellers, Cathy Lannon, and Jackie Werndli.

Absent: Debby Kearney, Chris Moore, Cynthia Miller, Rick Ellis, Elizabeth McArthur, Donna Blanton, Allen Grossman, Li Nelson, Charlie Stampelos, Dave Watkins, and Bill Williams.

**II. REVIEW OF BYLAWS:** Jackie Werndli explained that amending the bylaws of the Administrative Law Section will require approval by the Executive Council, publication to the members, and approval by the Board of Governors. Jackie will research whether amendment also requires approval of the section's members. The members proceeded to review the bylaws section by section and craft proposed amendments to be presented to the council.

Among the provisions discussed were:

Art. I, Name and Purpose – The members agreed to recommend that the bylaws contain an aspirational goal for the council to have a fair balance between lawyers in government and private practice.

Art. II, s. 3, Dues – Dues are currently capped at $25.00. The potential need to raise dues in light of Bar budget changes was discussed. Jackie stated that most sections do not have a dues cap in their bylaws. It was agreed to recommend removal of the cap.

Art. IV, Executive Council – The members agreed to recommend that the bylaws stated the minimum expected duties of council members.

Art. V, Meetings – Much discussion occurred over how to clarify and improve the procedures for noticing and conducting meetings. In particular, the members discussed how to achieve a balance between insuring fair notice of meetings while maintaining some flexibility for true emergency situations. The members recommended a significant rewrite of this article.

Art. VI, Committees – The members discussed several recommendations for this article, including: clarifying that the council chair-elect shall chair the Long Range Planning Committee; removing term limits for the Legislative Committee members; and adding a new section for the Law School Outreach Committee. The members also decided to recommend that Debby Kearney discuss the section on the Public Utilities Law Committee with Cindy Miller.

The Council adjourned at 12:30 p.m.

# Bylaws of the Administrative Law Section
## (Proposed Amentments)

**Article I**
**~~NAME AND~~**
**~~PURPOSE~~DESCRIPTION**

Section 1. Name. The name shall be "Administrative Law Section, The Florida Bar."

Section 2. Purposes. The purposes of this section are:

(a) to provide an organization within The Florida Bar open to members thereof in good standing having an interest in administrative law and procedure on both the state and federal levels, and

(b) to provide a forum for discussion and exchange of ideas leading to the improvement and development of the fields of administrative law and procedure and agency practice, and to serve the public generally and The Florida Bar in interpreting and carrying out the professional needs and objectives in these fields.

Section 3. Aspirational Goal. It is an aspirational goal to achieve fair balance between government attorneys and private practitioners among the executive council members of the section.

**Article II**
**MEMBERSHIP**

Section 1. Eligibility. Any member in good standing of The Florida Bar interested in the purposes of this section is eligible for membership upon application and payment of this section's annual dues. Any member who ceases to be a member of The Florida Bar in good standing shall no longer be a member of the section.

Section 2. Administrative Year. The administrative year of the section shall run concurrently with the administrative year of The Florida Bar.

Section 3. Annual Dues. The annual dues shall be the amount fixed by the executive council and approved by The Florida Bar~~, not to exceed $25.00 per year per member~~. After an applicant has become a member, dues shall be payable in advance of each membership year and shall be billed by The Florida Bar at the time that regular dues of The Florida Bar are billed.

Section 4. Affiliate Membership.

(a) Eligibility. Any person who is not a member of The Florida Bar but who has an interest in administrative law and processes may become an affiliate member of the Administrative Law Section. Such persons may include but are not limited to members of administrative boards, agency staff, law students, legal assistants, members of the legislature and legislative staff, and other administrative personnel.

(b) Privileges and Responsibilities. Affiliates shall be members of this section only. Affiliates shall have all the privileges accorded to members of the section except that affiliates shall not be entitled to vote on any matter or to hold any section office. Affiliate members shall pay annual dues as determined by the exceecutive council.

(c) Membership Limits and Administrative Expenses. The number of affiliate members shall not exceed one-third of the section membership. The section shall reimburse the bar for expenses incurred by the bar in administering this section's affiliate membership.

**Article III**
**OFFICERS**

Section 1. Officers. The officers of this section shall be a chair, a chair-elect, a secretary and a treasurer.

Section 2. Duties of Officers. The duties of the officers shall be as follows:

(a) Chair. The chair shall preside at all meetings of the section and at all meetings of the executive council. The chair shall appoint all committees and committee chairs with the approval of the executive council, be responsible for all reports to be submitted to The Florida Bar, and perform all duties as customarily pertain to the office of chair. The chair shall be an ex-officio member of each committee of the section.

(b) Chair-elect. The chair-elect shall become chair in the event of the death, resignation, or failure of the chair to serve for whatever reason; provided, however, that in the case of temporary disability or absence of the chair, the chair-elect shall serve as acting chair only for the duration of the chair's disability or absence. The chair-elect shall be responsible for such other duties as the chair may designate. The chair-elect shall be an ex-officio member of each committee of the section.

(c) Secretary. The secretary shall be responsible for all permanent files and records of the section, including the minutes of the meetings of the section and the executive council and all committee reports. The secretary shall keep accurate minutes of the proceedings of all meetings of the section and the executive council and shall furnish copies of said minutes to the executive director of The Florida Bar and to the section coordinator.

(d) Treasurer. The treasurer shall serve as liaison to The Florida Bar and other sections on matters involving section finances and shall have the responsibility of accounting for all funds of the section, shall approve all disbursements, shall prepare annual financial statements under the supervision of the executive council and shall prepare budget requests and amendments in a timely manner in accordance with the procedures of the budget committee of The Florida Bar.

Section 3. Term of Office.

(a) Chair. The term of office of the chair shall begin at the conclusion of the next annual meeting of the section after the chair was elected chair-elect and shall end at the conclusion of the next succeeding annual meeting. Upon expiration of the chair's term, the chair shall be automatically succeeded by the chair-elect.

(b) Other officers. The terms of office of the other officers shall run con-

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currently with that of the chair.

Section 4. Election of Officers. The chair-elect, secretary and treasurer shall be elected by a plurality of the membership of the section in attendance at its annual meeting. Nominations shall be made by the ~~executive council~~nominating committee of the executive council and may be accepted from the floor.

Section 5. Vacancies. Any permanent vacancy occurring in an office shall be filled for the balance of the unexpired term by vote of the executive council at its next meeting.

**Article IV**
**EXECUTIVE COUNCIL**

Section 1. Governing Body. There shall be an executive council composed of 14 members of the section, plus the chair, chair-elect, immediate past chair, secretary, treasurer, and chair of the public utilities law committee, who shall be ex-officio voting council members. The executive council shall be the governing body of the section between the annual meetings of the section. The chair of the section shall be the chair of the executive council and the secretary of the section shall be the secretary of the executive council. It shall have general supervision and control of the affairs of the section, subject to the provision of the Rules Regulating The Florida Bar and the bylaws of this section. It shall authorize all commitments or contracts which entail the payment of money and it shall authorize the expenditures of all section funds. It shall not, however, authorize commitments, contracts or expenditures involving amounts of money in excess of the total amount which is anticipated as receipts from dues during the fiscal year plus the amount that has been previously collected from dues and remains unexpended. As the governing body of the section, it shall be vested with the power and authority to formulate, fix, determine and adopt matters of policy concerning the affairs and purposes of The Florida Bar. All recommendations of the section to The Florida Bar, any branch of the judiciary or to any other group or body to which recommendations by the section are authorized to be made, must first be approved by the executive council. Any recommendation made to other than The Florida Bar shall have the prior approval of The Florida Bar. ~~The executive council shall conduct its business at regular and special meetings as provided for in these bylaws; provided, however, the business of the executive council between regular meetings may be conducted by correspondence to the extent authorized by the chair.~~

Section 2. Term of Office. All members of the executive council, excluding ex-officio voting council members, shall serve for a term of 2 years, the terms of the members being staggered so that 7 members shall take office at the conclusion of every other annual section meeting and shall serve until the conclusion of the annual meeting of the section 2 years thereafter, and 7 members shall take office at the conclusion of every other annual meeting and shall serve until the conclusion of the annual meeting of the section 2 years thereafter.

Section 3. Election of Executive Council Members. The members of the executive council to be elected each year for 2-year terms shall be elected by a plurality vote of the membership in attendance at the annual meeting of the section. Nominations shall be made by the executive council and may be accepted from the floor.

Section 4. Vacancies. Except as is otherwise provided herein, any permanent vacancy occurring in the membership of the executive council shall be filled for the balance of the expired term by vote of the executive council at its next meeting.

Section 5. Duties. In addition to attending meetings of the executive council and of the section, executive council members shall participate in at least 1 standing or ad hoc committee or serve as an executive council liaison to other Florida Bar committees or sections.

**Article V**
**MEETINGS**

Section 1. Meetings of the Membership.

(a) The annual meeting of the section shall be held at each annual meeting of The Florida Bar. The active members of the section attending any meeting of the section shall constitute a quorum for the transaction of business and a majority vote of those present shall be binding.

(b) Special meetings of the entire membership of this section may be called by the executive council provided 30 days' notice thereof shall be given to each member of the section.

~~Section 2. There shall be at least 3 meetings of the executive council each year, 1 of which shall be held in conjunction with the annual meeting of The Florida Bar. The executive council may act or transact business herein authorized, without meeting, by written approval of a majority of the entire executive council.~~

~~In the event any member of the executive council, other than elected officers, is absent, without being excused by the chair in advance, from any 2 meetings during the fiscal year, the member's office shall be deemed vacant, and such vacancy shall be filled as otherwise provided in these bylaws.~~

~~Meetings of the executive council shall be subject to call by the chair of the section upon 15 days' written notice to the members of the executive council. Those present at a meeting of the executive council duly called shall constitute a quorum and a majority vote of those present shall be binding.~~

Section 2. Meetings of the Executive Council.

(a) There shall be at least 3 meetings of the executive council each year, 1 of which shall be held in conjunction with the annual meeting of The Florida Bar.

(b) Regular meetings of the executive council shall be subject to call by

the chair of the section upon 15 days' written notice to the members of the executive council.

(c) Special meetings of the executive council shall be subject to call by the chair of the section upon written notice that is reasonable under the circumstances. For a special meeting, the purpose of the meeting must be stated in the call of the chair and no vote may be taken on business other than that stated in the call.

(d) The executive council shall conduct its business at regular and special meetings as provided for in these bylaws; provided, however, the business of the executive council between regular meetings may be conducted by correspondence to the extent authorized by the chair.

(e) Those participating in a meeting or in transacting business by correspondence as authorized above shall constitute a quorum and majority vote of those participating shall be binding.

(f) In the event a member of the executive council is absent from any 2 regular meetings during the fiscal year, the member's office shall be deemed vacant, and such vacancy shall be filled as otherwise provided in these bylaws.

~~Section 3. Special meetings of the entire membership of this section may be called by the executive council provided 30 days' notice thereof shall be given to each member of the section.~~

**Article VI**
**COMMITTEES**

Section 1. There shall be the following permanent, standing committees within the section:

(a) Budget Committee. The budget committee shall prepare and revise proposed budgets for submission to the executive council for approval. The budget committee shall be composed of the section chair, immediate past chair, chair-elect and treasurer.

(b) Long Range Planning Committee. The long range planning committee shall develop long-range goals for the section, review the present activities of the section and submit reports thereof and recommendations to the executive council for adoption. The long range planning committee shall be composed of the ~~immediate past~~ chair-elect of the section and such other persons as the chair may appoint.

(c) Legislative Committee. The legislative committee shall be composed of 3 members, appointed by the chair, who will also name the chair of the committee. ~~The first 3 will be appointed for staggered terms of 1, 2 and 3 years, and thereafter the chair will appoint 1 member each year. Each member of the committee will serve for a term of 3 years.~~

(1) Legislative Positions. The legislative committee shall from time to time make recommendations to the executive council regarding requests for the section to adopt a legislative position. Such position shall require a 2/3 vote of the executive council to be adopted as the section position.

(2) Legislature in Session. When the legislature is in session, the chair of the committee shall consult with the chair and, if available, the chair-elect of the section. The chair of the committee may then act upon pending or proposed legislation ~~in lieu of action by the executive council~~in accordance with section legislative positions if it is not reasonably possible or feasible for the executive council to act. The chair of the section shall notify all members of the executive council of such action taken as soon as it is reasonably possible to do so.

(d) Publications Committee. The publications committee shall be composed of the chair of the committee and the editors of the section's column in The Florida Bar Journal and the section's newsletter and any other section members appointed by the chair. The chair of the section will appoint the chair of the committee each year. The chair of the committee will appoint the editors for the section's publications ~~and~~, who will be responsible for the timeliness, quality, and contents of those publications.

~~Section 2.~~(e) Public Utilities Law Committee. ~~The public utilities law committee shall be a semi-independent permanent standing committee within the section.~~ The public utilities law committee's purpose is to gather and disseminate information, share expertise and advise its members on the legal, technical, and economic issues related to regulated utilities providing electric, gas, water, sewer, and telephone services. ~~(a)~~ Any member of the section may become a member of the committee by so notifying the chair of the committee in writing. ~~The section chair, chair-elect, and immediate past chair shall be ex-officio members of the committee.~~

~~(b) The officers of this committee shall be the chair and vice-chair, who is also the chair-elect. The officers shall be elected by the committee, with the approval of the section chair, for 1-year terms. The chair will be a member of the section's executive council. The chair shall submit a committee report at each meeting of the executive council.~~

~~(c) The committee will meet at least 3 times a year. Those members present at each meeting shall constitute a quorum and a majority vote of those present shall be binding.~~

~~(d)~~ The committee may present at least 1 CLE program which receives Bar approval for CLE credits each year. ~~The expenses of, and the revenue from, the committee's CLE programs shall be those of the section.~~ All CLE presentations must be ~~coordinated with the section~~approved by the executive council. The committee shall also be provided space in the section's newsletter featuring the committee's own column for matters of special interest to its members.

(f) Law School Outreach Committee. The law school outreach committee shall be composed of members appointed by the chair. The committee shall coordinate section activities with Florida law schools to stimulate students' interest in administrative law with the goal of increasing the number of law students with an interest in administrative law.

(g) Nominating Committee. There shall be a nominating committee composed of 3 executive council members appointed by the chair to determine and propose a slate of candidates for any vacancy which occurs either during an executive council member's term or at the conclusion of any executive council member's term.

*continued...*

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For any executive council member seeking re-appointment at the expiration of that member's term, consideration for re-appointment will be based upon that member's contributions to the executive council during the term that is about to expire.

Section 2. Ad Hoc Committees. The chair shall establish ad hoc committees from time to time as the need arises.

**Article VII**
**MISCELLANEOUS**

Section 1. Action of The Florida Bar. No action of the section shall be represented or construed as the action of The Florida Bar until the same has been approved by The Florida Bar.

Section 2. No member of the section nor any committee thereof shall take any action or espouse any position as being the action or position of the section except as otherwise provided in these bylaws.

Section 3. Financial Obligations. Before payment, all financial obligations must first be approved in the manner specified by the executive council.

Section 4. Compensation and Expenses. No salary or other compensation shall be paid to any member of the section for performance of services to the section but the chair may authorize the payment of reasonable out-of-pocket expenses resulting from performance of such services.

Section 5. Amendments. These bylaws may be amended only by The Florida Bar upon recommendation made by the executive council of the section.

Section 6. No action of this section shall be contrary to the policies of The Florida Bar.

**FIRST DCA**
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**Enactment of the "Competent Substantial Evidence" Standard**

In 1996, the Legislature amended the Chapter 120 definition of an "invalid exercise of delegated legislative authority" to add the lack of "competent substantial evidence" as a basis for challenging a rule, an amendment codified as Section 120.52(8)(f), Florida Statutes (1996).[4] At the time, few anticipated that the seemingly innocuous amendment would serve to fundamentally shift the focus of rule challenges.

**The First DCA Weighs In, Part I - *Cosmetic Surgery***

On January 23, 2002, the *Cosmetic Surgery* opinion was issued, which construed the effect of the 1996 "competent substantial evidence" amendment, and in effect rearranged the rule challenge landscape. That case, which dealt with a challenge to existing and proposed rules of the Board of Medicine regarding office surgery standards, construed the term "competent substantial evidence"[5] for purposes of determining if a rule is an invalid exercise of delegated legislative authority as constituting a standard of review "similar to certiorari review in circuit court of quasi-judicial action by local governmental agencies."[6] In so doing, the Court discerned a legislative intent to limit the role of an ALJ in a rule challenge proceeding from one of an independent, *de novo* review of all evidence admitted at the rule challenge hearing, including a review of the credibility of witnesses and the reliability of evidence, to one of simply determining whether any legally sufficient evidence in the record supported the rulemaking agency's decision.[7]

*Cosmetic Surgery* surprised many practitioners who had long practiced with the understanding, based in statute and case law, that rule challenge proceedings were *de novo* in nature, allowing for consideration of any and all relevant evidence either in support of or in opposition to a rule. The opinion, by narrowing the standard of review, had the effect of making successful challenges to rules more difficult, a result at apparent odds with legislative intent.[8]

**2003 Corrective Amendment**

In response to the *Cosmetic Surgery* opinion, the 2003 Legislature took up the issue of whether "competent substantial evidence" is a standard of proof or a standard of review. The repeal of "competent substantial evidence" in Section 120.52(8)(f) first appeared on April 3, 2003 in the first Committee Substitute for the 2003 APA bill.[9] As the bill worked its way through committee, the Senate staff prepared its analysis of the circumstances leading to its development, and the effect of the proposed amendments on Chapter 120.[10] In its discussion of the "Present Situation," the Senate staff stated as follows:

> Recently, the court in *Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc.*, noted that ... [t]o the extent ... that an ALJ's or reviewing court's conclusions in reviewing a rule challenge rest on findings of fact, the ALJ and reviewing court are limited to the "competent substantial evidence" appellate standard of review, which permits the reviewing body to consider only whether the rule is supported by legally sufficient evidence. In other words, the reviewing body may not: (a) reweigh the evidence; (b) make determinations regarding credibility; or (c) substitute its judgment for that of the agency.
>
> The court's holding was based on the language of s. 120.56(8)(f), F.S., which requires rules to be supported by "competent substantial evidence." According to the court, they believed this paragraph of law evidenced the Legislature's intent that agency rules be subject to a "competent substantial evidence" standard of review in DOAH proceedings, and that an ALJ's order be subject to a "competent substantial evidence" appellate standard of review in the district court.
>
> . . .
>
> The court's holding appears to re-

> quire that an agency develop a record demonstrating that a rule is supported by "competent substantial evidence" before the ALJ hears the rule challenge, and it leaves the ALJ, who should act as a neutral fact finder, without the ability to weigh the evidence presented by an agency at the DOAH hearing. This result does not appear to have been contemplated by any provision in ch. 120, F.S.
>
> Further, the court's holding appears to conflict with s. 120.57(1)(j), F.S., which provides that in hearings involving disputed issues of fact that an ALJ's or other presiding officer's findings of fact should be based on a "preponderance of the evidence," and with the rule challenge burden of proof standards set forth in statute and other case law, as discussed below. (citations omitted)[11]

The bill sought to clarify the confusion created by *Cosmetic Surgery* through the repeal of Section 120.52(8)(f),[12] which established "competent substantial evidence" as an element of determining whether a rule is an invalid exercise of delegated legislative authority;[13] and through the amendment of Section 120.56(1) to provide explicitly that challenges to proposed and existing rules are *de novo* in nature with a preponderance of the evidence standard of proof; and that the burden of proof in a challenge to an existing rule is on the challenger to prove by a preponderance of the evidence that the rule is an invalid exercise of delegated legislative authority.[14] In its final analysis of the effect of the proposed amendments, the Senate staff stated as follows:

> The effect of these amendments, in combination with the bill's removal of the "competent substantial evidence" language from ss. 120.52(8)(f) and 120.57(1)(e)1., F.S., should be to overturn the court's decision in *Florida Academy of Cosmetic Surgery, Inc*. As discussed in the "Present Situation" section of this analysis, this case held that an ALJ and appellate court in reviewing a rule challenge are limited to a "competent substantial evidence" standard of review. Under the bill, however, it is made clear that an ALJ's rule challenge hearing is de novo and that the burden of proof in the hearing is a "preponderance of the evidence."[15]

The pre-passage staff analysis of the bill is consistent with that of post-passage commenters, who recognized that the 2003 APA amendments were intended by the Legislature to clarify what it believed to be an erroneous construction of Chapter 120 rule challenge standards by the First DCA.[16]

### *Merritt* at the DOAH

In early 2004, the Department of Health adopted a rule that included surface electromyography ("SEMG"), an electrodiagnostic medical procedure used to quantify the electrical output of muscles for the purpose of determining injury, as one of a list of four diagnostic tests "deemed not to be medically necessary for use in the treatment of persons sustaining bodily injury covered by personal injury protection benefits," thus relieving insurance companies of the obligation of reimbursing for the costs of the procedure under PIP. Dr. Merritt, a licensed Florida chiropractor who used SEMG in his practice, challenged the adopted rule under Section 120.56(3), Florida Statutes. Although the parties agreed that the hearing was *de novo*, and that Dr. Merritt had the burden of proving the invalidity of the rule by a preponderance of the evidence, the intervening insurance companies argued that the ALJ did not have the authority to independently weigh the evidence justifying the rule pursuant to the standards established in *Cosmetic Surgery*, and that since there was some evidence to support the rule, the ALJ was precluded from finding it to be invalid.

In her Final Order, the ALJ recognized the restrictive "appellate standard of review" established in *Cosmetic Surgery*, but concluded that:

> the 2003 amendment is clear on its face that the Florida Academy of Cosmetic Surgery standard has been superceded due both to the repeal of the statutory section upon which the opinion was based, Section 120.52(8)(f), Florida Statutes (2002), and to the amendment of Section 120.56(1)(e), Florida Statutes, which now specifies the *de novo* standard.[17]

The ALJ found and concluded that the preponderance of all of the evidence introduced at the hearing demonstrated that SEMG did not meet the standards for inclusion of the procedure in the rule, despite the introduction of some evidence supportive of the rule by the Department of Health and the insurance company intervenors. Upon her review and independent assessment of the evidence as a whole, and based on her findings regarding the credibility of certain witnesses and the weight of the evidence introduced by all parties, the ALJ concluded that the rule was an invalid exercise of delegated legislative authority.

### The First DCA Weighs In, Part II - *Merritt*

The Department of Health and the insurance company intervenors appealed the Final Order to the First DCA. Among the issues raised by the Appellants was the propriety of the ALJ's independent evaluation of the evidence introduced at the rule challenge final hearing, and the continuing viability of the *Cosmetic Surgery* standard of review.

On January 5, 2006, the Court ruled. In its opinion, the Court discussed its construction of the "competent substantial evidence" element of an invalid exercise of delegated legislative authority, and the corresponding standard of review established four years earlier.[18] The Court continued with an analysis of the 2003 APA amendments, and their effect on the standard of review established by its opinion in *Cosmetic Surgery*. Its review of the entirety of the circumstances led the Court to conclude as follows:

> The only legislative intent that we can logically discern from these amendments is that our holding in *Cosmetic Surgery* regarding the limited ability of an administrative law judge to weigh the evidence presented in a rule challenge pro-

*continued...*

> ceeding has been legislatively overruled. Accordingly, in determining whether the challenged portion of the rule in the present case was an invalid exercise of delegated legislative authority, the judge properly considered, weighed (upon a preponderance of the evidence standard), and based her findings upon all of the available evidence, regardless of whether the evidence was presented to the Department during its rulemaking proceedings or was presented for the first time during the section 120.56 hearing.[19]

As a result of its decision regarding the *de novo* scope of the ALJ's review, the Court affirmed the Final Order and the invalidation of the rule.

**Conclusion**

The First DCA's opinion returns balance to Chapter 120 rule challenge proceedings. *Cosmetic Surgery* remains a thorough and recent articulation of the Court's view on issues of standing, statutory grants of rulemaking authority, amendment of petitions, and the construction of the terms "arbitrary" and "capricious." Thus, *Cosmetic Surgery* should not be overlooked or minimized in any discussion of those issues. However, through its decision in *Merritt*, the Court has recognized that a person substantially affected by the application of a rule may marshal all current information regarding the substance of the rule, and that an ALJ may review all of the evidence, judge the credibility of the evidence, and make an independent judgment as to whether the rule is an invalid exercise of delegated legislative authority.

**Endnotes:**

[1] ___ So. 2d ___, 31 Fla. L. Weekly D135a, (Fla. 1st DCA Jan. 5, 2006).
[2] 808 So. 2d 243 (Fla. 1st DCA 2002).
[3] Ch. 2003-94, Laws of Florida.
[4] Ch. 96-159, §3, Laws of Florida.
[5] §120.52(8)(f), Fla. Stat. (2002).
[6] 808 So. 2d at 257.
[7] 808 So. 2d at 257-258.
[8] For an excellent analysis of the history of the 1996 amendment, the substance of the *Cosmetic Surgery* opinion, and the reaction to the opinion by the private and governmental bar, see Donna E. Blanton, *Competent and Substantial Evidence in Rule Challenges: A Standard of Proof or Standard of Review?*, Admin. Law Section Newsletter, 1, 4-6 (Sept. 2002).
[9] CS/SB 1584 (2003).
[10] Senate Staff Analysis and Economic Impact Statement for CS/SB 1564 (April 1, 2003).
[11] *Id*. at pp. 3-4.
[12] The bill also repealed "competent substantial evidence" as a factor in determining whether agency action may be based on an unadopted rule as previously allowed pursuant to Section 120.57(1)(e)2.f., Fla. Stat. (2002).
[13] CS/CS/SB 1584, §1 (2003).
[14] CS/CS/SB 1584, §3 (2003).
[15] Senate Staff Analysis and Economic Impact Statement for CS/CS/SB 1564, p.10 (April 15, 2003).
[16] Lawrence E. Sellers, *The 2003 Amendments to the Florida APA*, 77 Fla. B. J. 74 (Oct. 2003).
[17] *Merritt v. Department of Health, et al.*, 27 FALR 2833, 2848 (Div. of Admin. Hearings 2005).
[18] *Merritt*, *supra* at D135a.
[19] *Id*.

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THE FLORIDA BAR

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