Administrative Law Section Newsletter

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From the Chair

by Dan R. Stengle

An active and eventful year for the Administrative Law Section comes to a close with this edition of the Newsletter. I turn the reins of the Section over to Mary Smallwood at the Annual Meeting of The Florida Bar with my congratulations and best wishes. This year presented the Administrative Law Section with new challenges and with many opportunities to engage in activities important to the theory and practice of administrative law.

Last summer, at the request of First District Court of Appeal Judge Bob Benton, the Section gave its formal input on a draft of an administrative appellate rule relating to stays, an issue that has vexed all three branches of government in recent years.

In the publications arena, the Section concentrated on reinvigorating this newsletter, and garnering submissions to The Florida Bar *Journal*. We continue to solicit your articles both for the newsletter and *Journal*. The executive council is developing a standing list of topics for future articles from which interested authors may be inspired. I am especially grateful to Elizabeth McArthur for her enduring efforts on behalf of this newsletter, and to Robert Downie for editing the Section's portion of the *Journal*.

The Administrative Law Section this year launched its law student writing contest, the Pat Dore Administrative Law Essay Competition. The Section solicited law student submissions on administrative law topics, including constitutional issues in administrative law or processes, from among the law schools in the state. The Section hopes that this effort will not only foster interest in administrative law among Florida's law student population, but will strengthen the relationships between the Section and Florida law schools. The competition carries with it cash prizes, and the Section will submit the winning entry to The Florida Bar *Journal* to consider for publication. Special thanks to Debby Kearney for getting this undertaking launched, and for working so closely with the law schools in the state.

Several years ago, concerns about the availability and long-term reten-

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1000 Friends of Florida, Inc. et al. v. State of Florida, Department of Community Affairs — Another Bite at the Apple for Interested Third Parties?

by Bucky Mitchell

Most administrative law practitioners, government or private, are aware of the recent developments in the Administrative Procedure Act[1] with regard to rulemaking. Agencies are now faced with the more restrictive rulemaking requirements of section 120.536, Florida Statutes, whereby "an agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute." What appears to be drawing less attention is the growing trend toward the creation of new points of entry into state agency proceedings. One example is the waiver and variance provision[2] en-

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tion of administrative orders led to a legislative interim project which set a uniform standard for indexing, retaining, and making available agency administrative orders. That effort has been largely successful, from all appearances. The Section is examining whether orders are indeed universally available as intended, however, and whether there may still be gaps in indexing and researching administrative orders.

In the CLE category, the Administrative Law Section presented its most important conference, the 2000 Pat Dore Administrative Law Conference, in Tallahassee on April 13 and 14. As always, the Pat Dore Conference engaged discussions at a sophisticated level of topical and cutting-edge administrative law issues. The success of the Conference was a tribute to the hard work both of its organizers and speakers. I particularly want to thank Conference Chair Bill Williams for his leadership. As well, the Section is deeply indebted to the Conference speakers, who brought a depth of knowledge and a wealth of experience to their interesting and informative presentations at the Conference. As part of the Pat Dore Conference, the Section honored the Justices of the Florida Supreme Court, the Judges of the First District Court of Appeal, and the Administrative Law Judges of the Division of Administrative Hearings.

Finally, the Administrative Law Section is preparing for the sixth edition of its practice manual, *Florida Administrative Practice*, a joint project of CLE Publications of The Florida Bar and the Administrative Law Section. This excellent publication is a comprehensive, one-volume desk reference for administrative law practitioners.

I wish to thank our Section Administrator, Jackie Werndli, for her tireless assistance and patience. The Section is fortunate to have an active and able executive council, which has been primarily responsible for the work of the Section this year. Thanks to you all. My enduring thanks to Linda Rigot, Bill Williams, and Mary Smallwood for their advice, counsel, and friendship. Of course, the efforts of the executive council were aided immeasurably by the Section's membership of administrative law practitioners — both public and private sector — who have a keen interest in the field of administrative law. I plan to stay involved in the work of the Section, and I hope that you will, too. I am privileged to be associated with the Administrative Law Section of The Florida Bar, and it has been a true honor for me to serve as its chair.

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acted in 1996. Another is a more expansive interpretation by the courts of the use of declaratory statements under section 120.565, Florida Statutes. A recent decision of the First District Court of Appeal, *1000 Friends of Florida, Inc. et al. v. State of Florida, Department of Community Affairs*,[3] may cause a follower of declaratory statement jurisprudence to scratch his or her proverbial head.

1000 Friends resulted from the appeal of a final order dismissing a petition for declaratory statement. Several parties, including 1000 Friends of Florida, Inc. ("1000 Friends" or petitioners), sought a declaration from the Department of Community Affairs (Community Affairs) that the installation of public facilities must be included in a county's comprehensive plan.[4]

The petitioners received a notice on January 26, 1998, that the Department of Transportation (DOT) had been granted a permit from the Department of Environmental Protection (DEP) to install sewer and water lines in St. Johns County. The lines would run along U.S. Highway 1 and Interstate 95 to two rest stops that would be maintained by DOT. The petitioners alleged that the water and sewer lines would be capable of providing water/sewer services to thousands of people in the future, thereby encouraging development in the affected parts of St. Johns County.[5]

The St. Johns County comprehensive plan was silent on these improvements and no public hearings were ever held to discuss the proposed water/sewer system. According to the petitioners, St. Johns County agreed to reimburse DOT for the costs of constructing the system without processing a comp plan amendment.[6] In fact, St. Johns County proposed no plan amendment and never issued a development order for the project.

The petitioners thus requested a declaratory statement from Community Affairs on April 10, 1998, asking if the project should have been included in the St. Johns County comp plan. On July 9, 1998, Community Affairs referred the petition to the Division of Administrative Hearings (DOAH) because it was unable to determine whether it could issue a declaratory statement in light of the recent decision in *Chiles v. Department of State, Division of Elections*.[7] In its referral to DOAH, Community Affairs stated:

> In light of the recent *Chiles* decision, the Department is unable to determine whether the Petition, which seeks the determination of laws and rules as they apply primarily to the Florida Department of Transportation and St. Johns County, is a proper request upon which the Department may issue a declaratory statement. *In the matter currently before the Department, Petitioners seek relief that appears to directly affect the rights of another party, or parties, not named in this action.*

(Emphasis supplied).

This is the crux of the *1000 Friends* case. The Administrative Law Judge (ALJ) recommended a dismissal of the petition on jurisdictional grounds, but he also determined that "1000 Friends" was seeking a declaratory statement concerning the conduct of St. Johns County and DOT, rather than its own particular circumstances.[8] Consistent with the ALJ's finding and recommendation, Community Affairs dismissed the "1000 Friends" petition on September 17, 1998, asserting

that the issue did not apply to the petitioner's particular set of circumstances.[9]

On appeal, Community Affairs asserted that the 1996 amendments to the Administrative Procedure Act "left intact the requirement that the statutory provision, rule or order of the agency apply to the petitioner's particular set of circumstances."[10] According to Community Affairs, the statutory basis for issuing a declaratory statement simply did not exist. On the other hand, "1000 Friends" asserted that it was entitled to a point of entry to challenge the approval and construction of the water/sewer lines, and that Community Affairs should require such projects to be included in the county's comp plan.

The conclusions of the ALJ and Community Affairs were well reasoned — "1000 Friends" had methods available to them for challenging the construction of the water/sewer system other than a declaratory statement. By remanding this cause to Community Affairs for reconsideration, the First District Court of Appeal may have overextended the reach of its holdings in *Chiles* and the recent Florida Supreme Court decision of *Florida Department of Business & Professional Regulation, Division of Pari-Mutuel Wagering v. Investment Corp. of Palm Beach*, 747 So.2d 374 (Fla. 1999).

In *Investment Corp.*, several parimutuel facilities petitioned the Department of Business and Professional Regulation's Division of Pari-Mutuel Wagering (DPMW) for a declaratory statement that would determine the proper distribution of uncashed tickets and breaks generated from wagering on out-of-state thoroughbred races. DPMW ultimately determined that the funds escheated to the state and noted within its declaratory statement that "the Division is cognizant that a similar fact pattern may exist between other tracks in Florida and that the same dispute may reoccur between one of these petitioners and a non-petitioner. Therefore, the Division will initiate rulemaking to establish an agency statement of general applicability." Curiously, instead of simply dismissing the petition, the DPMW issued a declaratory statement saying that *it would not make a determination*, but instead would proceed with rulemaking under section 120.54, Florida Statutes.

On appeal from the Third District, the Florida Supreme Court held that an agency may issue a declaratory statement *even if the decision has a potential impact on other parties*, expressly adopting the holding of the First District in *Chiles*.[11] In *Chiles*, then Commissioner of Education Frank Brogan filed a petition for declaratory statement with the Department of State, Division of Elections, asking if he, as a statewide candidate, was eligible for public campaign financing following a termination of the Election Campaign Financing Trust Fund.[12] Following the initial hearing, the Division of Elections wrestled with the question of whether it had the authority to issue a declaratory statement under the circumstances. The petition was properly noticed in the *Florida Administrative Weekly*, yielding two intervenors, the State Comptroller and the Executive Office of the Governor. The intervenors presented two earlier First District decisions,[13] asserting that because an answer to Mr. Brogan's question conceivably applied to other candidates, the Division should proceed to rulemaking (and therefore, decline to issue a declaratory statement). The Division, however, concluded that it was proper to issue the statement on the merits — Judge Padovano and the First District agreed. In his opinion, Judge Padovano wrote:

> While the issue must apply in the petitioner's particular set of circumstances, there is no longer a requirement that the issue apply only to the petitioner.
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> . . .
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> Section 120.565(2), Florida Statutes (Supp.1996) requires the agency to give notice of the filing of each petition for declaratory statement in the Florida Administrative Law Weekly. This provision accounts for the possibility that a declaratory statement may, in a practical sense, affect the rights of other parties.
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> . . .
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> The Division was authorized to reach the merits of the issue raised by the petition even though other statewide candidates might have also raised the same issue.

Chiles, 711 So.2d at 154, 155.

In *Investment Corp.* and *Chiles*, there existed a petitioner whose *particular set of circumstances* would be directly affected by the agency's pronouncement in a declaratory statement.[14] The petitioners in *1000 Friends*, however, sought a declaratory statement as to how the Growth Management Act should apply to St. Johns County and other state agencies. They alleged that they were "substantially affected" parties because, among other things, "1000 Friends" has "members who reside in, own property or operate businesses within St. Johns County, Florida."[15] Allowing a party such as 1000 Friends to obtain a declaratory statement incorrectly expands the scope of section 120.565, Florida Statutes. Does this decision mean that anyone who owns property in St. Johns County may petition Community Affairs for a declaratory statement on the issuance of a water/sewer permit and its relation to the Growth Management Act? The applicable uniform rule on declaratory statements is instructive on this point. Uniform Rule of Procedure 28-105.101 reads, in part:

> A petition for declaratory statement may be used only to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. *A declaratory statement is not the appropriate means for determining the conduct of another person or for obtaining a policy statement of general applicability from an agency.* A petition for declaratory statement must describe the potential impact of statutes, rules, or orders upon the petitioner's interests.

(Emphasis supplied).

In essence, the requirement that a statute, rule, or agency order apply to a petitioner's *particular set of circumstances* establishes a minimum standing requirement that was not met by the petitioners in *1000 Friends*. The petitioners clearly opposed the construction of the water/

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sewer system, but it is impossible to see how their particular set of circumstances or interests would be affected by a pronouncement in a declaratory statement. One of the petitioners in this case, Friends of Matanzas, Inc., originally sought to challenge issuance of the construction permits for the water/sewer system in St. Johns County, but was denied a formal administrative hearing because it was unable to properly allege standing. The standing issue was upheld by the Fifth District Court of Appeal in *Friends of Matanzas, Inc. v. Department of Environmental Protection*, 729 So.2d 437 (Fla. 5th DCA 1999).[16] Nevertheless, the petitioners were able to take advantage of the section 120.565 process after they had unsuccessfully challenged DEP's issuance of the permit to DOT.

Another alternative for "1000 Friends" would have been to petition Community Affairs to initiate rulemaking under section 120.54(7), Florida Statutes. When presented with a petition for a declaratory statement requiring a response that amounts to a rule, an agency should decline to issue the statement and initiate rulemaking.[16] *Investment Corp.*, 24 Fla. L. Weekly at S523; *citing Florida Optometric Association v. Department of Professional Regulation, Board of Opticianry*, 567 So.2d 928 (Fla. 1st DCA 1990) and *Agency for Health Care Administration v. Wingo*, 697 So.2d 1231 (Fla. 1st DCA 1997). This would have been the more appropriate outcome in *1000 Friends* and exactly what Community Affairs originally attempted to do.

Endnotes:

[1] ch. 120, Fla. Stat. (1999).
[2] §120.542, Fla. Stat. (1999).
[3] _____ So. 2d _____, 25 Fla. L. Weekly D283 (Fla. 3d DCA Jan. 25, 2000).
[4] *1000 Friends*, 25 Fla. L. Weekly at D283.
[5] The land covered by the proposed system is rural and undeveloped.
[6] Petitioners' allegation was incorrect, according to St. Johns County. The plan for reimbursement was proposed through a county ordinance, whereby the county would collect and pass on future connection fees to DOT to offset the cost of construction for a limited time. There was no guarantee that the reimbursement plan would fully cover DOT's project costs.
[7] 711 So.2d 511 (Fla. 1st DCA 1998).
[8] *1000 Friends*, 25 Fla. L. Weekly at D283.
[9] Community Affairs alleged in its submissions to the First District Court that St. Johns County was the proper respondent, in that the "primary focus and purpose of the Petition in this case is to determine the application of laws and rules to St. Johns County." 25 Fla. L. Weekly at D283.
[10] *Id*. at D284.
[11] The Florida Supreme Court invoked its conflict jurisdiction to reconcile the holdings between the 3d DCA's *Investment Corp.* decision and the 1st DCA's *Chiles* decision.
[12] *See* § 106.32, Fla. Stat. (1999). The Election Campaign Financing Trust Fund expired by operation of section 19(f), Article III, of the Florida Constitution, effective November 4, 1996. Following its expiration, section 215.3206(2), Florida Statutes, was amended to provide, in part:

> No appropriation or budget amendment shall be construed to authorize any encumbrance of funds from a trust fund after the date on which the trust fund is terminated or is judicially determined to be invalid.

[13] In their motion to dismiss, Intervenors relied on *Tampa Electric Co. v. Dep't. of Community Aff.*, 654 So.2d 998 (Fla. 1st DCA 1995) and *Florida Optometric Ass'n. v. Dep't. of Prof. Reg., Bd. Of Opticianry*, 567 So.2d 928 (Fla. 1st DCA 1990), for the proposition that any declaratory statement issued by the Division of Elections in the proceeding would have been "impermissibly broad."
[14] The *Chiles* court held:

> These principles lead us to conclude that Commissioner Brogan had a right to seek a declaratory statement from the Division of Elections. He was a substantially affected party and the issue he presented was applicable to him in the particular circumstances of his case.

711 So.2d at 154-155.
[15] P.3, *Petition for Declaratory Statement before the Department of Community Affairs*.
[16] Interestingly, St. Johns County recently moved for clarification of the First District's January 25, 2000 decision reversing Community Affairs' dismissal of the 1000 Friends petition. __So.2d__, 25 Fla. L. Weekly D991 (Fla. 1st DCA, April 20, 2000). St. Johns alleged in its motion that the court's opinion could be interpreted to mean that the appellants were "substantially affected persons" within the meaning of Section 120.565, Florida Statutes. The court issued a clarification, stating that its January 25th opinion did not address the question of standing, but that the issue should be addressed upon consideration of the merits of the petition. The court did not explain how it determined that the facial allegations of standing in the petition were adequate, leaving some doubt as to the actual meaning of the original opinion.
[17] However, the agency may face the possibility that it lacks adequate rulemaking authority under the new standards for rulemaking enacted by the Legislature in 1996. *See* §§ 120.52(8). 120.536, Fla. Stat. (Supp. 1996).

Emmett Mitchell, IV (Bucky) *has been a Senior Attorney for the Florida Department of State's Division of Elections since 1997, and was with the Department of State's Office of General Counsel before then. He specializes in campaign finance law, local government law, and first amendment law as it relates to political speech. He also serves as informal counsel for the Bureau of Administrative Code on rulemaking procedures and notice issues. He was presiding officer during the initial hearing in* Chiles v. Department of State, Division of Elections, *711 So.2d 511 (Fla. 1st DCA 1998), and he drafted the final order that was issued by the Division in that case.*

THE FLORIDA BAR

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

APPELLATE CASE NOTES

by Mary F. Smallwood

Licensing Activities

Jonas v. Department of Business and Professional Regulation, 25 Fla. L. Weekly 197 (Fla. 3d DCA 2000)

Jonas, a licensed contractor and architect, entered into a contract with a client to perform construction work to repair hurricane damage. He subcontracted with MACTEC to perform some of the necessary work. When the client became dissatisfied with the charges by MACTEC, Jonas ceased payments to the subcontractor. MACTEC filed suit and obtained a judgment against Jonas. Jonas failed to satisfy the judgment, and MACTEC filed a complaint with the Construction Industry Licensing Board. After an administrative hearing, the Board entered a final order suspending Jonas' license until he satisfied the judgment or paid restitution. On appeal, Jonas argued that the Board lacked authority to require either restitution or satisfaction of the judgment under Chapters 455 or 489, Florida Statutes. Specifically, Jonas pointed to the fact that Section 489.129(1)(r) allowed the Board to require restitution "to a consumer" where certain violations, including failure to satisfy a judgment, occurred. He noted, however, that the subcontractor was not a consumer. The Department relied on the more general authority of Section 455.227(g) which gives all boards the authority to require "corrective action" for a violation of a requirement of the applicable practice act.

While recognizing that the license discipline provisions are penal in nature and, thus, must be strictly construed, the court upheld the penalty. It held that Section 489.129(1)(r) made it a violation of the statute to fail to satisfy a judgment relating to the practice of the profession, without respect to whether the judgment was owed to a consumer. Since the Board had authority pursuant to Section 455.227(g) to require appropriate corrective action, suspension of the license was proper. Accordingly, it struck the language of the final order which required restitution but approved the suspension of Jonas' license until satisfaction of the judgment.

Marcelin v. Department of Business and Professional Regulation, 25 Fla. L. Weekly 710 (Fla. 3d DCA 2000)

Marcelin appealed two final orders of the Department. First, the Construction Industry Licensing Board had revoked Marcelin's residential contractor's license following an administrative hearing. Second, Marcelin was denied permission to take the general contractor's certification examination but was not allowed to challenge the factual basis for that denial.

The Department filed an administrative complaint alleging that Marcelin had used his license to obtain building permits for construction performed by unlicensed persons. At the hearing, the Administrative Law Judge heard testimony from one of the individuals who had allegedly performed the work. Based in part on that testimony, the administrative law judge entered a recommended order finding that Marcelin had used his license to obtain building permits for other people's work. The judge also found that Marcelin had falsely represented his role to county building officials, misrepresented the value of work to be performed, and improperly executed documents prior to reinstatement of his license following a prior suspension. On appeal, Marcelin challenged the latter three findings on the grounds that the administrative complaint had not contained allegations to that effect. He also challenged the findings regarding the use of his license to obtain building permits on several grounds, including the acceptance of testimony from one of the individuals who had performed work under the permit.

The court agreed with Marcelin that the Board improperly relied upon findings in the recommended order that were not based on any allegations in the administrative complaint. Accordingly, the matter was remanded to the Board for reconsideration of the penalty.

However, the court did not agree that the testimony of the unlicensed contractor was inappropriate. Marcelin relied upon *Robinson v. Board of Dentistry*, 447 So. 2d 932 (Fla. 3d DCA 1984), where the Third District had held that the testimony of a successor treating dentist was not competent substantial evidence in a disciplinary proceeding against the prior dentist. The court in that case reasoned that the successor dentist could have an interest in having his professional opinion vindicated that would affect his testimony. The *Marcelin* court found no such likelihood in the case of the unlicensed contractor, however, and rejected Marcelin's argument.

Adjudicatory Proceedings

Autoworld of America Corp. v. Department of Highway Safety, 25 Fla. L. Weekly 564 (Fla. 3d DCA 2000)

Autoworld appealed the revocation of its motor vehicle dealer license after an informal hearing pursuant to Section 120.57(2). It argued that several findings of fact in the final order were based on hearsay, and, thus, not competent substantial evidence. Citing with approval the Bar's *Florida Administrative Practice* CLE manual, the court upheld the final order. It held that the respondent had admitted all allegations in the administrative complaint by choosing to have an informal hearing. Accordingly, Autoworld had no right to challenge the factual findings in the final order.

Palm City Rehabilitation and Care Center v. Gritton, 25 Fla. L. Weekly 495 (Fla. 2d DCA 2000)

The Department of Children and Families entered an administrative order finding Palm City in violation of regulatory provisions requiring that a "notice of discharge" be issued

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whenever a nursing home patient is discharged from a facility. In this case, the nursing home stated that the patient had been discharged voluntarily at the request of her family. The only record on appeal consisted of a letter alleging the involuntary discharge of the patient, an order directed to Palm City to produce the notice of discharge, a letter from Palm City stating that there was no notice of discharge because the patient left voluntarily, and the final order finding Palm City in violation of the regulations. On appeal, the nursing home argued that the regulations requiring a notice of discharge did not apply to voluntary discharges; and the personal representative of the patient's estate argued that they did apply. Finding the regulation unclear and finding no precedent construing the regulation, the court remanded the case for a hearing. It noted that the initial order did not give Palm City notice that failure to produce a notice of discharge would result in the entry of a summary order finding a violation. The court "recommended" that the agency be made a party to the proceeding on remand to provide its expertise on the construction of the regulations. There was no discussion of whether the determination made in the final order was a factual finding or a legal conclusion.

Rule Validity
Caddy v. Department of Health, 25 Fla. L. Weekly 687 (Fla. 1st DCA 2000)

The Department of Health filed an administrative complaint alleging that Caddy, a licensed psychologist, had violated the Department's rules regarding sexual misconduct. Caddy filed an answer to the complaint admitting that he had seen D.J. professionally for about a month in 1986 at the request of the attorney representing her in divorce proceedings with regard to child custody issues. The next year, she contacted him in his capacity as a professor at a local university, seeking information on possible course work. Subsequently, they entered into a personal relationship that lasted for approximately 6 years. The ultimate breakup of the relationship was stormy, and D.J. filed a complaint with the Department against Caddy. Upon Caddy's admission that he had engaged in a sexual relationship with a former patient, the Department sought to have the case removed from DOAH on the grounds that there were no disputed issues of material fact. In his answer, Caddy challenged the validity of the Department's rules. In the hearing before the Board, Caddy was not allowed to argue the validity of the rules, however, as the Board took the position that the only issue was the appropriate penalty to be assessed. It entered a final order suspending Caddy's license for one year and imposing a year of probation.

Section 490.0111, Fla. Stat., prohibits "sexual misconduct" by a psychologist and mandates that the Department define the term by rule. The Department defined sexual misconduct broadly to include engaging in any sexual behavior with a client. The rule further provided that the client relationship "is deemed to continue in perpetuity." Rule 64B19-16.003, Fla. Admin. Code.

On appeal, Caddy argued that the rule was unconstitutional because it violated his right to privacy under Art. I, § 23, Fla. Const. He further argued that the Department's authority to define sexual misconduct did not include the authority to establish an irrebuttable presumption that the psychologist-client relationship is permanent. The court noted that the procedural status of the case was "convoluted" and the record deficient since the Department had refused to hear argument on the rule validity issues or proceed with a DOAH hearing. However, the court held that Caddy was able to challenge the rule on appeal as he had raised the issue in his answer to the administrative complaint. Despite the limited record on appeal, the court held the rule establishing a perpetual relationship between the psychologist and patient to be unconstitutional. While recognizing the interest of the state in protecting the integrity of the profession and the imbalance of power between the therapist and patient, it determined that the state did not employ the least intrusive means of protecting that interest, in violation of the constitutional right to privacy. A less intrusive means of protecting the patient would be to analyze the specific facts involved with respect to the relationship between the psychologist and patient rather than creating an irrebuttable presumption. Because the court found the rule to be invalid on this basis, it did not reach the question of whether the Department had sufficient statutory authority to adopt the rule.

Declaratory Statements
1000 Friends of Florida, Inc. v. Department of Community Affairs, 25 Fla. L. Weekly 283 (Fla. 1st DCA 2000)
See Feature Article.
Great House of Wine, Inc. v. Department of Business and Professional Regulation, 25 Fla. L. Weekly 810 (Fla. 3d DCA 2000)

Great Wine sought a declaratory statement from the Department regarding certain statutory provisions governing minimum inventory, warehouse space, and licensing requirements. Following the issuance of the statement, Great Wine appealed, arguing that the interpretation of the Department violated the substantive due process and equal protection provisions of the constitution by unduly burdening small, independent distributors. The record on appeal consisted of the request for a declaratory statement with stipulated facts, transmittal letters, and the final statement of the agency.

On appeal, the court held that the record was insufficient to assess the constitutional arguments made by the appellant. While the court noted that the request for the declaratory statement raised possible constitutional concerns, there was no evidence in the record to support those concerns. The declaratory statement was, thus, affirmed; however, the affirmance was without prejudice to the appellant to bring a declaratory judgment action in circuit court.

Sanctions Pursuant To Section 120.569(2)(c)
Friends of Nassau County, Inc. v. Nassau County, Florida, 25 Fla. L. Weekly 342 (Fla. 1st DCA 2000)

Fisher Development Company

and Nassau County filed permit applications with the St. Johns River Water Management District for activities associated with the proposed construction of an outlet mall. An attorney who represented a competitor of the applicant incorporated a nonprofit corporation, Friends of Nassau County, Inc., and recruited Sherry Bevis as the president and sole director. On behalf of Friends, Ms. Bevis executed three verified petitions challenging the issuance of permits to Fisher and the County. The petitions raised a number of concerns regarding the proposed stormwater management system for the development. Following discovery in the consolidated matters, the petitioner voluntarily dismissed the petitions. The notice of dismissal stated that information had become available to the petitioner subsequent to the filing of the petitions which indicated that the applicants had met permitting criteria. Fisher and the County sought the award of attorney's fees, arguing that the petitions had been filed for an improper purpose, contrary to Section 120.569(2)(c), Fla. Stat.

The administrative law judge found that the petitioner, Bevis, had never read the petitions before signing them. She further found that the competing developer (which was represented by one of the same attorneys as represented Friends) had obtained a competitive advantage from the delay in the issuance of permits to Fisher. Finally, she found that the attorneys, upon whom Ms. Bevis relied, had not made "reasonable inquiry" into the facts sufficient to justify filing the petitions. The ALJ entered a final order awarding Fisher and the County attorney's fees against Friends, Ms. Bevis, and counsel for Friends.

On appeal, the First District affirmed the award against Ms. Bevis and Friends but reversed the order against the two attorneys. The court concluded that Ms. Bevis violated the requirements of Section 120.569(2)(c) by failing to read the petitions before signing and filing them. However, the court did not find the attorneys for Friends to have violated the statute. It noted that counsel had diligently reviewed the agency's permitting files in the matter and had retained experts to review the technical and engineering impacts of the project design. Therefore, the court found the inquiry conducted by the attorneys to be reasonable, even though it recognized that certain of the allegations were questionable. The court further held that the applicants had the burden to prove entitlement to attorney's fees and that the ALJ had improperly shifted that burden to the petitioner and its attorneys. Judge Padavano dissented. He contended that the majority improperly substituted its judgment for that of the ALJ when the proper standard of review in such cases is whether there was an abuse of discretion by the ALJ. He noted that the ALJ found that all of the concerns raised in the petitions had been addressed by the applicants prior to the filing of the petitions, a fact that could have been ascertained through a careful review of the agency files.

Motions For Reconsideration

Crawford v. Department of Children and Families, 25 Fla. L. Weekly 158 (Fla. 3d DCA 2000)

A conflict has arisen between the Third and First Districts as to the authority of the Public Employees Relations Commission to adopt a rule allowing for motions for reconsideration. In *Department of Corrections v. Saulter*, 742 So. 2d 368 (Fla. 1st DCA 1999), the First District held that PERC's rule was not authorized because the Uniform Rules of Procedure did not provide for a motion for rehearing or reconsideration. Since PERC had not sought an exception, the Uniform Rules controlled. The First District held that the time for filing the appeal runs from the entry of the final order.

The Third District reached a contrary conclusion in *Crawford*. It held that an exception from the Uniform Rules is not required, reasoning that since the Uniform Rules contained no provisions addressing a motion for reconsideration PERC's rule allowing for the filing of such motions was not in conflict with the Uniform Rules. The Third District certified conflict with *Saulter*.

Emergency Orders

Sapp Farms, Inc. v. Department of Agriculture and Consumer Services, 25 Fla. L. Weekly 514 (Fla. 3d DCA 2000)

The Department of Agriculture and Consumer Services issued a number of Immediate Final Orders ("IFOs") requiring the destruction of trees threatened by the spread of citrus canker. The IFOs included a notice of rights stating that injunctive relief could be sought in circuit court. The respondents sought injunctive relief, at which time the Department argued that they had failed to exhaust administrative remedies. On appeal, the respondents argued, *inter alia*, that the notice of rights was defective in light of the Department's subsequent position on exhaustion of administrative remedies, and that the IFOs incorrectly identified the property subject to the orders. The court rejected the arguments on appeal and affirmed. Specifically, it held that the notice of rights simply tracked the language of Section 120.569(2), Fla. Stat., which provides that an IFO "shall be appealable or enjoinable from the date rendered." The court found that this language did not obviate the requirement that the respondents exhaust administrative remedies before seeking injunctive relief. The court also held that the mistaken identification of the properties was not prejudicial since the respondents were clearly aware of the property subject to the orders.

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

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THE FLORIDA BAR
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WHAT AGENCIES DO YOU PRIMARILY WORK WITH? _____

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WHAT LEGAL AREAS ARE YOU MOST INTERESTED IN? _____

_____

FROM THE STANDPOINT OF YOUR PROFESSION, WHAT ISSUES INVOLVED IN ADMINISTRATIVE LAW AND PROCEDURE AND STATE AGENCY PRACTICE ARE MOST IMPORTANT?

_____

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Executive Branch Rulemaking — Big Picture

by R.S. Power

I. What is a rule?

An agency statement of general applicability that:

(1) implements or interprets law or prescribes policy,

(2) imposes any requirement or obligation not specifically required by statute.[1]

II. Exceptions:

(1) internal management memoranda of the agency which do not affect private interests, such as an agency's employee handbook, [2]

(2) legal opinions,

(3) budgets [3]

III. What is the effect of a rule adopted pursuant to § 120.54, Fla. Stat.?

It has the force of law on both the public and the agency. [4]

IV. Does an agency have the inherent authority to adopt rules?

No, a statute must authorize agency rulemaking. [5]

V. May an agency impose a penalty for violating a rule?

Not unless specifically authorized by statute. [6]

VI. Does the agency need a rule?

(1) No, if the statute includes the detail needed for implementation or enforcement.[7]

(2) Yes, if interpretation, detail, or policy is needed. [8]

VII. When is rule adoption pursuant to § 120.54, Fla. Stat., required of an agency?

If the answer to the preceding question (VI) is yes, as soon as it is feasible. Rulemaking is feasible **unless**:

(1) insufficient time has passed for the agency to acquire knowledge and experience,

(2) related matters are not sufficiently resolved,

(3) detail or precision in the establishment of standards is not practicable and is best left to adjudication of individual cases. [9]

VIII. Can an agency be penalized for using, but failing to adopt, a rule when it is feasible?

(1) Yes, if a substantially affected person successfully challenges an unadopted rule in a § 120.56(4) proceeding, the agency must pay the challenger's costs and attorney's fees, and [10]

(2) the agency must immediately stop using the unadopted rule. [11]

IX. Other than by prevailing, how can an agency avoid the negative consequences of a § 120.56(4) proceeding?

Before the entry of a final order, the agency can publish a notice of proposed rulemaking, which addresses the unadopted rule. [12]

X. How is a rule adopted? (Summary) [13]

(1) publish a notice of rule development in the Florida Administrative Weekly and hold a workshop if requested,

(2) publish a notice of proposed rulemaking which invites public comment and participation in an information-gathering hearing,

(3) consider comments and information received, and

(4) file the final text of the proposed rule at the Department of State within 90 days of the notice of proposed rulemaking.

XI. What can extend the 90-day adoption deadline? (Summary)

(1) A substantive change in the rule based on information or comment received from the public, [14] or

(2) a petition by a substantially affected person or organization alleging that the proposed rule exceeds statutory authority. Such a proceeding is known as a "rule challenge". [15]

XII. Can the rulemaking process be accelerated?

Yes, but

(1) the agency must declare an emergency by finding an immediate danger to the public health, safety, or welfare.

(2) An emergency rule is effective for only 90 days. [16]

XIII. Is there an exception to the 90-day life of an emergency rule?

Yes, an emergency rule may be renewed if

(1) the agency immediately follows the adoption of the emergency rule by publishing notice of an identical proposed rule, and

(2) a "rule challenge" petition is filed challenging the proposed rule. [17]

XIV. How is an emergency rule adopted?

(1) By any procedure which is fair under the circumstances, and

(2) by publication of the agency's emergency declaration.[18]

XV. What is JAPC? [19]

It is the Legislature's joint Administrative Procedures Committee. Its responsibility is to:

(1) determine if a rule is necessary and if the proposed rule is within the authority of the statute being implemented,

(2) determine whether the proposed rule can be made less complex and less burdensome, and

(3) determine if rulemaking procedures are being correctly followed.

XVI. You have been assigned to draft a proposed rule — how do you get started?

(1) Formulate the regulatory goals, keeping in mind the limits of the statutory authority,

(2) outline the steps needed to accomplish the goals, and

(3) look for models from other states or the federal government.

XVII. How do you improve the quality of communication?

(1) Use short sentences,

(2) avoid merely reiterating the statute — if you find yourself reiterating, reconsider whether you need a rule,

(3) avoid using synonyms — use the same word or phrase throughout the rule to prevent ambiguity,

(4) use a word or phrase with a generally accepted meaning consistently with the generally accepted meaning,

(5) avoid using jargon,

(6) avoid making references by using the words "above", "below", or "herein". These words lack needed specificity.

(7) When enumerating ideas, make them parallel in grammatical structure. See The Elements of Style by Strunk and White.

(8) Be aware of the different meanings associated with the use of "and" and "or".

The use of "and" means that each listed requirement must be met.

The use of "or" means that there are alternative ways to satisfy the regulatory requirement.

(9) Avoid using the future tense. A provision meant to have continuing effect should be stated in the present tense.

(10) If a provision can be stated positively or negatively, use the positive. Be careful to avoid double negatives.

(11) Phrasing a provision in the plural can cause ambiguity. When possible, use the singular. Instead of "all applicants" use "each applicant".

(12) Avoid using legalese.

XVIII. Should you define terms?

It is often better not to and instead rely on the common usage as found in the dictionary. Use definitions in the following circumstances :

(1) to give precise meaning to a word with multiple dictionary meanings, or

(2) to avoid repetition of a lengthy phrase, title, or agency name.

Use the word "means" to restrict or limit a definition. Use "includes" to broaden or extend a definition.

XIX. Where are definitions placed?

(1) Create a separate definitions section if defined terms will apply to more than one rule section, or

(2) place a definition in the substantive rule section if it only applies there.

XX. What about exceptions, limitations, or qualifications to the rule?

(1) Introduce with "except", "but", or "however."

(2) It is often clearer to start a new sentence.

XXI. How can the general counsel's office help?

(1) Assist with rulemaking process questions, and

(2) advise whether you have statutory authority for your rule.

XXII. What is the best way to learn rulemaking?

Take the plunge and volunteer to handle a new rule, rule amendment, or rule repeal!!!

Endnotes:

[1] § 120.52(15), Fla. Stat.
[2] *Dept. of Revenue v. Novoa, et al.*, 24 F.L.W. 2358, ___ So. 2d ___ (Fla. 1st DCA 1999).
[3] § 120.52(15)(a)—(c), Fla. Stat.
[4] § 120.68(7)(e), Fla. Stat.
[5] § 120.54(1)(e), Fla. Stat.
[6] § 120.54(1)(e), Fla. Stat..
[7] *Dept. of Legal Affairs v. Father and Son Moving and Storage*, 643 So.2d 22 (Fla. 4th DCA 1994); *rev. den.*, 651 So.2d 1193 (Fla. 1995); *St. Francis Hospital v. Department of Health and Rehabilitative Services*, 553 So.2d 1351(Fla. 1st DCA 1989).
[8] § 120.52(15), Fla. Stat.
[9] § 120.54(1)(a), Fla. Stat.
[10] § 120.595(4), Fla. Stat.
[11] § 120.56(4)(d), Fla. Stat.
[12] § 120.56(4)(e), Fla. Stat.
[13] § 120.54(1)—(3), Fla. Stat.
[14] § 120.54(3)(e)2, Fla. Stat.
[15] § 120.56(2)(b), Fla. Stat.
[16] § 120.54(4), Fla. Stat.
[17] § 120.54(4)(c), Fla. Stat.
[18] § 120.54(4)(a), Fla. Stat.
[19] §§ 120.52(4) and 120.545, Fla. Stat.

R.S. ("Sam") Power *was a staff attorney at HRS from 1984 until 1992. In 1992, he took the position of agency clerk at the Agency for Health Care Administration when that agency was created, and he remains in that position today. As agency clerk, he is responsible for drafting agency final orders upon receipt of a recommended order from DOAH, monitoring legislative activity in the APA area, handling some rulemaking assignments, and providing rulemaking training for agency staff, for which he has developed this outline.*

Plan on joining us at The Florida Bar Annual Meeting

June 21-24, 2000
Boca Raton Resort & Club

Administrative Law Section Reception

Thursday, June 22, 6:30 p.m.

Executive Council/Annual Meeting

Friday, June 23, 8:30 a.m.

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Administrative Law Essay Competition

DON'T WRITE OFF the Pat Dore Administrative Law Essay Competition. Packets of information have been provided to all of the Florida law schools, inviting their students to submit articles on the subject of Florida administrative law. We are hoping to have a good sampling of articles for this first competition. To assure that we do, you can be of enormous help.

Many of you stay in contact with your law school and many of you have developed a relationship with law professors who teach administrative law courses. Please mention to them that you would appreciate anything they could do to enhance interest in the writing competition. Perhaps you could pass on issues of merit that would prompt a student to write or encourage professors to suggest interesting issues to their students to encourage participation. The prizes are substantial: $1400 for first place and $500 and $300 for second place and honorable mention, respectively.

In this era of the push for professionalism, law schools are looking for ways to better interact with the practicing legal community. Here is one way for you to introduce administrative law professors to our Section's programs.

FROM THE CHAIR
from page 1

On the Move

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

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

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

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

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

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

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

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WHAT AGENCIES DO YOU PRIMARILY WORK WITH?

_____

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WHAT LEGAL AREAS ARE YOU MOST INTERESTED IN?

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FROM THE CHAIR
from page 1

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

Join the Public Utilities Law Committee

The Public Utilities Law Committee of the Administrative Law Section is concerned with the legal, technical and economic issues related to regulated providing electric, gas, water, wastewater, and telephone services. If you are a member of the Administrative Law Section and would like to become a member of this committee, please complete and return the form below:

_____ I would like to become a member of the Public Utilities Law Committee. (AL709)

Name: _____ Fla. Bar No. _____

Address: _____

City/State: _____ Zip Code: _____

Telephone: (____) _____ Telecopier: (____) _____

Please return completed form or a copy to: Jackie Werndli, Program Administrator, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.