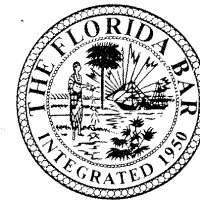


ADMINISTRATIVE LAW SECTION NEWSLETTER



Vol. IX, No. 2

THE FLORIDA BAR

MAY 1988

Chairman's Message

You may have noticed that thus far this year there has been no Administrative Law Conference. Historically, the Conference has been in the late winter/early spring of the year. Last fall, when Steve Pfeiffer, current Chairman of the Conference, and his committee began planning for this year's gathering, they discovered that the only adequate facilities in the Tallahassee area were not available during the traditional timeframe for the Conference. There ensued renewed consideration of the ideal time of the year to stage the Administrative Law Conference. The conclusion reached from that consideration was the late winter and early spring are not the best seasons for the Conference. Indeed, it was concluded that neither summer nor fall are the best seasons for the Conference. Rather, after careful and scholarly consideration it became clear that the best season for the conference is football season. Therefore, you will find that the next Administrative Law Conference is scheduled for Friday, September 9, 1988, and Saturday, September 10, 1988. Coincidentally, you will note that the Florida State University Seminoles are playing football in Tallahassee on Saturday, September 10, 1988. The Conference will conclude on Saturday in time for the participants to attend the FSU game. Hopefully, the addition of this festive, social occasion will enhance the overall atmosphere of the Conference.

Please begin making plans now to attend the Conference. There will be an outstanding list of guest participants whose thought and contribution should be provocative. For example, Professor Arthur E. Bonfield, has agreed to participate. Professor Bonfield, from the University of Iowa, is presently the Chairman of the Section of Administrative Law, American Bar Association. Further, he is considered perhaps the leading contemporary scholar of today on Administrative Law at the state level. Arrange your schedule now so that you can attend.

Don't forget about the Florida Bar Convention in June. Plan to attend the Administrative Law Section luncheon which will be held jointly with the Environmental and Land Use Law Section and the Local Government Law Section on Friday, June 17, from 12:30 p.m. to 2:00 p.m. Also don't forget to attend the end of the year section meeting at the convention on Friday, June 17, from 2:00 p.m. to 5:00 p.m.

Chris Bentley, Chairman

Nancy Roen to Address Joint Luncheon at Annual Bar Meeting

A joint luncheon has once again been scheduled by the Administrative Law, Local Government Law and Environmental Law Sections at The Florida Bar's Annual Meeting in Orlando. The luncheon will take place on Friday, June 17th. The featured speaker will be Nancy Roen, General Counsel to the General Development Corporation and Chairman of the South Florida Water Management District. Nancy was asked to identify some timely topic of common interest to all three sections but indicated that she would rather show slides of her trip last year to Vail, Colorado. So, sideshow or slide show, we won't really know until Nancy takes the podium on June 17 in Orlando. Be there or be square.

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From the Editor



I would like to give special thanks to Steve Pfeiffer, Jim Konish and Tom Ervin for their timely and good-natured contribution to this newsletter. I am disappointed that Steve did not include a photograph to accompany his pitch for the administrative law conference.

Not that a photograph of Pfeiffer himself was necessary, just a photograph of *anything* to stretch the graphic capabilities of our print shop and to make the newsletter visually engaging. Maybe the side of a tobacco barn somewhere near Quincy or a picture of several people talking about important issues in administrative law. But, no!

I also appreciate all the cards and letters we have received here at the newsletter headquarters

from those of you out there who are supporting our program. It is heartwarming to greet the mailman each day knowing that there are letters, postcards, words of encouragement, and, yes, even contributions to carry on our work. Because, without this kind of support, I can assure you, there would be no Administrative Law Newsletter. So, friends, keep up the good work and keep those cards and letters coming. *cgs*

Gary Stephens, a graduate of Duke University and the FSU College of Law, maintains a private practice in Tampa in the fields of Environmental, Land Use, and Administrative Law. A former DER attorney, Stephens also serves on the executive council of the Florida Bar Administrative Law section and frequently lectures or writes in the area of environmental dispute resolution.

Is the Federal Government Still Out There?

One of the aspects of Administrative Law Section activities that has struck me as curious over the years is the absence of a federal component. By this I mean the absence of any ongoing consideration of federal administrative issues as they affect the practice of law in Florida. Initially, I suspect, the exclusive orientation toward Florida law reflected a preoccupation with Florida's fledgling Administrative Procedure Act, Chapter 120, Florida Statutes.

The fact that federal law still affects Florida citizens and that federal agencies implement and interpret federal law and adopt federal regulations, however, is a truism. Moreover, there are numerous legal relationships in which state and federal law duplicate, extend, contradict, or overlap one another, both in substance and in process. It has been suggested by several members of the Administrative Law Section that these areas have gone too long unattended.

Your comments and suggestions in this area would be very helpful not only to the leadership of the Administrative Law Section but to the CLE program and active members of related substantive law and sections as well. In particular, do you feel that federal administrative law issues should receive greater attention by our section? Which areas of substantive law do you feel are most amenable to such examination? Should Florida Bar CLE programs attempt to include segments dealing with federal administrative law issues? Should this newsletter and others brief relevant federal court decisions in the administrative law field?

Please address your comments to the Editor. Whatever the results are, they will be tabulated in vertical columns and presented as a scientific poll with a margin of error of plus or minus two per cent.

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

Chris H. Bentley Chairman
Tallahassee

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Board of Governors Liaison Report

by Thomas M. Ervin, Jr.



It is a pleasure to report to the Administrative Law Section again regarding Board of Governors issues and activities.

In my last report I described the rather dismal Bar budget picture, and steps being taken to avert a projected deficit in the \$600,000-\$700,000 range this year. As current Budget Committee Chair, I am pleased to advise that this bullet has been dodged. As things now stand, the Bar should have, at worst, a very modest deficit and could well end up the year on a break-even basis.

While the Budget Committee, Board and Bar staff all worked toward this budget turnaround, much of the credit must also go to sections and their members. The Bar has had the active assistance of sections in areas ranging from dues structure and expanded CLE, to terrific participation in the Midyear Meeting and upcoming Annual Convention. All of these section efforts have served to dramatically improve the Bar budget situation, and have earned sections the gratitude of the Board. You have my thanks, as well as those of the current (formerly beleaguered) Budget Committee.

As of this writing we are again entering the legislative season. It is uncertain what all will arise this session, but we are certain to once again have to expend substantial effort defending the right of the public's access to courts and entitlement to redress for injury. We do know that all of the various legislative budget proposals for the judi-

cial system at this time amount to less than 2% of the entire state budget, and can best be described as a starvation regimen. As usual, virtually no state funds are intended for civil legal needs of the poor, though federal funding diminishes annually.

Under these circumstances, the absolute necessity of a strong Bar legislative program is clearer than ever before. We simply have to carry on and, in addition to our work on "access to courts" and Bar regulation issues, we must convince the legislature that the state's adjudicative systems, including administrative and workers' compensation systems, are also a part of the state's infrastructure which must be adequately funded. While the sections have responsibly adopted and expanded their separate legislative programs, the continued, vigorous overall Bar program is also essential. I urge you to support it, and to personally respond if called upon for assistance.

Finally, my thanks for the opportunity to provide these brief remarks. As I noted in my prior column, I am available at any time to discuss section concerns. I welcome your comments and suggestions on any Bar issues.

Thomas M. Ervin, Jr., has served on the Board of Governors since 1983, and as Board liaison to the Administrative Law Section since 1985. He received his B.S. in 1963 from Florida State University and his J.D. from the University of Florida in 1967. He is a partner in the Tallahassee law firm of Ervin, Varn, Jacobs, Odom & Kitchen.

September Administrative Law Conference Scheduled in Tallahassee

The 1988 Administrative Law Conference has been scheduled for September 9 and 10 in Tallahassee. The conference will be held at the Florida State Conference Center. It has been scheduled to coincide with a home football game at Florida State University. There is a good prospect that FSU will be the number one ranked college football team in the nation when the conference is held.

The primary focus of the Administrative Law Conference is to provide a forum for discussion of important policy issues and trends in Florida Administrative Law. Topics will include current issues of practical importance to attorneys who

practice in the area, but the emphasis will be on broader policy issues. Important speakers who can relate Florida's experiences and practices to trends in other states and the Federal Government will be presented.

A Steering Committee has been created, and topics, written materials, and speakers are being solicited. If you have any ideas regarding topics and speakers, or would like to have a role in organizing the conference, please contact Steve Pfeiffer, or his secretary Teresa, 101 North Monroe Street, Suite 910, Tallahassee, Florida 32301, (904) 681-0411.

—Steve Pfeiffer

Nonrule Policy and the FALR

Agencies often formulate policy on a case by case basis. While rulemaking is the preferred vehicle for agency policymaking, it never has and probably never will be the exclusive vehicle.

As publishers of the FLORIDA ADMINISTRATION LAW REPORTS (FALR), we carefully edit the Orders of nearly all Florida agencies and publish and index those Orders which contain nonrule policy, i.e., those which amplify and explain the pertinent statutes, rules and judicial decisions.

The FALR is published biweekly and has been published continuously since January, 1979. A current listing of agencies published and indexed in the FALR is available by writing the publishers at:

FALR
P.O. Box 385
Gainesville, Florida 32602

Companion publications include:

(I) FLORIDA PUBLIC SERVICE COMMISSION REPORTER (FPSC). The FPSC is published monthly and contains all Orders pertaining to public utility regulation by the Florida Public Service Commission, with indexing. The FPSC is fully on-line with Lexis.

(II) EDUCATION PRACTICES COMMISSION (EPC) REPORTER (ED FALR). The ED FALR is published in three (3) year intervals and now includes Final Orders of the EPC from Jan. 1980-Dec. 1987, with indexing.

The FALR library contains numerous materials not yet published. Research requests are welcome. Computer-assisted key-word searches are available.

These resources include:

- I. All Binding Letters of the Dept. of Community Affairs from 1974 to date.
- II. All Orders of the Florida Public Service Commission from Jan. 1970 to date.
- III. All Technical Assistance Advisements (TAA) of the Department of Revenue.
- IV. Electronic database of unpublished state disciplinary actions settled informally since January, 1979.
- V. Subject matter indexes for agencies not published in the FALR or companion publications:
 - a) Dept. of Transportation (DOT)
 - b) Public Employees Relations Commission (PERC)

—Jim Konish

Agencies Currently Published in the FALR

- | | |
|---|--|
| 1. ACCOUNTANCY, Bd. of | 25. LAND SURVEYORS, Bd. of |
| 2. ACUPUNCTURE, Bd. of | 26. LANDSCAPE ARCHITECTS, Bd. of |
| 3. ADMINISTRATIVE HEARINGS, Div. of | 27. LEGAL AFFAIRS, Dept. of |
| 4. AGRICULTURE & CONSUMER SERVICES, Dept. of | 28. MASSAGE, Bd. of |
| 5. ARCHITECTURE, Bd. of | 29. MEDICAL EXAMINERS, Bd. of |
| 6. BARBER'S Bd. | 30. NATURAL RESOURCES, Dept. of |
| 7. BUSINESS REGULATION, Dept. of | 31. NATUROPATHIC EXAMINERS, Bd. of |
| 8. CHIROPRACTIC, Bd. of | 32. NURSING, Bd. of |
| 9. COMMUNITY AFFAIRS, Dept. of | 33. NURSING HOME ADMINISTRATORS, Bd. of |
| 10. DENTISTRY, Bd. of | 34. OPTICIANRY, Bd. of |
| 11. EDUCATION PRACTICES Comm. | 35. OPTOMETRY, Bd. of |
| 12. ELECTRICAL CONTRACTORS' Lic. Bd. | 36. OSTEOPATHIC MEDICAL EXAMINERS, Bd. of |
| 13. ENGINEERS, Bd. of Professional | 37. PHARMACY, Bd. of |
| 14. ENVIRONMENTAL REGULATION, Dept. of | 38. PILOT COMMISSIONERS, Bd. of |
| 15. ETHICS, Commission on | 39. PODIATRY, Bd. of |
| 16. FUNERAL DIRECTORS, Bd. of | 40. PROFESSIONAL REGULATION, Dept. of |
| 17. GAME & FRESH WATER FISH Comm. | 41. PSYCHOLOGICAL EXAMINERS, Bd. of |
| 18. HRS, Dept. of | 42. REVENUE, Dept. of |
| 19. HEARING AID SPECIALISTS, Bd. of | 43. SOUTH FLORIDA WATER MANAGEMENT Distr. |
| 20. HIGHWAY SAFETY & MOTOR VEHICLES, Dept. of | 44. STATE, Dept. of |
| 21. HOSPITAL COST CONTAINMENT Bd. | 45. UNEMPLOYMENT COMPENSATION APPEALS, Bureau of |
| 22. HUMAN RELATIONS, Fla. Comm. On | 46. VETERINARY MEDICINE, Bd. of |
| 23. INSURANCE & TREASURER, Dept. of | |
| 24. LABOR & EMPLOYMENT SECURITY, Dept. of | |

Administrative Law Recent Developments

Recent cases of interest interpreting various provisions of the Administrative Procedure Act or other aspects of governmental practice include:

Santa Fe Pass, Inc. v. DER and Santa Fe Lake Dwellers Association, Inc., 13 FLW 209 (Fla 1st DCA Jan 15, 1988), 10 FALR 908. Developer filed a petition for a hearing on DER's refusal to issue a permit for a storm water retention facility. The hearing officer recommended issuance of the permit. DER, however, denied the permit on the grounds that the articles of incorporation for the homeowners association, the successor entity to the developer, were not prepared in accordance with Florida Administrative Code Rule 17-25.027. The court, disappointed that common sense had not prevailed, remanded this cause to DER, and to the hearing officer, to allow the homeowners association time to amend.

Rudloe and Gulf Specimen Company, Inc. v. DER and Taylor County Board of County Commissioners, 12 FLW (Fla 1st DCA Dec. 17, 1987). 10 FALR 308. Appellants sought review of two DER final orders denying their petitions to intervene in and to initiate formal administrative proceedings concerning DER's decision to issue a dredge permit. The court, in affirming the orders reached three conclusions: that intervention is not permitted in an administrative hearing when the original petition is voluntarily dismissed; that circumstances could arise where the agency's action is so different from the proposed action that a third party could not know from a review of the file that the agency would rule as it did, thus creating a new point of entry; that a rule challenge which implicates the agency's expertise, as in the present case, must first be raised in an administrative proceeding.

Humbosco, Inc. d/b/a Humana Hospital South Broward et al. v. Department of Health and Rehabilitative Services, Case No. 83-3944, 84-0265, 83-0266, Jan 20, 1988, 10 FALR 706. The Department of Health and Rehabilitative Services denied a certificate of need application seeking authorization to transfer beds. The application did not meet HRS' bed transfer policy and statutory criteria. The case contains a discussion of the acute care bed need rule, 10-5.011(1)(m).

Diaz v. Florida Department of Corrections, 13 FLW 154 (Fla 1st DCA Jan 5, 1988), 10 FALR 601. The court found there was no rational basis

for The Department of Corrections' denial of an inmate's access to information in the Department's files pursuant to Rule 33-6.006(1), Florida Administrative Code and Section 945.10(2), Florida Statutes (1985) which was the statutory authority for the rule, especially in light of the fact that such information was available to the press and thus the public. The courts reasoning was based on *Turner v. Safley*, 482 U.S. —, 96 L.Ed. 64, 107 S.Ct. 2254 (1987).

Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, and Office of the Comptroller, State of Florida, et al. v. McKesson Corporation, et al., 13 FLW 120 (Supreme Court of Florida Feb 18, 1988), 10 FALR 1201. The Florida Supreme Court found that the preference scheme, contained in Sections 564.06 and 565.12, Florida Statutes (1985), granting exemptions or tax preferences to wines and distilled spirits manufactured from citrus, sugar cane and certain grape species, all of which grow in Florida, was at odds with the Commerce Clause which prohibits a state from using its regulatory power to protect its own citizens from outside competition. The court held that the statute placed an excessive burden on interstate commerce by imposing discriminatory taxes or requirements that were designed to coerce another state into desisting from an alleged Commerce Clause violation.

American Insurance Association, et al. v. Department of Insurance, 13 FLW 21 (Fla 1st DCA Dec 29, 1987). 10 FALR 332. The Department of Insurance, pursuant to 627.351(5), Fla. Stat. (Supp. 1986), issued an order treating the Florida Property and Casualty Joint Underwriting Association (FPCJUA). The first DCA reversed the action of the Department in creating the FPCJUA and noted several errors in the Department's handling of the administrative hearing requested by several associations and affected companies.

A Professional Nurse, Inc. v. State of Florida, Department of Health and Rehabilitative Services, and St. Mary's Hospital of Bethesda Memorial Hospital, 13 FLW 284 (Fla 1st DCA Jan 27, 1988). 10 FALR 910. The court, in reviewing a final order issued by the Department of Health and Rehabilitative Services, concluded that a hearing officer has authority to impose sanctions for failure to comply with discovery orders, pursu-

continued...

RECENT DEVELOPMENTS

from preceding page

ant to Section 120.58(3), Florida Statutes. However, the combined effects of various prohibitions and sanctions can be tantamount to dismissing the case. The hearing officer does not have the authority to formulate a need methodology. This must be done by the Department consistent with the requirements of Section 381.494, Florida Statutes.

Fairfield Communities v. Florida Land and Water Adjudicatory Commission, Friends of Fort George, Inc. Florida Audubon Society and Florida Wildlife Federation, 13 FLW 813 (Fla 1st DCA, March 30, 1988). The First District upheld the hearing officer's rejection of Fairfield's Chal-

lenge to Rules 27G-1.06(2) and 27G-1.08(4), Florida Administrative Code, which spell out the Florida Land and Water Adjudicatory Commission's (FLWAC) duty to attach conditions and restrictions to its decisions to grant or deny permission to develop.

Department of Transportation v. Dr. & Mrs. Lopez-Torres, Town of Ocean Ridge and Audubon Society of the Everglades, 13 FLW 263 (Supreme Court of Florida April 14, 1988). By virtue of its preemptive authority, the Department of Transportation may route a state road or bridge through or into a municipality by way of a corridor that conflicts with the municipality's comprehensive growth plan. Nevertheless, DOT's power, while plenary, is not absolute, and is limited to the lawful exercise of its discretion.

**1987-1988
Administrative Law
Section Budget**

| Line Item | Budget | Expenses | |
|-----------------------|----------------|---------------------------------|--------------|
| Revenues | 1988-89 | Postage | 500 |
| | | Printing | 150 |
| DUES | 10,080 | Officer/Council Office Expenses | 100 |
| Less 1/2 Dues | [5,040] | Newsletter | 700 |
| Net Dues | 5,040 | Membership Drive | 50 |
| | | Supplies | 50 |
| CLE SEMINARS | | Photocopying | 150 |
| Practice DOAH | 1,000 | Officer Travel Expenses | 100 |
| Admin. Law | 660 | Meeting Travel Expenses | 100 |
| Admin. Practice | 600 | CLE Speaker Expense | 100 |
| | | Committee Expense | 200 |
| Total Seminar Revenue | 2,260 | Board or Council Meetings | 150 |
| | | Bar Annual Convention | 3,000 |
| OTHER REVENUE | | Midyear Meeting | 200 |
| Interest | 700 | Awards | 200 |
| Miscellaneous | 200 | Admin. Conference | 3,800 |
| | | Other | 100 |
| Total Other Revenue | 900 | TOTAL EXPENSES | 9,650 |
| TOTAL REVENUE | 8,200 | Operating Reserve | 1,000 |
| | | Net Operations | [2,450] |
| | | Beginning Fund Balance | 11,704 |
| | | Ending Fund Balance | 9,254 |

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