Administrative Law Section Newsletter

Vol. XXVIII, No. 3 **Elizabeth W. McArthur, Editor** **March 2007**

The Top 10 Cases Since the 1996 APA Amendments

by T. Kent Wetherell, II[1]

Administrative law . . . is an area of law that will not be ignored. More and more cases of great import and impact upon our lives are determined in the administrative arena.[2]

In 1996, the Legislature undertook the most comprehensive revision of the Administrative Procedure Act (APA) since 1974.[3] The 1996 APA amendments completely reorganized Chapter 120, Florida Statutes, and made a number of other significant changes to the APA, including restrictions on agency rulemaking, statutory authorization for variances and waivers, new attorney's fees provisions, and new standards for bid protests.

The significance of the 1996 amendments cannot be understated; they were the subject of a symposium in the *University of Florida Law Review*[4] and a special issue of *The Florida Bar Journal*.[5] The 1996 amendments and the cases and subsequent legislation that they spawned have also been the subject of extensive commentary in this newsletter and other publications.

In celebration of the 10-year anniversary of the 1996 APA amendments, I put together a list of the "top 10" APA cases decided since the 1996 amendments and presented the list at the Pat Dore Conference in October 2006. Participants at the conference were given an opportunity to vote on their own "top 10" lists, and the votes were used to create a separate list, which was also discussed at the conference.

This article presents both lists as well as a summary of the cases on

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From the Chair

by Booter Imhof

In my first and second columns, I invited the membership to become more involved with the section. I am very pleased to say that many of you have taken me up on that and have volunteered for various activities. It is not too late (actually, it's never too late) to get involved. The section is continuing to improve our website and I invite you to visit it often at: *http://www.flaadminlaw.org*.

I also mentioned the presentations that were made at the 2006 Pat Dore Administrative Law Conference by Scott Boyd of the Joint Administrative Procedures Committee on the committee's website and by representatives from the Department of State on the new Florida e-Rulemaking website. My last column discussed the Joint Administrative Procedures website. Scott and his staff are working every day to upgrade the site, so if you have any suggestions, please let them know. Again, the website can be found at *http://www.japc.state.fl.us/*. Remember, Scott indicated that his office is always ready to add a case, opinion, or article that is not listed if you are aware of one.

As promised in my last column, this time I will tell you about the Department of State's e-Rulemaking website, which can be found at *http://flrules.com/*. The Department's goal as stated on the website is "to streamline and improve the rulemaking process, providing Florida's citizens and state agencies with enhanced tools for submitting and commenting on

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information published in the *Florida Administrative Weekly.*" The search tools for the site include searching by rule number, by agencies, by chapter number, by statute number, by FAW issues, by division number (e.g., 64B18), and by text search. There is also an advanced search capability.

On the right-hand side of the site, there is a "How Do I" link. It tells you how to get e-mail notifications of rule and notice activities. I just signed up for alerts for the departments that I am interested in and I will report on my experiences with it in my next column. Comments on rules can be submitted electronically and the instructions are located here also. The Department's rulemaking handbook can also be accessed from the site.

The Department of State staff is also working on improvements to the site, so don't hesitate to give them your suggestions.

Finally, your Executive Council is discussing an issue regarding the section's budget. The council has expressed concerns regarding how The Florida Bar is allocating costs to the sections for the use of Bar staff and equipment. As we know, the sections and committees are the lifeblood of the Bar. I will have more to say about this topic at a later time after the Executive Council has had time to discuss how to respond to this issue.

Amendments to the Uniform Rules of Procedure

by Gladys Pérez

The Administration Commission performed a substantive review of the Uniform Rules of Procedure, to consider revisions to the rules. This review process stemmed from changes to Chapter 120 made by the Florida Legislature during the 2006 session, as well as section 120.74(1), Florida Statutes (2006), which requires agencies to periodically review rules and identify and correct deficiencies in the rules; clarify and simplify its rules; delete obsolete or unnecessary rules; delete rules that are redundant of statutes; and improve efficiency, reduce paperwork, and decrease cost to government and the private sector. On September 21, 2006, the Administration Commission held a public workshop to receive input and consider suggested changes to the Uniform Rules. Considerable input from the Administrative Law Section of The Florida Bar, agency counsel, government and private practitioners, and the Joint Administrative Procedures Committee resulted in amendments to the Uniform Rules. The rule changes became effective on January 15, 2007.

Although a number of rules were changed to clarify language or incorporate technological advances, the scope of this article is limited to those substantive changes that will most likely affect administrative law practitioners. Accordingly, rules not specifically discussed herein should be consulted to verify if any changes were made.

Rule 28-104.005 Time for Consideration of Emergency Petition

Subsection (2) was added to rule 28-104.005, requiring agencies to give notice of receipt of petitions for emergency variances or waivers on the agencies' website and by any other means fair under the circumstances, or provide notice in the first available issue of the *Florida Administrative Weekly.* Within five days of publication, interested persons may provide comments. However, notice and comment requirements do not apply if the agency head determines that an immediate danger to the public health, safety, or welfare requires an immediate final order.

Rule 28-105.001 Declaratory Statements

The deletion of language in this rule reflects the Florida Supreme Court's decision in *Department of Business and Professional Regulation v. Investment Corp. of Palm Beach*, 747 So. 2d 374 (Fla. 1999). An agency's issuance of a declaratory statement interpreting statutes, rules, or orders may be of general applicability.

Rule 28-105.0024 Notice of Filing

This is a new rule. Section 120.54(b)(6), Florida Statutes, was amended during the 2006 legislative session, requiring the Uniform Rules to describe contents of notices that must be published in the *Florida Administrative Weekly* under section 120.565 (Declaratory Statement by Agencies). *See* Ch. 2006-82, Laws of Fla.

Rule 28-105.0027 Intervention

This is also a new rule, which was added to permit intervention in proceedings for Declaratory Statements under Chapter 28-105. The addition of this rule resulted from statutory

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changes to Florida's Administrative Procedure Act. *See* Ch. 2006-82, Laws of Fla. Note that the rule requires a petition for leave to intervene to be filed at least 10 days before the final hearing.

Rule 28-105.004 Notice of Disposition

A new rule, 28-105.004, requires that an agency file a Notice of Disposition for the Declaratory Statement in the next available issue of the *Florida Administrative Weekly* and include the information specified in the rule.

Rule 28-106.111 Point of Entry into Proceedings and Mediation

Subsection (4) of this rule now includes a sentence that states, "This provision does not eliminate the availability of equitable tolling as a defense." The language was added to section 120.569, Florida Statutes, during the 2006 session. Ch. 2006-82, Laws of Fla. Section 120.569(2)(c) requires the dismissal of an untimely filed petition. Thus, rule 28-106.111 requires the filing of a request for hearing within 21 days or suffering waiver of the right to request a hearing. Although the Legislature specifically made equitable tolling a viable defense, it does not follow that untimely filed petitions will be permitted as a matter of course. Instead, courts will most likely require adherence to well-established caselaw defining the equitable tolling doctrine. Thus, practitioners should be mindful that:

> The doctrine of equitable tolling was developed to permit under certain circumstances the filing of a lawsuit that otherwise would be barred by a limitations period. The tolling doctrine is used in the interests of justice to accommodate both a defendant's right not to be called upon to defend a stale claim and a plaintiff's right to assert a meritorious claim when equitable circumstances have prevented a timely filing. Equitable tolling is a type of equitable modification which focuses on the plaintiff's excusable ignorance of the limitations period and on [the] lack of prejudice to the defendant… *Generally, the tolling doctrine has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum.*

Machules v. Department of Admin. 523 So. 2d 1132, 1133 -1134 (Fla.1988) (citations omitted) (emphasis added); *see also Cann v. Dep't of Children and Family Serv.*, 813 So. 2d 237 (Fla. 2d DCA 2002).

Rule 28-106.2015 Agency Enforcement and Disciplinary Actions

Rule 28-106.2015 incorporates former rule 28-107.104, which was repealed during the revision process. The Legislature added section 120.54(5)(b)5. Florida Statutes (2006), requiring the Administration Commission to adopt uniform rules for the filing of a request for an administrative hearing by a respondent in agency enforcement and disciplinary actions. Ch. 2006-82, Laws of Fla. Under the rule, the agency's administrative complaint is considered the petition, and service of the administrative complaint on the respondent initiates the proceedings. The rule specifies the information that an agency must include in the administrative complaint. The rule also specifies the information that the respondent must include in a request for hearing. Of note is that agency enforcement and disciplinary actions may be initiated against "a licensee or *person or entity subject to the agency's jurisdiction*." (Emphasis added).

Rule 28-106.305 Conduct of Proceedings

Former subsection (2) of this rule provided that "If during the course of the proceeding a disputed issue of material fact arises, then, unless waived by all parties, the proceeding under this Part shall be terminated and a proceeding under Part II shall be conducted." This provision was deleted during the revision, because of a concern about lack of statutory authority.

Rule 28-106.501 Emergency Action

This is a new rule, which incorporates repealed rule 28-107.005. The rationale for this change is that an emergency action is another type of proceeding in which substantial interests are determined. The rule requires a finding of immediate danger to the public health, safety, or welfare. Upon such finding, the agency is allowed to enter an emergency order summarily suspending or restricting a license. The emergency order is immediately appealable, and the agency is required to give notice of this right in the emergency order.

Chapter 28-107 Licensing

The Licensing chapter was repealed in its entirety. Licensing is a type of proceeding in which substantial interests are affected and substantively covered in new rules 28-106.2015 (Agency Enforcement and Disciplinary Actions) and 28-106.501 (Emergency Action). Moreover, nothing in repealed Chapter 28-107 added to the licensing procedure set forth in section 120.60, Florida Statutes, which should guide agency action with regard to licensing.

Conclusion

The Administration Commission's revision of Chapter 28, F.A.C., incorporates statutory changes, minimizes the number of rules, simplifies the administrative process, and reflects the use of current technology. Although not all of the amendments proposed during the public workshop resulted in rule changes, the Commission appreciates continued input and dialogue concerning the Uniform Rules of Procedure.

Gladys Pérez *serves as counsel to the Administration Commission and is Assistant General Counsel to Governor Charlie Crist.*

APPELLATE CASE NOTES

by Mary F. Smallwood

Adjudicatory Proceedings

Mid-Chattahoochee River Users v. Department of Environmental Protection, 31 Fla. L. Weekly 2916 (Fla. 1st DCA, November 22, 2006)

Mid Chattahoochee River Users ("MCRU"), an association of public and private entities in Alabama and Georgia, filed a petition with the Department challenging the agency's decision to deny a permit to the U.S. Army Corps of Engineers to conduct maintenance dredging in the Apalachicola River. Members of MCRU alleged that their substantial interests would be affected because they used or planned to use the Apalachicola River for transportation of goods or equipment. Specifically, it was alleged that the ability to transport by water gave them an economic advantage when negotiating with other carriers such as trucking or rail transporters. The Department dismissed the petition for lack of standing, holding that economic interests were not within the scope of interest protected under applicable law; and MCRU appealed.

The appellate court affirmed. Citing *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981) and *City of Sunrise v. South Florida Water Management District*, 615 So. 2d 746 (Fla. 4th DCA 1993), the court held that economic injuries were not the type of interests to be protected under Chapter 373, Fla. Stat.

Baycare Health System, Inc. v. Agency for Health Care Administration, 31 Fla. L. Weekly 2705 (Fla. 2d DCA, October 27, 2006)

Baycare Health System disputed denial of its claims for reimbursement of medical costs by Health Options, Inc., an HMO. Baycare voluntarily chose to submit the dispute to Maximus Center for Health Dispute Resolution pursuant to Section 408.7057, Fla. Stat. When Baycare became aware that Maximus recommended to AHCA to accept Helath Options' position on reimbursement, Baycare wrote to Maximus requesting that its claims be withdrawn. Maximus subsequently submitted new recommendations to AHCA that the claims be dismissed, which AHCA adopted. On appeal, the First District Court in *Health Options, Inc. v. Agency for Health Care Administration*, 889 So. 2d 849 (Fla. 1st DCA 2004), reversed and held that AHCA had no authority to dismiss the claims after fact-finding had occurred in the voluntary dispute resolution. Subsequent to that decision but prior to the entry of final orders by AHCA, Baycare filed several petitions for formal administrative proceedings arguing that the dispute resolution process did not provide due process of law. Shortly after the petitions were filed, AHCA entered final orders in the prior case adopting the original recommendations by Maximus. Baycare appealed the final orders.

On appeal, the court rejected Baycare's arguments that the dispute resolution failed to provide due process because the statutory provision unconstitutionally delegated quasi-judicial powers to Maximus without providing adequate guidelines for the decision-making. The court held that due process protections do not extend to private organizations such as Maximus where, as here, parties voluntarily submit to the proceeding.

Matar v. Florida International University, 31 Fla. L. Weekly 3130 (Fla. 3rd DCA, December 13, 2006)

Matar, a student at Florida International University, appealed a decision of the Vice-Provost expelling him from school for cheating. His professor had determined that Matar had plagiarized materials in completing an assignment for his class. Since Matar had previously received a grade of "F" in another class for cheating, the professor concluded it was necessary to resolve the matter via a formal charge of academic misconduct. Matar was notified of this decision in writing and advised to consult the student conduct code which contained specific information regarding his various options to challenge that determination. He chose to request an administrative hearing. The hearing was conducted by the Vice-Provost. The professor testified on behalf of the university, and Matar testified on his own behalf. During the course of the hearing, Matar repeatedly attempted to interrupt the professor's testimony to state his position and was told he would be allowed to speak after the professor completed his testimony. At the conclusion of Matar's testimony, he asked if he could ask the professor a question and was told to direct any questions to the Vice-Provost. He only asked if he could have his course materials returned to him. Following the hearing, the Vice-Provost issued his decision expelling Matar.

On appeal, Matar argued that he was denied due process of law on several grounds, including the university's failure to notify on its forms of his right to a formal review proceeding and denial of the right to cross-exam the university's witness.

The court affirmed the decision. It noted that student disciplinary proceedings are exempt from the requirements of Sections 120.569 and 120.57, Fla. Stat. Instead, the institutions adopt their own procedures which are required to afford the students due process of law. In this case, the court held that Matar had been given adequate notice of his various remedies when the university cited him to the student conduct code. Its failure to use the specific form did not deprive him of due process. With respect to the ability to cross-examine the professor, the court held that there was no indication that Matar was deprived of that right. He was simply asked to address any questions to the Vice-Provost, and he never asked any question other than whether he could have his class materials returned to him.

Bethesda Healthcare System, Inc. v. Agency for Health Care Administration, 31 Fla. L. Weekly 3139 (Fla. 4th DCA, December 13, 2006)

Bethesda Healthcare filed a certificate of need application to transfer beds from one of its facilities to another facility within the same subdistrict. That request was denied by the Agency for Health Care Administration ("AHCA") on the grounds that Bethesda had failed to demonstrate that the first facility was inaccessible or that the second facility needed the additional beds.

On appeal, Bethesda argued that AHCA had failed to follow its own precedent, citing to other cases where AHCA had approved intra-subdistrict transfers. The court rejected that argument and affirmed the decision below. While the court noted the applicability of the doctrine of *stare decisis* to administrative decisions, it noted that AHCA had acknowledged the other cases in its final order. The court found that those cases were not on point with the case below as they did not involve situations where the applicant failed to demonstrate accessibility or need.

Dieguez v. Department of Law Enforcement, 32 Fla. L. Weekly 151 (Fla. 3rd DCA, January 3, 2007)

Dieguez, a police officer with the City of Sweetwater, appealed a final order of the Department revoking his license as a law enforcement officer. A formal administrative hearing was held at which the Department presented evidence that Dieguez had sexual relations with his 16 year old stepdaughter. The stepdaughter had initially told her mother of the relationship, and the mother and daughter reported the matter to the police department. The daughter stated in interviews that Dieguez had prepared written "contracts" for her to indicate her willingness to engage in certain sexual acts. Shortly thereafter, the mother reported that she doubted her daughter's veracity and the daughter was interviewed separately. At that time she recanted her story about sexual abuse. However, several months later a police officer who had been assigned to a squad vehicle that had previously been used by Dieguez found three "contracts" concealed under the car's trunk lining. When the daughter was re-interviewed, she again accused Dieguez of sexual abuse. The mother confirmed in a separate interview that the handwriting on the documents was that of Dieguez.

At the formal hearing, the "contracts" were introduced into evidence as an exception to the hearsay rule as an admission against interest. The daughter, who was then an adult, testified at the hearing. At that time, she again recanted her earlier statements and denied that there was sexual abuse. However, the administrative law judge found in the recommended order that her testimony was not credible and instead supported a finding that Dieguez had actually abused her. She recommended revocation of the license.

On appeal, Dieguez argued that the revocation was based solely on hearsay evidence and must be reversed. The court affirmed the order below. It agreed that the "contracts" were properly admitted into evidence as exceptions to the hearsay rule and that the administrative law judge had based her recommendation on those documents. Furthermore, the statements of the daughter to the police regarding what the documents represented and the mother's statements about the handwriting belonging to Dieguez, while hearsay, were properly admitted and considered to explain or supplement other evidence.

Potiris v. Department of Community Affairs, 32 Fla. L. Weekly 172 (Fla. 4th DCA, January 3, 2007)

Potiris filed a petition challenging a land use plan amendment of the Village of Wellington. He asserted that he had standing as an "affected person" under Section 163.3184(1)(a), Fla. Stat., in that he owned or operated a business within the boundaries of the jurisdiction whose plan he sought to challenge. While he did not have a business address within Wellington, he alleged that he represented property owners in that jurisdiction from time to time on land use matters. The Department dismissed the petition, holding that Potiris did not have standing.

The court affirmed, holding that conducting business within a jurisdiction occasionally is not the same as "owning or operating a business" under the provisions of the statute.

Rulemaking

Association of Florida Community Developers v. Department of Environmental Protection, 31 Fla. L. Weekly 3099 (Fla. 1st DCA, December 12, 2006)

The Association of Florida Community Developers ("AFCD") challenged a proposed rule of the Department of Environmental Protection implementing Section 373.223(4), Fla. Stat., which provides that the governing board of a water management district or the Department may "reserve from use by permit applicants, water in such locations and quantities … as in its judgment may be required for the purpose of protecting fish and wildlife or the public health and safety." The proposed rule, after essentially quoting the statutory language above, identified five examples of situations in which a water reservation might protect fish and wildlife and four examples of situations in which a reservation might protect public health and safety. The examples of protection of fish and wildlife included restoration of natural systems that provide habitat for fish and wildlife. Examples of protection of public health and safety included preventing sinkholes and saltwater intrusion. Additionally, the rule provided that the governing board or Department could reserve water prospectively. The administrative law judge held that the rules were not an invalid exercise of delegated legislative authority.

On appeal, the court wrote only to address whether the rules enlarged, modified, or contravened the provisions of Section 373.223(4). It affirmed the order below. The court noted that the statute provided the Department with a broad grant of authority to reserve water to protect fish and wildlife or the public health and safety. It concluded that the examples provided in the rule were well within that grant of authority.

Volusia County School Board v. Volusia Home Builders Association, 31 Fla. L. Weekly 2882 (Fla. 5th DCA, November 17, 2006)

The Volusia Home Builders Association ("VHBA") filed a Section 120.56

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challenge to an action of the Volusia County School Board recommending that the County adopt a revised school impact fee. The administrative law judge, relying on the County's amendment of the school impact fee ordinance in February 2005, held that the School Board's recommendation, which was the basis of the 2005 ordinance, was an unadopted rule.

On appeal, the court reversed. It further held that the VHBA lacked standing to challenge the rule. The court noted that a 1992 ordinance resulted in adoption of a policy by the School Board which called for biennial recalculation of impact fees based on certification of costs by the School Board to the County. In 1997, that ordinance was repealed and replaced by one that did not require Board certification. However, the 1997 ordinance called for review of the process every five years. In 2004, the School Board, in its reevaluation of the process, adopted a recommendation to the County that would again have required periodic certification of costs to the County by the Board. After a hearing on the recommendation, the County adopted it as proposed; however, there was extensive discussion at the meeting and other options were considered and voted on by the County.

The court concluded that the administrative law judge had incorrectly assumed that the 2005 ordinance, requiring Board certification, was in effect in determining that the "recommendation" of the Board was a rule. Instead, the court held that the 1997 ordinance was the one in effect. The Board's recommendation did not directly affect the rights of VHBA or its members since it had no direct effect without being adopted by the County. Based on the same reasoning, the court held that VHBA lacked standing to challenge the recommendation since its effect was speculative until implemented by the County in the 2005 ordinance.

Licensing

Mullins v. Department of Law Enforcement, 31 Fla. L. Weekly 3002 (Fla. 5th DCA, December 1, 2006)

Mullins, a police officer for the City of Sanford, challenged the action of the Criminal Justice Standards and Training Commission revoking his certification as a law enforcement officer. After a formal administrative hearing, the administrative law judge concluded that Mullins had committed perjury and had engaged in sexual relations while on duty. The ALJ recommended revocation. No exceptions were filed, and the Commission adopted the recommended order.

On appeal, Mullins argued that the ALJ incorrectly found that he engaged in misconduct and that he was denied assistance of effective counsel. The court affirmed the final order. It held that Mullins was simply requesting that the court reweigh the evidence. With respect to his argument regarding competent counsel, the court held that there is no Sixth Amendment right to counsel in an administrative proceeding for licensure discipline. Accordingly, there is no correlative right to challenge the effectiveness of counsel.

Department of Financial Services v. Mistretta, 32 Fla. L. Weekly 120 (Fla. 1st DCA, December 27, 2006)

Following a formal administrative hearing on an application for licensure as an insurance agent, the administrative law judge, *sua sponte*, raised the issue of whether a default permit should be issued and recommended issuance pursuant to Section 120.60(1), Fla. Stat.

On the Department's petition for review of non-final agency action, the court reversed and remanded. It held that the administrative law judge's failure to allow the parties to present evidence or argument on the issue was a departure from the essential requirements of law.

Salam v. Board of Professional Engineers, 31 Fla. L. Weekly 3164 (Fla. 1st DCA, December 15, 2006)

Salam sought attorney's fees on appeal after successfully obtaining a writ of mandamus from the appellate court requiring the Board of Professional Engineers to grant or deny his petition for a formal administrative hearing. The court found that the Board's failure to act on the request was a gross abuse of discretion pursuant to Section 120.595(5), Fla. Stat. Judge Van Nortwick dissented on the grounds that the action of the agency in granting or denying a petition is a ministerial duty, not a discretionary one.

Appeals

Webb v. Florida Department of Children and Family Services, 31 Fla. L. Weekly 2659 (Fla. 4th DCA, October 25, 2006)

Webb appealed the denial of his application for Medicaid waiver services. The hearing officer had concluded that Webb did not qualify as retarded, relying on testing conducted by one of the witnesses at the hearing. Webb had received four neuropsychological evaluations beginning in 1997 when he was ten years old. The first two were performed by Nova Southeastern University. When Webb sought a waiver, the agency requested a third test. A final evaluation was performed by a doctor appointed by the Dependency court to determine whether Webb met the waiver requirements.

According to the agency's guidebook, "no single score" is to be used as the sole criterion, and all scores and other factors are to be considered. The appellate court therefore held that it was error for the hearing officer and the agency to deny eligibility based on a single test, contrary to the governing statutes and the agency's "published interpretations." Because the wrong legal standard was used, the court reversed and remanded for further procedings.

Mary F. Smallwood *is a partner with the firm of Ruden, McClosky, Smith, Schuster & Russell, P.A. in its Tallahassee office. She is a 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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(Revised 3/12/07)

Minutes — Administrative Law Section Executive Council – Special Meeting to Review Budget

January 12, 2007

Tallahassee, Florida (Telephone Conference)

I. CALL TO ORDER: Executive Council Chair Booter Imhof called the meeting to order at 4:12 pm.

Present: Booter Imhof, Andy Bertron, Li Nelson, Elizabeth McArthur, Linda Rigot, Bill Williams, Donna Blanton, Dave Watkins, Seann Frazier, Clark Jennings Cynthia Miller, Allen Grossman, Kent Wetherell, Scott Boyd, Bruce Lamb, and Jackie Werndli

Absent: Debby Kearney, Cathy Sellers, Wellington Meffert, Mary Ellen Clark, Cathy Lannon

II. CONSIDERATION OF 2007-08 PROPOSED BUDGET

Seann Frazier explained the format of the proposed budget document circulated by Jackie Werndli with notice of this special meeting. The proposed budget for 2007-08 projects a substantial Section loss, attributable to the new allocation of expenses by The Florida Bar. Section dues from members is stable but the Section gets a smaller percentage because The Florida Bar is taking more of the Section dues, while the Section is allocated a greater percentage of expenses and is also allocated certain overhead of The Florida Bar. The Florida Bar is now retaining $17.50 per dues-paying section member.

There was extended discussion of many of the charges that The Florida Bar is imposing on section activities. Concerns were expressed over the registrar line item, which reflects a flat $15 charge imposed by The Florida Bar on the CLE sponsor each time an individual registers for a CLE course (even if done on-line), and each time a CLE registration is changed (such as a cancellation). Concerns were also expressed about the multiple charges imposed on CLE tape and CD sales, including a flat charge per format for setting up the recording equipment that appears higher than private sector charges, plus another unit charge for each tape or CD sold, plus another charge for the processing of each order. The charges do not appear to bear a relationship to the actual costs. Several of these charges will be referred to the Council of Sections as being beyond the charges initially disclosed by The Florida Bar and agreed to by the Council of Sections. The focus of prior discussions by The Florida Bar was on the allocation of the time value of direct administrative support for section activities.

Some of the expense allocations are not complete at this time. For example, expense allocations are not complete for the recent Administrative Law conference. In addition, The Florida Bar may be allocating additional expense items or amounts that have not been identified yet.

Several members expressed concern that the Section might need to reduce services to its members in the future or seek services from the private sector for services previously provided by The Florida Bar. Although one possibility would be to consider raising dues, at this point the consensus was to try to have the Section's concerns addressed and revisit the subject at the next Executive Council meeting.

Jackie Werndli went over a number of proposed adjustments to the proposed budget.

Allen Grossman made a motion to approve the proposed budget as revised by the proposed adjustments. Clark Jennings seconded the motion. The motion carried unanimously.

On motion, duly seconded, the meeting was adjourned at 5 pm.

Respectfully submitted,
Elizabeth McArthur
Secretary

TOP 10 CASES
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the lists. The article also includes summaries of a number of cases that did not make either list but are still worth mentioning.

CASE SUMMARIES

• My Top 10

1. *St. Johns River Water Management Dist. v. Consolidated-Tomoka Land Co.*, 717 So. 2d 72 (Fla. 1st DCA 1998)

This was the first case to interpret the more restrictive rulemaking standard in §§120.52(8) and 120.536(1), F.S., which was arguably the most significant aspect of the 1996 APA amendments. Although the court's "class of powers" test was quickly rejected by the Legislature in the 1999 APA amendments, the case remains good law for several propositions -- *e.g.*, existing rules are presumed valid; the party challenging a proposed rule has the initial burden of production as to objections even though the agency has the ultimate burden of persuasion (this was codified in the 1999 APA amendments); and the Legislature has the authority to establish the test for determining rule validity. The case is also significant because it generated more than 330 pages of amicus briefs from agencies, various interest groups, the Legislature, the Governor, and the Attorney General.

2. *Barfield v. Dept. of Health*, 805 So. 2d 1008 (Fla. 1st DCA 2001).

This is the first case to interpret the 1999 amendments to §120.57(1)(l), F.S., which effectively prohibits agencies from rejecting conclusions of law over which they do not have substantive jurisdiction. The opinion was authored by Judge Ervin, who also authored the concurring opinion in *DCF v. Moreman*, 715 So. 2d 1076 (Fla. 1st DCA 1998), discussed below. Judge Ervin candidly acknowledged that the 1999 amendments to §120.57(1)(l), F.S., were "a direct legislative response to the concurring opinion in *Moreman* and an acceptance of Judge Benton's dissenting opinion therein."

THE LISTS

My Top 10	**Conference Participants' Top 10**
1. *Consolidated-Tomoka*	1. *Barfield*
2. *Barfield*	2. *Consolidated-Tomoka*
3. *Investment Corp. of Palm Beach*	3. *Brookwood Extended Care Center*
4. *Save the Manatee Club*	4. *Save the Manatee Club*
5. *Cosmetic Surgery*	5. (tie). *NAACP v. Board of Regents*
6. *Cann*	5. (tie). *Day Cruise*
7. *Brookwood Extended Care Center*	7. *Investment Corp. of Palm Beach*
8. *Crawford / Saulter*	8. *Cann*
9. *G.E.L. Corp.*	9. *Verleni*
10. *Life Care Centers of America*	10. *Campbell*

3. *DBPR v. Investment Corp. of Palm Beach*, 747 So. 2d 374 (Fla. 1999)

In this case, the Florida Supreme Court resolved a conflict between the First and Third DCAs regarding the proper scope of declaratory statements after the 1996 APA amendments. The court sided with the First DCA, and approved its decision in *Chiles v. Department of State*, 711 So. 2d 151 (Fla. 1st DCA 1998), which held that after the 1996 APA amendments, a declaratory statement may be issued even if the issue that it addresses is not unique to the petitioner. Interestingly, the opinion included extensive discussion and tacit approval of *Consolidated-Tomoka,* but no mention of the 1999 amendments to §120.52(8), F.S., which had been adopted by the time the court issued its opinion. The court also included extensive discussion of the late Professor Pat Dore's 1986 article, *Access to Florida Administrative Proceedings,* which the court correctly referred to as "an authoritative source on Florida's administrative statutes."

4. *Southwest Florida Water Management Dist. v. Save the Manatee Club, Inc.,*
773 So. 2d 594 (Fla. 1st DCA 2000)

This was the first case to interpret the revisions to the rulemaking standard adopted in 1999 in response to *Consolidated-Tomoka.* The opinion was written by Judge Padovano, who also wrote the opinion in *Consolidated-Tomoka.* As it did in *Consolidated-Tomoka,* the court began by recognizing the Legislature's "right to replace a judicially created test to determine the validity of a rule" since rulemaking is a legislative function. The court held that a case-by-case analysis is required to determine whether or not the enabling statute contains a specific grant of authority for the challenged rule. It is noteworthy that the court pointed out that the Florida Chamber of Commerce argued in its amicus brief for the case-by-case analysis, and some have suggested that the court did so to make it harder for the business community and other proponents of the more restrictive rulemaking standard to complain to the Legislature if the *ad hoc* approach worked against rule challengers.

5. *Board of Medicine v. Florida Academy of Cosmetic Surgery*, 808 So. 2d 243 (Fla. 1st DCA 2002)

This is the first case interpreting the "competent substantial evidence" prong of §120.52(8), F.S., adopted in 1996. The court construed the prong as establishing a standard of review rather than a standard of proof and, in so doing, called into question the *de novo* nature of rule challenge hearings. Indeed, the court suggested that rule challenge hearings are "technically" *de novo,* but more akin to certiorari proceedings in circuit court. In 2003, in direct response to the decision, the "competent substantial evidence" prong was removed from §120.52(8), F.S., and amendments were adopted to clarify that rule challenge hearings are *de novo* proceedings and not just a review of the "record" developed by the agency during the rulemaking process. The court acknowledged in *Dept. of Health v. Merritt*, 919 So. 2d 561 (Fla. 1st DCA 2006), that its "holding in *Cosmetic Surgery* regarding the limited ability of an [Administrative Law Judge (ALJ)] to weigh the evidence presented in a rule challenge proceeding has been legislatively overruled."

6. *Cann v. DCF*, 813 So. 2d 237 (Fla. 2d DCA 2002)

This case was the first to construe the 1998 amendment to §120.569(2)(c), F.S., which requires agencies to dismiss untimely or otherwise deficient petitions. The court held that "excusable neglect" no longer saves an untimely petition for hearing, but that "equitable tolling" might. The availability of "equitable tolling" as a defense to an untimely petition was codified in §120.569(2)(c), F.S., in the 2006 APA amendments.

7. *Brookwood Extended Care Center v. AHCA*, 870 So. 2d 834 (Fla. 3d DCA 2003)

In this case, the court held that a petition for administrative hearing contesting an administrative complaint issued by the agency must include all of the information required by §120.54(5)(a)4., F.S., and the implementing Uniform Rule 28-106.201, F.A.C. The court recognized that after the 1998 APA amendments, agencies are no longer allowed to refer deficient petitions to the Division of Administrative Hearings, but rather are required by §120.569(2)(c), F.S., to dismiss deficient petitions. In his concurring opinion, Judge Cope suggested that the party contesting the administrative complaint should not be required to file an extensive petition but rather that he or she should be required only to identify the facts alleged by the agency that are in dispute. The 2006 APA amendments adopted Judge Cope's suggestion by authorizing specific Uniform Rules for disciplinary cases to allow for the use of an election of rights form in lieu of a petition that complies with Rule 28-106.201, F.A.C., and the Uniform Rules were amended accordingly. *See* Fla. Admin. Code R. 28-106.2015 (effective January 15, 2007).

8. *Crawford v. DCF*, 785 So. 2d 505 (Fla. 3d DCA 2000), and *DOC v. Saulter*, 742 So. 2d 368 (Fla. 1st DCA 1999)

These cases addressed the authority of agencies to adopt and enforce procedural rules after the adoption of the Uniform Rules mandated by §120.54(5), F.S. The Third DCA held in *Crawford* that an agency rule authorizing motions for reconsideration is not preempted because the Uniform Rules did not contain such a rule, whereas in Saulter, the court held that the absence of such a Uniform Rule precludes the agency from adopting a rule on the subject. DCF filed a petition for review with the Florida Supreme Court in *Crawford,* but the Supreme Court subsequently dismissed the petition so the conflict between *Crawford* and *Saulter* was not resolved. The 2007 amendments to the Uniform Rules seem to adopt the approach followed in *Crawford*. *See* Fla. Admin. Code R. 28-108.001 (requiring agency to petition for exception to the Uniform Rules "for procedural rules within the scope of any Uniform Rule of Procedure").

9. *G.E.L. Corp. v. DEP*, 875 So. 2d 1257 (Fla. 5th DCA 2004)

In this case, the court held that the ALJ retains jurisdiction to consider requests for attorney's fees under §120.595(1)(c), F.S., even if the petition for hearing is voluntarily dismissed. As support for its holding, the court referred to the 2003 amendment to §57.105(5), F.S., that authorized fee awards under that statute in administrative proceedings and expressly stated that a voluntary dismissal does not divest the ALJ of jurisdiction to make the award. The court also discussed the limited scope of the agency's authority to reject conclusions of law by virtue of §120.57(1)(l), F.S., as construed in *Barfield*.

10. *Life Care Centers of America, Inc. v. Sawgrass Care Center, Inc.*, 683 So. 2d 609 (Fla. 1st DCA 1996)

This is the first reported appellate decision discussing the 1996 APA amendments. It was decided on November 21, 2006, less than two months after the October 1, 2006, effective date of the 1996 APA amendments. The opinion was authored by Judge Benton and discusses the application of the 1996 APA amendments to pending cases. The specific amendment addressed in the opinion was the repeal of the requirement that the Recommended Order include a ruling on each proposed finding. The court held that the amendment applies to pending cases and, therefore, the hearing officer's failure to independently rule on each proposed finding was not a basis for reversal.

• Honorable Mentions (in chronological order)

Florida Power & Light Co. v. Siting Board, 693 So. 2d 1095 (Fla. 1st DCA 1997). This case, which involved FPL's controversial orimulsion project, is worth mention simply because of Judge Benton's parenthetical comment in his concurring opinion that the hearing officer in the case was "statutorily reincarnated as an administrative law judge" as a result of the 1996 APA amendments. The issue raised in Judge Benton's concurring opinion— whether the agency had the authority to reject the ALJ's evidentiary ruling — was not finally resolved until *Barfield* in 2001.

State Contracting and Engineering Corp. v. DOT, 709 So. 2d 607 (Fla. 1st DCA 1998). This was the first case applying the 1996 version of the bid protest statute, §120.57(3), F.S. The court did not undertake an extensive analysis of the new standards in the statute, but it did reaffirm the proposition that the ALJ may receive new evidence in the bid protest proceeding even though the object of the proceeding is to review the action taken by the agency and not to formulate recommended action.

DEP v. Environmental Trust, 714 So. 2d 493 (Fla. 1st DCA 1998). In this case, the court held that an agency statement explaining how a rule will be applied in a particular set of circumstances is not itself a rule. The court also held that, as a general rule, amendments to rules operate prospectively. In response to the decision in this case, the Legislature adopted §120.54(1)(f), F.S., which precludes the adoption of retroactive rules, including rules intended to clarify existing law, unless specifically authorized by statute.

DCF v. Moreman, 715 So. 2d 1076 (Fla. 1st DCA 1998). This case involves the agency's authority to reject conclusions of law over which it does not have substantive jurisdiction, which was severely restricted by the 1996 APA amendments to §120.57(1)(l), F.S. Judge Ervin's concurring opinion construed the statute to restrict the agency's rejection of the ALJ's

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conclusions of law, but not to restrict the agency's rejection of the ALJ's interpretation of rules. Judge Benton's dissenting opinion construed the statute to equally restrict the agency's rejection of the ALJ's conclusions of law and rule interpretations. Judge Benton's view ultimately was adopted by the court in *Barfield* after the Legislature adopted clarifying amendments to §120.57(1)(l), F.S., in 1999.

Mariner Properties Development, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 743 So. 2d 1121 (Fla. 1st DCA 1999). In this case, the court held that the variance and waiver provisions adopted in 1996 and codified in §120.542, F.S., only apply to regulatory authority and not to the proprietary authority of the Board of Trustees over sovereign submerged lands.

Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Ass'n, Inc., 794 So. 2d 696 (Fla. 1st DCA 2001). In this case, Judge Benton offered his analysis of the more restrictive rulemaking standard, as amended after *Consolidated-Tomoka.* The court clarified in a later opinion in the case, 798 So. 2d 847, that its decision is "fully consonant with the decision in *Save the Manatee Club.*" The opinion is also notable because it includes extensive citations to law review articles and legislative history material relating to the 1996 amendments.

Novick v. Board of Medicine, 816 So. 2d 1237 (Fla. 5th DCA 2002). In this case, the court held that it is not appropriate to issue a declaratory statement when the petitioner is seeking approval or disapproval of conduct that has already occurred. In support of its holding, the court cited the First DCA's *Chiles* decision (which was approved by the Supreme Court in *Investment Corp. of Palm Beach*) for the proposition that the purpose of a declaratory statement is to allow a party to select the proper course of action in advance.

Osceola Fish Farmers Ass'n, Inc. v. DOAH, 830 So. 2d 932 (Fla. 4th DCA 2002). In this case, the court held that an administrative challenge to an unadopted rule pursuant to §120.56(4), F.S., becomes moot when the agency publishes a proposed rule because, according to the court, "the purpose of a section 120.56(4) proceeding is to force or require agencies into the rulemaking process." In response to the decision, the 2003 APA amendments codified a detailed procedure to be followed when the agency initiates rulemaking while a challenge is pending under §120.56(4), F.S. *See* §120.56(4)(e)2.-5., F.S.

Verleni v. Dept. of Health, 853 So. 2d 481 (Fla. 1st DCA 2003). In this case, the court reaffirmed that an agency may not recast the ALJ's findings of fact as conclusions of law and then reject those conclusions under §120.57(1)(l), F.S. The court also held that a professional board's oral rulings on exceptions to the Recommended Order control over its later written order. The decision is also noteworthy because the court awarded appellate fees against the agency under §120.595(5), F.S., for improperly rejecting or modifying the Recommended Order.

NAACP, Inc. v. Board of Regents, 863 So. 2d 294 (Fla. 2003). In this case, the court reaffirmed the test for associational standing in rule challenge proceedings that was first adopted in *Florida Homebuilders Association v. Department of Labor and Employment Security*, 412 So. 2d 351 (Fla. 1982). The court also expressly rejected a requirement that the challenger demonstrate "immediate and actual harm" caused by the rule.

Campbell v. DBPR, 868 So. 2d 1264 (Fla. 4th DCA 2004). In this case, the court held that the agency is required to afford a licensee a formal hearing pursuant to §120.57(1), F.S., when disputed issues of fact arise during an informal hearing under §120.57(2), F.S. The court rejected the agency's argument that a request for an informal hearing is tantamount to a waiver of the right to a formal hearing. It is debatable whether the case is still good law because the Uniform Rule relied upon by the court to support its decision was recently amended to delete the requirement that an informal hearing be terminated when a disputed issue of fact arises during the hearing. *Compare* Fla. Admin. Code R. 28-106.305 (as amended January 15, 2007) *with* Fla. Admin. Code R. 28-106.305(2) (as adopted April 1, 1997). It remains to be seen whether, as a matter of due process, courts will continue to follow the holding in *Campbell* notwithstanding the amendment to Rule 28-106.305, F.A.C.

Daniels v. Dept. of Health, 898 So.2d 61 (Fla. 2005). In this case, the court held that attorney's fees are not available under §57.111, F.S., where the administrative complaint is brought against the individual licensee even if the licensee operates through a corporation that is a "small business party"

under the statute. The 2006 APA amendments modified the definition of "small business party" to effectively allow attorney's fees awards in these circumstances.

G*opman v. Department of Education*, 908 So. 2d 1118 (Fla. 1st DCA 2005). This case, authored by Judge Benton, offers a good refresher course on the distinction between "free form" agency action and final agency action taken after a hearing under §120.57(1), F.S.

Dept. of Health v. Merritt, 919 So. 2d 561 (Fla. 1st DCA 2006). This case is the first to construe the 2003 APA amendments adopted in response to *Cosmetic Surgery*. The court held that *Cosmetic Surgery* was "legislatively overruled" and that ALJs may independently weigh the evidence presented at the rule challenge hearing.

French v. DCF, 920 So. 2d 671 (Fla. 5th DCA 2006). In this case, the court held that after the 1996 APA amendments, agency hearing officers do not have the authority to award attorney's fees under §120.595, F.S. As a result, attorney's fees motions must be considered by ALJs even if the agency is authorized by the APA to utilize hearing officers rather than ALJs in its formal hearings.

CONCLUSION

Only time will tell whether any of the cases discussed in this article will go down in the annuls of administrative law as "seminal" APA decisions alongside cases such as *McDonald*[6] and *J.W.C.*[7] Suffice it to say, however, the 10 years since the 1996 APA amendments were an eventful and exciting time to practice administrative law in Florida. Here's hoping the next 10 years brings more of the same!

Endnotes:

[1] Administrative Law Judge, Division of Administrative Hearings.
[2] Governor Lawton Chiles, *On Rules Reduction and Rational Executive Branch Reform,* Fla. Bar. J., Mar. 1997, at 17.
[3] Ch. 96-159, Laws of Fla.
[4] Vol. 48, No. 1 (1996).
[5] Vol. LXXI, No. 3 (Mar. 1997).
[6] *McDonald v. Dept. of Banking & Finance*, 346 So. 2d 569 (Fla. 1st DCA 1977).
[7] *Dept. of Transportation v. J.W.C. Co., Inc.*, 396 So. 2d 778 (Fla. 1st DCA 1981).

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