# Administrative Law Section Newsletter

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## From the Chair

**by Dave Watkins**

As my tenure as Chair draws to a close, it is fitting to reflect on the Section's accomplishments this past year, and to recognize those folks who contributed so much of their time and talent to help ensure the continued effectiveness and vitality of our Section. However, before I do, I would like to renew my invitation to all members to become more actively involved in the work of the Section. For example, if there is a particular issue that you believe the Section should address, contact an officer or council member and let them know. If you have encountered an interesting point of administrative law in your practice, and would like to author an article on the issue, contact one of the Section's editors. They would love to hear from you. I have always believed that one of the strengths of our Section, and a distinguishing characteristic from all others, is the diversity of our membership. We count among our membership practitioners of environmental and land use, labor and employment, health care, elder care, and state and local government law, among others. Share with your officers or council members your unique perspective on administrative law issues of interest to you, and our Section will be stronger for it.

This has been both an exciting and challenging year for the Administrative Law Section. Exciting because of the continued progress in implementing many of the Section's long-range plans, and challenging primarily due to the continuing threat to the APA posed by the state legislature, some members of which seem

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## Be Not Amazed !
### At The Lessons of *Barfield v. Department of Health, Board of Dentistry*

**by Robert P. Smith**

*When the head aches, all the members partake of the pains.*

— Cervantes, DON QUIXOTE DE LA MANCHA, III, 2

"Amazing," she said to herself, peeling off layer after layer of *Barfield v. Dept. of Health, Board of Dentistry*, 805 So.2d 1008 (Fla. 1st DCA 2002), to get at the heart of it. Finding ever deeper layers of intriguing but daunting questions, incoming ALS chair Lisa Nelson reported her adventure in the March 2002 Newsletter, saying she found the *Barfield* decision "rather amazing," "circular," and finally silent on the questions generated by Gregory Barfield's *pro se* effort before DOAH (winning) and the Board of Dentistry (losing) to earn a Florida dentist license by examination, s. 466.006, Fla. Stat.

The First District denied Barfield a license without resolving the issue that was decisive of his licensure, namely, the relative probity of his grading sheets, prepared by Board examiners in Barfield's hands-on clinical test, *versus* an ALJ's assess-

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ment of the candidate's (and examiners') performance in that test, by way of narrative testimony and other conventional proofs. This essay concludes that the *Barfield* court did not resolve the issue, or even acknowledge it, because the court was distracted by the baleful influence of s. 120.57(1)(l), Fla. Stat., whereby the 1996 and 1999 legislatures transformed DOAH into a court, in violation of Art V Sec 1 of the Constitution.

**1.**

The *Barfield* court never got around to *saying what the law is,* on grading records *versus* ALJ fact-finding, because the court had such trouble *getting at* the ALJ's ruling that discounted the grading sheets as hearsay, not independently probative of their contents. The records had been stipulated into evidence, without qualification but also without explanation; but when no examiner came to testify and be cross-examined, ALJ Rigot entered a Recommended Order characterizing the documents as uncorroborated hearsay, and finding the facts to be as Barfield testified. The Board contested that conclusion of law, a response that the legislature "outlawed" by s. 120.57(1)(l) (Judge Ervin in *Barfield*, quoting Judge Benton), and went on to deny Barfield licensure. The First District held that the Board, though correct on the hearsay issue, was forbidden to dispute the ALJ's ruling, and the ALJ's ruling, though binding on the Board, was dead wrong. The examiners' grading sheets were "admissible" (*probative*, the court meant) as business records.

The problem that so consumed the court's labors in *Barfield* was not the hearsay issue but the inaccessibility of that issue on review of a Final Order that violated the statute requiring agencies to acquiesce in ALJ conclusions of law not within the agency's "substantive jurisdiction." But obviously, if the agency acquiesces, there may be no appeal at all. The court surmised that a compliant agency might appeal the untouchable ruling, delaying everything else, or might accept the ALJ's ruling "under protest," and attempt to appeal from its own Final Order. This Board simply crashed the statutory barrier by a contrary Final Order. The court found the ALJ's hearsay ruling accessible to review, on appeal from that outlawed Final Order, because review of the displaced ALJ decision was "necessary" to the court's own decision. Since this Board was right on the hearsay issue, it suffered no censure for disobeying the statute: the court denied Barfield's motion for attorney fees. Plainly dissatisfied, the court asked the legislature to enact some easier appellate review.

After holding that the grading sheets "were admissible as business records," the court abruptly closed on the merits. "[B]ecause the sheets disclose that Barfield did not pass the clinical portion of the dental examination, he was not entitled to licensure." Chief Judge Allen in partial dissent agreed that the Board violated s. 120.57(1)(l), but said he "would not address the other issues" and "would remand this case to the Board for further proceedings," which Judge Allen did not describe.

Wait a minute. Everyone knew what the grading sheets "disclosed" before Barfield asked for a s.120.57(1) hearing. This *grading* was the whole point of requesting a hearing, the target of his testimony, *infra* Part **2**, and the dominant subject of ALJ Rigot's findings that Barfield "properly performed both the amalgam cavity preparation on his patient and the endodontic procedure on the extracted tooth," and "should be awarded full points on both procedures."

So, Li Nelson complained in her March Newsletter report, the court's decision that the grading sheets were "admissible" does not *ipso facto* nullify the ALJ's findings that Barfield, in fact, *passed* this clinical exam. Why wasn't the case remanded for consideration by the ALJ or Board, on the now complete record? Nelson thought that's what Chief Judge Allen wanted to do; but he did not say so, which he might have done had he wished to mitigate the court's terminal decision that Barfield was "not entitled to licensure."

Shall we then conclude that decisions represented by such grading sheets, if authenticated and "admissible," are immune from APA processes? Surely not, but the court did not say.

Lawyers know that courts instinctively budget their time and energy in order to handle their many cases; lawyers try not to waste those resources by giving courts unprofitable and frustrating work. But that's exactly what s. 120.57(1)(l), Fla. Stat., gave the First District: an ordinary hearsay ruling, maybe decisive of the merits, and maybe incorrect, which the court could not reach in the ordinary course of an appeal from a Final Order complying with the statute. Having expended its energies just getting to the hearsay issue and deciding it, the court seems to have had no appetite for the larger issues posed by the ALJ's findings favorable to Barfield, i.e., the fate of the ALJ's findings in consequence of the "ad-

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missible" business records, and the relative probative value of those records and Barfield's contrary testimony.

How *should* an ALJ conceive of factual issues about a practical exam that the applicant took not today, before the ALJ, but at another venue in the distant past, resulting in grades that the applicant disputes?

ALJ Rigot approached her judging task, on testimony and other evidence, much as does the NFL referee who reviews on instant replay a back judge's close call on a disputed sideline reception. But of course the ALJ has no instant replay of the applicant's work in the patient's mouth, nor of the examiners' work in judging that dentistry. There's the rub. How shall the ALJ judge the examiners' judgment?

Looking over Li Nelson's shoulder as she peeled away layer after layer of *Barfield v. Dept. of Health, Board of Dentistry*, and found herself deeper into the tissue but seemingly no nearer the heart of the case, one gets the sense of watching someone peel an onion. Hold onto your hats, there's more peeling to be done, and it may set us all to weeping before we're through.

**2.**

In presenting his *pro se* evidentiary case to ALJ Rigot, Dr. Barfield invoked his professional training at Emory, 13 years of licensed dental practice in California, and his licensure in Georgia.

Barfield as a typical *pro se* litigant was oblivious to lurking legal impediments, and he sallied forth in the evidentiary hearing with a missionary sense of conviction. He supposed that he was getting, essentially, a *de novo* trial on his clinical performance, or at least a review by the ALJ in the manner of a referee on that remote testing field, peering at Barfield's replay of the examiners' disputed calls, through testimony and exhibits. The Department's lawyer said nothing to dispel Barfield's impression. Like many a lawyer who is apprehensive about overbearing a *pro se* adversary, the Department's lawyer let the man talk, and waived both opening statement and closing argument.

So it augured well for Barfield's expectations when the Recommended Order began by defining the issue tried as "whether Petitioner achieved a passing score on the June 1999 Florida dental licensure examination." The ALJ wrote that she had considered the Department's proposed recommended order, but made no mention of its contention that the applicant's burden was to prove the examiners' scores were "arbitrary or capricious or constituted an abuse of discretion." The Department supported its position with citations to *State ex rel. Topp v. Board of Electrical Examiners*, 101 So.2d 583, 585-86 (Fla. 1st DCA 1958), and *State ex rel. Glaser v. Pepper*, 155 So.2d 383, 384 (Fla. 1st DCA 1963). Those were pre-APA appeals from circuit court action on agency decisions by common law writ of mandamus, which "does not lie to establish a legal right, but solely to enforce a legal right once it is established."

Barfield testified before ALJ Rigot that he well and truly performed both the cavity preparation, on the "patient" he brought to the exam (Barfield's brother), and the root canal prep, on an extracted specimen tooth.

Barfield testified that the three dentist-examiners who graded his cavity preparation Zero, Zero, and One, where Three is passing on a scale of One to Five, simply misjudged the patient's condition. "This is clearly like a misdiagnosis," he testified, "I was very shocked." His patient not only had a second, frontal cavity requiring dentistry that was not part of Barfield's exam, he also had a rare "dead tract" in his tooth, where the "dentin isn't calcified." This confused all three of his examiners, Barfield testified, and they down-graded him for leaving "caries" or "debris" where none existed in fact. Apprehensive of just such a misconception, Barfield said that when he modified his cavity preparation appropriately for the patient's "dead tract" and extra cavity, he wrote an explanatory note to the test monitor and left it on a chair where the examiner gestured from across the room, attending another candidate.

No monitor note from Barfield ever made it to Barfield's test record or to the DOAH hearing record.

On his root canal preparation of the extracted tooth, Barfield testified, his grades of Zero, Three and Five, by one of those first examiners and two new ones, impermissibly varied in their grading by more than two points of difference. Certainly, he declared, he did *not* perforate that tooth as the Zero grader claimed. That mishap in fact occurred *afterwards*, Barfield said, in his post-exam review, when a Dr. Shields, using an instrument to show Barfield the supposed defect in his work, *himself* "put a big hole in the tooth." "I am thinking," Barfield recalled, "I wish he had shown me before he does that."

Barfield's testimony offered other reasons to conclude that, as Barfield mildly put it, the testing venue was "not a mistake-free zone."

There were problems with his brother-patient's identifying name tag, Barfield said. His brother was rejected as a test patient by one of two pre-qualifiers, and was accepted only after a tie-breaker vote. His brother told him afterwards, Barfield testified without objection, that he saw the two examiners put their heads together, talking, after viewing Barfield's dentistry in his brother's mouth. Barfield took this to mean the examiners collaborated on their supposedly independent grading.

The Department's chief witness was Dr. Shields. He participated in this exam session as an examiner or proctor, attending other candidates. An experienced dentist, the director of dental services for the Department of Corrections, and consultant to the Board of Dentistry and the Agency for Health Care Administration, Dr. Shields conducted the post-exam review with Barfield. Its purpose was to explain his failing grades. Dr. Shields testified that there was no monitor note from Barfield in the file.

Dr. Shields testified he distinctly remembered seeing the perforation in the specimen tooth, for which Barfield got that Zero. As for the passing Three and that perfect Five on the same tooth, Dr. Shields said it's not unheard of for examiners to miss seeing a perforation. He said that in discussing the perforation with Barfield, he, Dr. Shields, likely "put an instrument in the pulp chamber . . . to identify the defect" in Barfield's work. The Department's

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lawyer said he had brought the tooth along to the hearing, and offered to display it.

It was Dr. Shields' testimony explaining the testing and record-making routine, augmented by the deposition of another agency official, which the court later found qualified the grading sheets as business records. Though the documents were stipulated into evidence, ALJ Rigot was not asked to treat them as business records, probative of their contents. Hence her conclusion that "those documents . . . are hearsay and cannot form the basis for a finding of fact as to what happened during the examination."

The Recommended Order thus credited Barfield's testimony as the only "competent evidence as to the work performed by [Barfield] during the clinical portion of the examination." While Barfield's testimony might therefore have been accepted by default, the ALJ plainly did not begrudge that ruling, as if doubting Barfield's story. The Recommended Order did not address the clear implication of Dr. Shields' testimony, that *he* did not punch that hole in Barfield's specimen tooth. Seemingly, the ALJ was persuaded by Barfield's story, perhaps thinking it too strange to be untrue.

At any rate she found, "What the two examiners mistook for further decay [in the patient's tooth] was the dead tract. No debris remained." And, Barfield did in fact write that explanatory note and leave it in the chair as directed. And, the graders' comments "suggested that they had not seen the monitor note generated by [Barfield] explaining the manner in which he was preparing the tooth and why." As for the perforation, "Petitioner did not perforate the tooth during his endodontic procedure."

Finally, "Petitioner properly performed both the amalgam cavity preparation on his patient and the endodontic procedure on the extracted tooth," and he "should be awarded full points on both procedures," sufficient for a passing score.

On review of the Recommended Order, the Dentistry Board pounced on the ALJ's hearsay ruling, even while acknowledging it was forbidden to do so by s. 120.57(1)(l). The ruling was "a departure from the essential requirements of law," the Board declared, doubly prejudicial because the ALJ admitted the grading record without giving any "indication of concern as to its admissibility or as to any problem with the lack of foundation for its use."

The Board's Final Order also asserted, as had its proposed recommended order, that the proper standard for an evidentiary hearing in such a case is proof by the applicant "that the grades in issue were arbitrarily or capriciously given by the examining agency." Again, the Board cited the *Pepper* mandamus decision by the First District, and its own final order in *In re Altchiler*, 4 FALR 724A (Fla. Board of Dentistry, Final Order Jan. 16, 1982). Other such rulings by ALJs are archived in DOAH's website: *Chokhawala v. Board of Dentistry* , DOAH No. 81-2950, and *In re Chokhawala*, Fla. Board of Dentistry Final Order, Nov. 15, 1982; *Forchion v. Board of Cosmetology*, DOAH No. 82-2352; *Ramos v. Board of Architecture*, DOAH No. 82- 2893; and *Mancino v. Department of Professional Regulation, Board of Architecture,* DOAH No. 83-141. A contrary Recommended Order, distinguishing the old circuit court mandamus cases, was entered in *Sloan v. Department of Professional Regulation, Board of Dentistry*, DOAH No. 89-3301, but was rejected by the agency Final Order, Aug. 6, 1990.

Why did the First District in *Barfield* not frame the fundamental issue and the burden of proof in APA proceedings involving test results? There appear to be two reasons. First, the parties did not raise the issue. Barfield, assisted on appeal by lawyer Steve Maher, briefed the Board's violation of s.120.57(1)(l) and its substitution of factual findings, but did not attack the Board's "arbitrary and capricious" standard as substantive law. The Board invoked its substituted standard in introducing its argument, but made no point of arguing its correctness as contrasted with "whether Petitioner achieved a passing score on the June 1999 Florida dental licensure examination."

And second, the Board had no more "substantive jurisdiction" to displace the ALJ ruling on that ultimate issue than it had to contest the ALJ hearsay ruling. It must have seemed to the court that defining the basic issue correctly, and describing the burden of proof, was *necessary* if the case were to be remanded. And yet, for the court to reach out for that issue before the ALJ, again penetrating a Final Order that had illegally reversed the ALJ not once but twice, would only make the case history more, well, amazing. Having been once to that well, on the hearsay issue, was quite enough for the *Barfield* court. The court ignored the fundamental issue, denied Barfield licensure, and was done.

**3.**

This part of the essay is short because it need not be longer.

It requires no strenuous construction of Art V Sec 1 to conclude that it forbids legislation converting DOAH into a *court* by making its "recommended orders" final and decisive on questions of law affecting another agency's official functions. Nor is it hard to see that s.120.57(1)(l) does precisely that, with pernicious effect upon *Barfield v. Department of Health, Board of Dentistry*.

Art V Sec 1 names the authorized courts, not including the Division of Administrative Hearings, and declares, "No other courts may be established by the state . . . ."

What is a "court"? It is the governmental body charged by law and history with power *to say what the law is, decisively.* "Decisively" means binding on the affected parties. The existence of an appellate remedy in a higher court makes a lower court no less a *court.* All the courts named in Art V Sec 1, including the Supreme Court, are subject to some kind of appeal.

What characterizes an Art V "court"? Not necessarily the presence of officers called "judges". That designation conditions the mind, to be sure, and in the case of DOAH no doubt confuses the public about the extent of ALJ powers. But the Department of Labor and Employment Security has "judges" too, to render the Department's workers' compensation decisions under Ch 440; and

they are not judges of "courts" in an Art. V sense, because they are housed entirely within the Department whose function it is to decide workers' compensation cases.

DOAH, by contrast, is empowered by s.120.57(1)(l) to decide, *decisively* at its level of decision, law issues binding the functions of *other* departments of government. That is the hallmark of a court: its *function*.

*By their fruits ye shall know them*.

A certain signature *function* has identified the American *courts* ever since the early days of the Republic, when Chief Justice John Marshall and others found need to characterize the *function* of courts as they warded off legislative depredations upon that function, beginning well before Marshall's time and persisting still to our own time.

Thus Marshall recorded for the ages, in *Marbury v. Madison* (1803), that "It is emphatically the province and duty of the judicial department to say what the law is."

*To say what the law is*. Courts *are* what courts *do*. Who declares what the law is, with authority to bind others, is a *court*.

Florida's first great constitutional jurist, Justice Albert Semmes of long-neglected memory, buttressed Marshall's principle in *Ponder v. Graham* (Fla. 1851). The function of *divorce* pertains to courts, he wrote for our first Supreme Court. Divorce is not a function of legislatures, whose function is to enact laws. A law can be repealed in the next session, or in any session. Can a *divorce* that was enacted by such a law thus be repealed and cancelled, casting the parties back into their former marriage and, if either of them has remarried, into felonious bigamy? No, that cannot be, Justice Semmes wrote. Divorce pertains to the courts, whose function is to say, decisively, what the law is respecting this marriage or that one.

So when the legislature insisted on giving DOAH power *to say what the law is*, binding on another department of government – thereby creating, not inadvertently, an axis of power, legislature-and-DOAH, which regulated interests much prefer to constitutional government - the legislature violated the prohibition, "No other courts may be established by the state . . . ."

Art V Sec 1 also says what it does *not* mean by "no other courts."

"Commissions established by law, or administrative officers of bodies may be granted quasi-judicial power in matters connected with the functions of their offices."

Agencies of government may be granted court-like powers *in matters connected with the functions of their offices*. As for example, the court-like powers granted judges of compensation claims, in the Department of Labor and Employment Security.

The "functions" referenced by Art V Sec 1 are those assigned by the Constitution or "allotted" by legislation comporting with Art IV Sec 6: "All functions of the executive branch of state government shall be allotted among not more than twenty-five departments, . . ."

The legislature allotted the *function* of qualifying dental license candidates to the Board of Dentistry, Department of Health. Ch 466, Fla. Stat. The performance of that function requires quasi-judicial powers of judgment.

"[T]he functions of their offices," in Art V Sec 1, does not mean the functions of *other agencies'* offices. The text does not read, "Administrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of other agencies' offices."

Nor can the text be given a circular, self-referential reading, as if it were, "may be granted quasi-judicial power in matters connected to the quasi-judicial functions of their offices." Such a redundant reading would deprive the text of any meaning. DOAH may be granted powers of "recommending" orders, of course, and disciplines may be imposed upon a recipient agency receiving such recommendations, but the authority for decisively adjudicating any "matter in connection with the functions of their offices" resides constitutionally in the recipient agencies.

Agency rulemaking, it should be noted, is another matter, historically deemed a quasi-legislative power. *Department of Administration v. Stevens* (Fla 1st DCA 1977) held that Art V Sec 1 does not forbid the legislature to grant final court-like authority to DOAH in rule-challenges, subject to judicial appellate review. There are constitutional limitations on the legislature's use and abuse of that power, as well, which are beyond the scope of this essay.

The legislature may of course entirely re-allot the functions created by Ch 466, Fla. Stat., to the Division of Administrative Hearings. DOAH's name doesn't control what its functions are. In that event, DOAH would entirely administer Ch 466. But the legislature may not leave those functions in the Board and put DOAH in judgment over them, as a functioning court.

**4.**

Li Nelson need not have been

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"amazed," as she said, at the shambles that s.120.57(1)(l) made of *Barfield v. Department of Health, Board of Dentistry*. It was inevitable. Miguel de Cervantes spoke the truth, *When the head aches, all the members partake of the pains*. The Constitution was violated and the court partook of the pain. The Department and the Board partook. DOAH and the ALJ partook. Certainly, Gregory Barfield partook of the pain. Our APA jurisprudence partook of the pain, and it still partakes.

Why have we acted for six years as though we had no constitutional doubts about s.120.57(1)(l)? It is as though all our copies of FLORIDA STATUTES 2000, Volume 6, include only an index and the tracing tables. Turn around and take that volume off the shelf and into your hands, gentle readers. Turn to page A-15 and look there in the right hand column, halfway down. Now, as Justice Felix Frankfurter exhorted his law students before he went to the Court, Read the text, Read the text, Read the text.

We know why agency lawyers have not raised the unconstitutionality of s.120.57(1)(l) in the courts. Their agencies are intimidated by the legislature, afraid of what will happen to their budgets and careers if they protest the evisceration of "the functions of their offices." Governors Chiles and Bush, for all their other virtues, seem not to have been interested in protecting executive branch agencies from depredations by the legislative.

And, regrettably, the First District itself, and the courts at large, have not found it convenient to raise the issue. They mistake the principle they are perhaps thinking of: the rule is *not* to avoid constitutional questions absolutely, but to avoid them unless a constitutional decision is necessary to the case. If the parties litigant cannot bring themselves to espouse the Constitution, then the courts have ample power to recruit an *amicus curiae* to serve their deliberations, by putting the Constitution in play.

The 2002 Legislature came perilously near exacerbating DOAH's status as an unauthorized court by enacting SB 280 and HB 257. These companion bills would have tripled, and more (substituting $50,000 for $15,000) the attorney fees awardable by DOAH against non-prevailing agencies under s. 57,111, Fla. Stat., upon DOAH adjudicating, without agency review, that the agency's free-form position "was not substantially justified" in law or fact. That statute, too, makes DOAH a *court*, because again, the statute empowers DOAH to *say what the law is, decisively*, by an order binding upon the agency, This statute, too, and others like it, violate Art V Sec 1.

Section 57.111 was supposedly modeled on the federal Equal Access to Justice Act, 5 U.S.C. s.504, and in some respects it was. But there is one highly significant difference. All the federal ALJs are housed within the substantive agencies, and the agency itself is responsible for any final fee decision. *See L & T Fabrication v. Sec'y of Labor*, 197 F.3d 1289 (10th Cir. 1999). Subject to judicial review, each federal agency thus decides the limits as well as the fact of its own fee liability, as further attested by 5 U.S.C. s. 504(b)(1)(A).

HB 257 passed in the House, notwithstanding constitutional objections voiced to the House Council for Smarter Government on February 7, 2002. Constitutional objections to SB 280 were written and voiced to the Senate Committee on Governmental Oversight and Productivity, taking the bill up on February 12. Back in January, before the Art V Sec 1 objection was circulated to appropriate committees, the Senate Judiciary Committee, of which Senator Locke Burt is chairman, unanimously approved SB 280. But on March 5, after Senator Burt and other members of the Committee on Governmental Oversight and Productivity read and heard the Art V Sec 1 objection to SB 280, Senator Burt voted "No" on SB 280. He was outvoted, 6-1. A more extensive written statement of the constitutional objection was then delivered on March 14 to the Senate Appropriations Subcommittee on General Government, where SB 280 lay at its final station before the Senate floor.

SB 280 died in that Appropriations Subcommittee, and HB 257 died in Senate Judiciary Committee.

So, if the legislative leadership will listen when the Constitution speaks, why wouldn't the courts? Time's a-wasting.

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# Legislature Revises Citizen Standing Under Section 403.412(5):

## *The "Devil's Deal" or Much Ado About Nothing?*

**by Lawrence E. Sellers, Jr. and Cathy M. Sellers**

The Legislature recently enacted a controversial measure that revises the standing afforded citizens under Section 403.412(5), Florida Statutes ("F.S."), to challenge environmental permitting decisions. This measure, Section 9 of House Bill ("HB") 813, revises the statute to effectively overrule prior judicial decisions that had interpreted s. 403.412(5) to provide virtually "automatic standing" to citizens and Florida environmental interest groups to initiate administrative proceedings under Florida's Administrative Procedure Act ("APA"). The bill expressly provides that s. 403.412(5) does *not* authorize a citizen to initiate (or request or petition for) an administrative proceeding under s. 120.569 or s. 120.57.

### Background

#### Section 403.412(5) Provides Standing to "Intervene" in Certain Proceedings.

Enacted in 1971 as part of Florida's Environmental Protection Act, subsection (5) of s. 403.412 provides standing to any citizen of the state to "intervene" in administrative, licensing, or other proceedings authorized by law for the protection of the air, water, or other natural resources of the state.[1]

#### The Courts Interpret Section 403.412(5).

*Greene v. Department of Natural Resources*[2] was the first appellate case to interpret s. 403.412(5), F.S. In *Greene*, a citizen asserted standing under s. 403.412(5), F.S., to challenge approval by the Board of Trustees of the Internal Improvement Trust Fund of the inclusion of a tract of land in Broward County on the Conservation and Recreational Lands list on the ground that the land did not meet the criteria for inclusion on the list. In upholding the denial of Greene's petition for an administrative hearing, Judge Shivers explained: "Section 403.412(5) does not authorize or allow a citizen to *initiate* a Section 120.57 proceeding without first meeting the substantial interest test. . . ."[3] Quoting s. 403.412(5), the court found that the statute's plain language addressing standing to *intervene* precluded Greene from initiating an administrative proceeding under s. 403.412(5).

Notwithstanding the court's fidelity in *Greene* to the statute's plain language, the following year the court's interpretation of s. 403.412(5) took a turn in *ManaSota-88 v. Department of Environmental Regulation*.[4] In that case, ManaSota-88 filed a petition under s. 403.412(5) seeking to "intervene" into the Department of Environmental Regulation's free-form permitting process with respect to several environmental permits for which Gardinier had filed applications. DER denied ManaSota-88's petition because it determined that until it issued its proposed agency action, there was not yet any agency action in which ManaSota-88 could participate. The court affirmed DER's denial of ManaSota-88's petition, but *in dictum* the court expanded the scope of s. 403.412(5), stating: "In the event that the Department does propose to issue the permits to Gardinier, § 403.412(5) would appear to be a statutory provision entitling appellants to participate as a party to proceedings under §120.52(10)(b), including *initiation* of a §120.57 hearing." The court distinguished *Greene* as applying only to cases that did not involve licensing or permitting, or when the statutorily required allegations of environmental injury were absent.[5]

Figuratively speaking, *ManaSota-88* let the horse out of the barn. Not long after, in *Booker Creek v. Mobil Chemical Co.*,[6] the court relied on the dictum in *ManaSota-88* to find that Booker Creek had standing under s. 403.412(5) to initiate a challenge to a DER determination that a groundwater discharge permit was not required for two wastewater storage areas proposed in connection with a phosphate mining operation. Booker Creek had not alleged or proved that it or any of its members' substantial interests were in any way affected by the proposed wastewater storage operations. After the decisions in *ManaSota-88* and *Booker Creek*, a number of cases have cited s. 403.412(5) as the sole basis for standing to initiate Chapter 120 proceedings.[7]

### The Legislature Responds

These judicial interpretations of s. 403.412(5) did not sit well with the business community. Home builders, developers and other business people repeatedly complained that the liberal standing provided by these interpretations, especially when coupled with loose pleading[8] and proof requirements,[9] made it far too easy for opponents to defeat or modify projects, not based on the merits of their objections, but simply as a result of the delay and expense created by the requested administrative proceedings.[10] These complaints eventually prompted the introduction of legislation that would effectively overrule these judicial decisions. Although very controversial with environmental interest groups, this legislation came close to passage in both 2000 and 2001.[11]

This legislation was introduced again during the 2002 Regular Session in the form of Senate Bill ("SB") 270, by Senator Jim King, and HB 819, by Rep. Cantens. Environmental interest groups actively opposed the bills, but both measures enjoyed considerable success in their respective chambers. Ironically, the legislation ultimately passed the Legislature as part of HB 813, a bill that also provides funding for Everglades restoration — funding which was actively sought and supported by all environmental interest groups. The irony of this pairing of the standing legislation with the Everglades restoration bill

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**CITIZEN STANDING**
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was not lost on even the casual observer. One newspaper editorial dubbed it "the Devil's Deal."[12]

Some newspaper editorials and most environmental interest groups urged the Governor to veto the bill,[13] while other editorials and one prominent environmental interest group urged the Governor to allow it to become law.[14] There was much disagreement about the effect of the bill on citizen standing.[15]

So what does the legislation *really* do?

**Overrules Prior Judicial Decisions**.

As originally filed, the legislation principally sought simply to make clear that s. 403.412(5) does not allow an unaffected citizen to "initiate" an administrative proceeding.[16] As enacted, the bill does this by expressly providing that "as used in this section and as it relates to citizens, the term "intervene" means to join an ongoing s. 120.569 or s. 120.57 proceeding; this section does not authorize a citizen to institute, initiate, petition for, or request a proceeding under s. 120.569 or s. 120.57."[17] The legislation clearly has the effect of overruling prior judicial decisions, including *ManaSota-88*.[18]

During the many legislative committee hearings on HB 819 and SB 270, there was considerable confusion and controversy about the effects of the bills as originally filed. Accordingly, the legislation was expanded in several ways in an effort to alleviate this confusion and to reduce some of the controversy.

**Confirms that there is No Effect on APA "Substantial Interests" Standing.**

First, the bill was expanded to make clear that citizens continue to have standing to request administrative proceedings under the Administrative Procedure Act if their substantial interests will be determined or affected by the challenged agency action. The bill does this by expressly providing that "[n]othing in this section limits or prohibits a citizen whose substantial interests will be determined or affected by a proposed agency action from initiating a formal administrative proceeding under s. 120.569 or s. 120.57."[19]

The bill goes on to provide that "[a] citizen's substantial interests will be considered to be determined or affected if the party demonstrates it may suffer an injury in fact which is of sufficient immediacy and is of the type and nature intended to be protected by [Chapter 403]."[20] In this fashion, the bill appears to codify the APA "substantial interests" standing test as set out in the seminal case of *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981).

**Describes What "Substantial Interests" Are Sufficient.**

In an effort to address claims that citizens would have difficulty meeting the APA's substantial interests test, the bill also establishes what showing of "substantial interests" will be sufficient under the APA. The bill provides that a sufficient demonstration may be made by a petitioner who establishes that the proposed activity, conduct, or product to be licensed or permitted affects the petitioner's use or enjoyment of air, water, or natural resources protected by Chapter 403.[21]

This language is intended to codify existing case law holding that demonstrating that a proposed activity will affect one's use and enjoyment of natural resources protected under the specific statute at issue is sufficient to demonstrate "substantial interest." *See, e.g., Friends of the Everglades v. Board of Trustees*, 595 So. 2d 186 (Fla. 1st DCA 1992). As such, it appears that this language was intended neither to relax nor make more stringent the "substantial interests" standing test to participate in environmental proceedings.

**Provides that No Showing of "Special Injury" Is Required.**

Notwithstanding the addition of the language that was designed to make clear that the bill would have no effect on a citizen's ability to establish "substantial interests" standing under the APA, some expressed concern that this showing nonetheless would be difficult if it required the citizen to demonstrate some form of "special injury," i.e., an injury that is different in kind or degree than from that suffered by the general public. Some environmental interest groups were particularly sensitive about this requirement because the Department of Environmental Protection recently had denied standing to neighbors seeking to challenge an air permit for a nearby cement plant, in part because the allegations in their petition did not demonstrate that the petitioners would suffer any "special injury" beyond that which might be sustained by all persons residing in the surrounding area.[22] In its final order, DEP concluded that such "special injury" was necessary to confer standing under the "substantial interests" standing requirements of the APA.[23]

To address this concern, the bill was amended to provide that "no demonstration of special injury different in kind from the general public at large is required."[24] Of course, allegations of injury to the environment alone or other generalized grievances which are of concern to everyone are still insufficient to confer standing under the "injury in fact" test. However, the addition of this language and the deletion of any "special injury" test may actually have the effect of making it easier for petitioners in environmental cases to demonstrate this "substantial interests" standing.

**Provides for "Automatic Standing" to Certain Environmental Interest Groups.**

As noted, a number of Florida environmental interest groups had previously relied on the judicial interpretations of s. 403.412(5) to provide them with essentially "automatic standing" to initiate administrative proceedings on environmental permitting decisions. They therefore strenuously opposed any change to the law. They argued that change was unnecessary because in reality the law had been used only sparingly and that if it were abused, there were other means to deal with these abuses. They also argued that the change to s. 403.412(5) would not prevent them from filing challenges; it simply would require them to go to the unnecessary trouble of demonstrating that they or their individual members would be affected by the challenged permitting decision.

In an effort to reduce the contro-

versy concerning the effect of the bill on some of these groups, a new subsection (6) was added to the bill. It provides "automatic standing" to environmental interest groups that meet certain requirements.[25] Most notably, the group must be a "Florida" corporation, the corporation must have at least 25 current members residing within the county where the activity is proposed, and the corporation must have been formed at least one year prior to the date of the filing of the permit application that is the subject of the proposed agency action.

The requirement that the group be a "Florida" corporation has generated considerable criticism, particularly from foreign corporations like the Sierra Club. However, the courts previously have held that these groups are *not* citizens of the state for purposes of the standing provided by s. 403.412(5),[26] so it does not appear that this change would have any adverse effect on such foreign corporations.[27]

The requirement that the group have been formed at least one year prior to the date of the filing of the permit application apparently is designed to deal with cases like *Friends of Nassau County, Inc. v. Nassau County*.[28] In that case, the petitioner, "Friends of Nassau County," was created on the day the petition was filed by individuals who were business competitors of the applicant.[29]

**Describes Standing Test for Federally Delegated or Approved Programs.**

In Florida, the DEP implements several federally delegated or approved environmental programs for the United States Environmental Protection Agency (EPA). For example, DEP implements the NPDES, RCRA, PSD and Clean Air Act Title V permit programs in Florida. Applicable federal regulations require these programs to include provision for citizen participation and for judicial review of final permits by specified persons. Previously, Florida had advised EPA that it provided the required opportunities for judicial review by way of the liberal standing provided by s. 403.412(5). EPA became aware of the proposed changes to s. 403.412(5) and reminded Florida of the requirements to provide for judicial review of final permits.[30] Although the bill does not directly affect the existing right to seek judicial review of final permit decisions,[31] the sponsors adopted DEP's suggestion that the bill be amended to add a new subsection (7) that provides for standing to request administrative proceedings on such permits if the citizen meets the standing requirements for judicial review of a case or controversy under Article III of the U.S. Constitution.[32]

## Conclusion

Section 9 of HB 813 was enacted primarily to clarify standing afforded to citizens of the state under s. 403.412(5), which authorizes citizens to "intervene" in certain proceedings. To accomplish this, the legislation expressly provides that the term "intervene" means to join an already ongoing administrative proceeding, and it expressly provides that it does not authorize a citizen to "initiate" (or request or petition for) an administrative proceeding under s. 120.569 or s. 120.57. In so providing, the Legislature has rejected the contrary interpretation adopted by the courts.

The Legislature also sought to alleviate confusion and to reduce controversy resulting from this change to s. 403.412(5). It did so by expanding the statute in several ways. The legislation confirms that the change will have no adverse effect on a citizen's traditional standing under the APA to request a hearing if the citizen's substantial interests would be affected or determined, it describes what interests are sufficient, and it makes clear that no showing of special injury is required in such cases. In addition, the legislation provides "automatic standing" for Florida environmental interest groups that meet certain requirements. Finally, the legislation seeks to insure that Florida will continue to be able to implement certain federally delegated or approved programs.

No doubt these additional efforts to alleviate confusion and to reduce controversy will themselves provide the courts with new opportunities to interpret the standing now provided by this new version of s. 403.412.

**Endnotes**:

[1] One of the early articles on Florida's Environmental Protection Act of 1971 characterized the legislative history of the Act as "sparse," and containing only one document even remotely bearing on legislative intent. Patricia A. Renovitch, *The Florida Environmental Protection Act of 1971: The Citizen's Role in Environmental Management*, *2* FLA. ST. U. L. REV. 736, 751 (1974).

[2] 414 So. 2d 251 (Fla. 1st DCA 1982).

[3] *Id*. at 253 (emphasis added).

[4] 441 So. 2d 1109 (Fla. 1st DCA 1983).

[5] 441 So. 2d at 1111.

[6] 481 So. 2d 10 (Fla. 1st DCA 1985).

[7] *E.g., ManaSota-88 v. Gardinier*, 481 So. 2d 948 (Fla. 1st DCA 1986); *Cape Cave Corp. v. DER*, 498 So. 2d 1309 (Fla. 1st DCA 1986).

[8] It was not until 1998 that the Legislature amended the APA to require an agency to dismiss a petition for hearing if it was not in substantial compliance with the requirements of the Uniform Rules. *See* s. 120.569(2)(c), F.S.

[9] Generally speaking, the applicant for a license or permit carries the ultimate burden of persuasion of entitlement throughout all proceedings. *Florida Department of Transportation v. J.W.C. Company, Inc.*, 396 So. 2d 778 (Fla. 1st DCA 1981).

[10] In addition, early administrative decisions held that the attorney's fees provisions in s. 403.412 did not apply to intervention under Subsection (5). *See generally* "Pro/Con: Intervention in Environmental Permitting: Should There Be a Price?", FLA. B. J. 51 (January 1990).

[11] In 2000, the House bill (HB 1135) passed the House, but not the Senate. In 2001, two Senate bills (CS/SB 910 and CS/SB 1560) passed the Senate, but neither passed the House.

[12] Editorial, "Devil's Deal on the Everglades," *Palm Beach Post* (March 31, 2002).

[13] Editorial, "In Need of Vetoes," *St. Petersburg Times* (April 3, 2002); Guest Opinion, "Veto Everglades Bill; It Includes a Toxic Amendment," *Miami Herald* (April 4, 2002); Editorial, "Kill Measure Restricting Protest of Developments," *Tampa Tribune* (April 6, 2002); Carl Hiassen, "Everglades Bill Hijacked by Special Interests," *Miami Herald* (April 7, 2002); Editorial, "Everglades Bill Sullied by Dirty Trick," *Tallahassee Democrat* (April 10, 2002).

[14] Editorial, "For Everglades Funding," *Miami Herald* (April 3, 2002); Editorial, "A Lousy, But Clear, Choice," *Ft. Lauderdale Sun-Sentinel* (April 7, 2002); Editorial, "Glades Choice: Pragmatism vs. Principle," *Lakeland Ledger* (April 7, 2002).

[15] David Royse, "Activists Disagree About Environmental Bill," *Tallahassee Democrat* (March 29, 2002); Craig Pittman, "Everglades Bill Could be Unmaking of Activist," *St. Petersburg Times* (April 7, 2002).

[16] § 2, HB 819 (2002); § 2, SB 270 (2002).

[17] § 9, HB 813,Third Engrossed and Enrolled Ch. 2002-261, §9, Laws of Fla.2002.

[18] *See* Senate Staff Analysis and Economic Impact Statement for CS/SB 270 (March 13, 2002); House of Representatives Analysis for CS/HB 819 (Feb. 22, 2002).

[19] § 9, HB 813, Third Engrossed and Enrolled Ch. 2002-261, §9, Laws of Fla.2002.

[20] *Id*.

[21] The sponsor of the House bill, Representative Gaston Cantens also read a statement of legislative intent that elaborated on this provision in the following fashion: "With regard to individual citizens who are natural persons,

*continued...*

## CITIZEN STANDING

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all standing requirements to demonstrate substantial interest will be satisfied if the petitioner demonstrates that the proposed activity of the environmental permit will affect the person's use or enjoyment of air, water, or natural resources. In other words, if that person fishes in the water body to be altered by a permit, watches birds there, or undertakes similar activities that will be changed by the fact that a permit is granted, they will have standing." Journal of the House of Representatives, p. 2189 (March 20, 2002).

[22] Final Order of Dismissal, *Woodhouse and Tyler v. Suwannee American Cement Company and DEP*, OGC Case No. 99-2231, DOAH Case No. 00-0702 (DEP May 25, 2000), *aff'd*, 798 So. 2d 729 (Fla. 1st DCA 2001) (citations omitted).

[23] *Id.* Some courts have refused to apply the "special injury" analysis to determinations regarding standing under the APA. *E.g.*, *Friends of the Everglades, Inc. v. Board of Trustees of the Internal Improvement Trust Fund*, 595 So. 2d 186, 189 (Fla. 1st DCA 1992). In a case considering another subsection of s. 403.412, the Florida Supreme Court has held that the Legislature enacted s. 403.412 to extend standing to private and corporate citizens of Florida without any showing of special injury. *See Florida Wildlife Fed'n v. DER*, 390 So. 2d 64, 67-68 (Fla. 1980).

[24] § 9, HB 813, Third Engrossed and Enrolled Ch. 2002-261, §9, Laws of Fla.2002, amending s. 403.412(5), F.S.

[25] *Id.*, to be codified at s. 403.412(6), F.S.

[26] *See Legal Environmental Assistance Foundation v. DEP*, 702 So. 2d 1352 (Fla. 1st DCA 1997); *Sierra Club v. Suwannee American Cement Co.*, 802 So. 2d 520 (Fla. 1st DCA 2001).

[27] In addition, nothing in the bill changes the law on "associational standing," so even foreign environmental corporations will continue to be able to assert standing based on the individual standing of their members. *See generally Florida Home Builders Ass'n v. Department of Labor and Employment Security*, 412 So. 2d 351 (Fla. 1982) (holding that association may have standing even though acting solely as representative of its members, provided certain requirements are met); *NAACP v. Florida Bd. of Regents*, __ So. 2d __ 27 Fla. L. Weekly D462 (Fla. 1st DCA, February 26, 2002).

[28] 752 So. 2d 42 (Fla. 1st DCA 2000).

[29] *Id.* at 49.

[30] *See* letter dated February 20, 2002, from Deputy Regional Counsel, Region 4, EPA.

[31.] In a recent opinion, a Florida appellate court held that an environmental interest group that had relied solely on s. 403.412(5) for standing to request an administrative hearing did not establish standing for judicial review of the final permit decision. *See Sierra Club v. Suwannee American Cement Co.*, 802 So. 2d 520 (Fla. 1st DCA 2001).

[32] This language apparently was taken from a case involving consideration of whether Virginia's standing provisions were consistent with the federal requirements for approved programs, *Commonwealth of Virginia v. Browner*, 80 F. 3d 869 (4th Cir. 1996).

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# APPELLATE CASE NOTES

by Mary F. Smallwood

## Licensing

*Stueber v. Gallagher*, 27 Fla. L. Weekly 504 (Fla. 5th DCA 2002)

Stueber appealed from a final order of the Educational Practices Commission revoking his teaching certificate. He argued for the first time on appeal that the Commission had deprived him of due process by raising new issues for the first time at the hearing and by failing to refer the matter to the Division of Administrative Hearings ("DOAH") when it became apparent that there were contested issues of fact.

Stueber had initially requested a formal hearing but subsequently withdrew that request and submitted an election of rights form requesting an informal proceeding. The administrative complaint alleged that Stueber had used his school computer to access pornographic web sites, that he had reconnected that computer to the Internet without proper authorization, and that he had battered his wife. At the final hearing, the agency counsel sought permanent revocation of the certificate, arguing that the pornography accessed by Stueber was "teenage oriented" and that the wife had suffered injuries adversely affecting her ability to work during the battering. While Stueber stated that he could dispute these additional allegations, he declined to do so and never requested a formal proceeding.

On appeal, the court rejected Stueber's argument that the Commission should have *sua sponte* referred the matter to DOAH. It held that Stueber's failure to request such referral constituted a waiver of that right. In addition, the court held that Stueber had waived the right to assert that the Commission had raised new issues at the hearing not contained in the complaint as he failed to make that argument in front of the Commission. Finally, the court held that Stueber was held to the same standard of competency as counsel even though he appeared *pro se*.

*Ocampo v. Department of Health*, 27 Fla. L. Weekly 395 (Fla. 1st DCA 2002)

After an hearing before the Board of Medicine, Ocampo was disciplined for violations of Sections 458.331(1)(b) and (kk), Fla. Stat., by having his license acted against by another jurisdiction and by failing to report that action to the Department within 30 days. At the hearing, Ocampo argued that the action involved was not an action by the licensing authority of any other jurisdiction as provided by the statute. In this case, Ocampo had been excluded by the federal Department of Health and Human Services from participating in federal health care programs, including Medicaid and Medicare.

The court reversed the order of the Department. It agreed with Ocampo that the right to participate in the federal programs was not a "license or the authority to practice medicine" under Section 458.331(1)(b), Fla. Stat. The court noted that the only privilege taken away from Ocampo was the right to bill the federal government for certain procedures, not the right to practice medicine. It further held that a Medicare provider number is not a license under Section 120.52(9), Fla. Stat. In construing the statutory provisions involved, the court concluded that the statute must be interpreted in a manner favorable to the licensee, as the statute is penal in nature.

## Definition of Agency

*Department of Insurance v. Florida Association of Insurance Agents*, 27 Fla. L. Weekly 623 (Fla. 1st DCA 2002)

The Department of Insurance and the Florida Windstorm Underwriting Association (the "Association") appealed an order of the administrative law judge determining that the Association was an agency under Chapter 120, Fla. Stat., and, therefore, subject to a rule challenge action regarding certain procedures proposed by the Association. The administrative law judge concluded that the Association qualified as either a "board" or "authority" under Section 120.52(1), Fla. Stat.

On appeal, the court reversed and remanded the matter with instructions to the administrative law judge to dismiss the rule challenge. It noted that the Association was a private or quasi-public unincorporated entity created by the legislature to make windstorm insurance available to citizens that would not otherwise be able to obtain it in the private market. The Association was governed by a board including primarily representatives of the insurer members, together with three consumer representatives. It receives no state funds and has no taxing powers. The Association has never been granted rulemaking authority and the statute creating it does not contemplate that it be subject to the APA.

The court concluded that the Association was not a board or authority as those terms are intended under the APA. Moreover, while the Association performs some public functions, they are not traditionally governmental in nature. Rather, the provision of insurance coverage is essentially a private function.

## Rule Challenges

*NAACP, Inc. v. Florida Board of Regents*, 27 Fla. L. Weekly 462 (Fla. 1st DCA 2002)

The NAACP, Mattie Garvin (individually and on behalf of her son), and Keith Garvin (individually) challenged several rules of the Board of Regents adopted to implement Governor Bush's One Florida Initiative. The Administrative Law Judge ("ALJ") concluded that the NAACP had associational standing under *Florida Home Builders Association v. Department of Labor and Employment Security*, 412 So. 2d 351 (Fla. 1982), to challenge the rules. He further held that the Garvins had standing as substantially affected persons under Section 120.56, Fla. Stat. After an evidentiary hearing, the ALJ

*continued...*

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determined that one portion of the rule was invalid but upheld all other provisions of the rule. The petitioners appealed, and the Board cross-appealed the final order as to the standing of the NAACP and the Garvins.

In concluding that the NAACP had associational standing, the ALJ relied upon *Coalition of Mental Health Professions v. Department of Professional Regulation*, 546 So. 2d 27 (Fla. 1st DCA 1989). He held that the student members of the NAACP would be "regulated by the proposed amendments in their applications to the [State University System]." Thus, without requiring any further evidence of how the students would be personally affected by the rules, he held that the NAACP met the test for establishing associational standing.

Keith Garvin, a high school sophomore, testified that he wanted to attend a college within the State University System upon graduation from high school. His mother, Mattie, testified that she wanted to provide her son with the best possible educational opportunities. The ALJ found that both of the Garvins had standing, because Keith's admission to a state university was regulated and controlled by the rules.

On appeal, the court reversed the ALJ with respect to the standing of both the NAACP and the Garvins. With respect to the NAACP, the court rejected the ALJ's reliance on *Coalition of Mental Health Professionals*. That case involved a challenge by several professional associations to rules that would regulate the practices of their members, clinical social workers, family and marriage therapists, and mental health counselors. The court in *Coalition of Mental Health Professionals* held that the fact that the members would be regulated by the proposed rules was sufficient to establish standing without elaboration of how individual members would be affected.

However, in this case, the court limited its ruling in *Coalition of Mental Health Professionals* to only trade or professional associations, all of whose members would be regulated by a proposed rule. Noting that *Florida Home Builders* required that an association demonstrate that "a substantial number of its members, although not necessarily a majority, are 'substantially affected' by the challenged rule," (*id*. at 353-54) the court held that applying the ruling in *Coalition of Mental Health Professionals* would essentially negate that requirement. The court found that the NAACP had not introduced any evidence of the effects on its individual members of the rules. In fact, it noted testimony of one of the association's witnesses that it was not possible to predict the impact the rule amendments would have.

Judge Browning dissented. He noted that *Coalition of Mental Health Professionals* had been applied in many other contexts, including *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000), *Friends of the Everglades, Inc. v. Board of Trustees of the Internal Improvement Trust Fund*, 595 So. 2d 186 (Fla. 1st DCA 1992), and *Ward v. Board of Trustees of the Internal Improvement Trust Fund*, 651 So. 2d 1236 (Fla. 4th DCA 1995). He opined that the majority's limiting construction of *Coalition of Mental Health Professionals* was a significant departure from the case law of standing under Chapter 120, Fla. Stat.

With respect to the Garvins, the majority held that they had failed to introduce any evidence that they would be substantially affected. The court noted that Keith Garvin was only a sophomore in high school and not yet eligible to apply to college. Moreover, it found that based on his high school record, he would be eligible for admission to a state university without regard to the changes in the rules. Accordingly, the court concluded that any potential impact on Keith was speculative.

Again, Judge Browning dissented. Citing *Ward*, he concluded that Keith had standing because he would be regulated by the rules.

*Miles v. Florida A & M University*, 27 Fla. L. Weekly 822 (Fla. 1st DCA 2002)

Miles appealed a final order of the University dismissing him from employment after a hearing in which he was found to have sexually harassed several students. He argued that the University's rule required complaints of sexual harassment to be filed within 60 days of the incident leading to the complaint. In this case, the complaints were filed after that time.

On appeal, the court affirmed the final order. It recognized that the rule in question, 6C3-10.103(8), Fla. Admin. Code, did require complaints to be filed within 60 days and provided that the filing of a complaint was a prerequisite to initiation of a formal investigation. However, the rule further provided that it did not limit the University in any way from initiating its own investigation. Holding that an agency's own interpretation of its rules is entitled to great weight, the court concluded that the University's interpretation was not clearly erroneous nor had it prejudiced the respondent.

## Adjudicatory Proceedings

*Cann v. Department of Children and Family Services*, 27 Fla. L. Weekly 779 (Fla. 2d DCA 2002)

Upon receipt of notice from the Department of Children and Family Services that their license as a medical foster care home was not going to be renewed, the Canns retained counsel to challenge the action. The attorney noted on his calendar that the deadline for filing the petition for hearing was November 29, 2000. He prepared and mailed the petition on November 28, but it was not received by the Department until November 30. The Department dismissed the petition as untimely, even though counsel argued that he had legitimately assumed that the mail would be received within one day since the two offices were in close proximity.

On appeal, the Canns argued that the petition should not be dismissed, relying on prior precedent that untimely petitions should be accepted where excusable neglect was involved. *See Unimed Lab, Inc. v. Agency for Health Care Administration*, 715 So. 2d 1036 (Fla. 3d DCA 1998); *Rothblatt v. Department of Health and Rehabilitative Service*s, 520 So. 2d 644 (Fla. 4th DCA 1988). The court, however, held that

*Unimed* and *Rothblatt* had been overruled by the 1998 amendment of the APA adding Section 120.569(2)(c), Fla. Stat. That provision states that a petition shall be dismissed if filed late. While the court opined that Section 120.569(2)(c) had probably not overturned *Machules v. Department of Administration*, 523 So. 2d 1132 (Fla. 1988), which recognized that the doctrine of equitable tolling could be applied in administrative proceedings, it found that the Canns had not met the requirements of that doctrine in this case.

While upholding the Department's decision, the court expressed grave concerns about the policy of dismissing a petition that had been filed within one day of the due date if excusable neglect could be demonstrated, comparing the circumstances to a default in a judicial proceeding. However, the court concluded that it could not overturn an administrative dismissal for untimeliness unless there was a violation of due process.

*Department of Agriculture and Consumer Services v. Broward County*, 27 Fla. L. Weekly 624 (Fla. 1st DCA 2002)

The consolidated interlocutory appeals from proceedings before the Division of Administrative Hearings challenged several rulings of the administrative law judge on evidentiary issues. The proceedings below involved rule challenges against the Department by a number of local governments and individuals regarding a proposed rule on citrus canker eradication programs.

The orders of the administrative law judge being appealed included an order granting petitioners' request for a continuance, an order denying a Department motion for a protective order to prevent the deposition of the agency head, and an order denying a motion for disqualification of the administrative law judge.

While recognizing the need for an expeditious hearing on the challenges, the court affirmed the order granting a request for a continuance, finding the judge did not abuse his discretion in that matter. The court noted that there was a counterbalancing need to preserve due process rights of the petitioners in full discovery.

The court reversed the administrative law judge on the other two orders, however. First, it held that the judge erred in refusing to grant a protective order for the agency head. It found that the Department's offer to produce the deputy commissioner responsible for the program for deposition was reasonable. The court further opined that it was not appropriate to require that agency heads be made available for discovery as a general matter, because of the adverse impact on agency efficiency.

Second, the court reversed the administrative law judge's order denying the motion for his disqualification. The Department filed a motion seeking disqualification of the judge, relying on a letter from a *pro se* individual (who was seeking to intervene in the proceeding). In part, the letter thanked the administrative law judge for speaking with the letter writer and expressed gratitude that the judge was "interested in doing something about this Citrus Eradication program." The Department attached an affidavit from an agency representative stating that it feared the letter reflected an *ex parte* communication between the proposed intervenor and the judge and indicated a bias on the part of the judge. Subsequently, the letter writer filed an affidavit intended to clarify that there had been no *ex parte* communication. The judge declined to consider the letter writer's affidavit but held that the request for disqualification was legally insufficient.

In reversing that order, the court noted that the test for determining legal sufficiency is whether the facts, as alleged, would prompt a reasonably prudent person to fear that he could not get a fair hearing. The court relied on the holding in *Brake v. Murphy*, 693 So. 2d 663 (Fla. 3d DCA 1997), that *ex parte* communications between a party and a judge may serve as a basis for disqualification.

*Herold v. University of South Florida*, 27 Fla. L. Weekly 398 (Fla. 2d DCA 2002)

Herold, an associate professor at the University of South Florida College of Medicine, sought an administrative hearing to challenge the College's decision not to approve his application for promotion to full professor. The department's Appointment, Promotion and Tenure ("APT") Committee originally approved the application; but the college-wide APT Committee, the dean of the College, and University Provost all concurred in denial of the application. The University dismissed the petition for lack of standing.

On appeal, the court affirmed that decision. It concluded that Herold's substantial interests were not determined by the denial of his application to become a full professor since he had no legal entitlement to that position, merely a unilateral expectation. The court rejected his argument on appeal that he had a substantial interest in maintaining his professional reputation. Citing *Paul v. Davis*, 424 U.S. 693 (1976), the court noted that defamation by the government, by itself, does not constitute a deprivation of liberty or property. Instead the plaintiff must demonstrate "stigma-plus" injuries. Here, the court held that denial of his application did not alter Herold's legal status in any way. Potential damage to his reputation alone was insufficient to meet the stigma-plus test.

## Bid Protests

*University of South Florida College of Nursing v. Department of Health*, 27 Fla. L. Weekly 761 (Fla. 2d DCA 2002)

The Department of Health sought competitive bids for provision of gynecological services at public health clinics in Hillsborough County. It received bids from two providers, including the University of South Florida ("USF"). Initially, the Department rejected both bids and sought

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to negotiate contracts with both providers. When that failed, the Department chose the provider with the higher ranking, rejecting USF. USF filed a petition for a formal administrative hearing under Chapter 120, stating that its substantial interests had been affected. The Department dismissed the petition on the grounds that USF lacked standing since the provision of the subject services was statutorily exempt from the competitive bidding processes of Chapter 287, Fla. Stat.

On appeal, USF argued that the Department had subjected itself to competitive bidding requirements voluntarily by seeking bids and that USF therefore had a substantial interest in the outcome. The court rejected that argument, holding that voluntary compliance with competitive procurement procedures did not obligate the Department to comply with all aspects of the administrative process with respect to bid protests. Alternatively, USF argued that the statutory exemption was applicable only to sealed bid procedures under one specific provision of Chapter 287. While noting that the arguments from both sides on this issue were compelling, the court declined to decide the issue, as it had not been raised below.

### Public Records and Government in the Sunshine

*Knight Ridder, Inc. v. Dade Aviation Consultants*, 27 Fla. L. weekly 532 (Fla. 3rd DCA 2002)

The Miami Herald sought certain records of Dade Aviation Consultants ("DAC") relating to fees paid to its lobbyists. After DAC was required by the trial court to provide those documents, the Herald sought to recover attorney's fees. The trial court, however, found that DAC had not unlawfully withheld the documents initially.

On appeal, the District Court reversed. It noted that DAC had been aware of its obligations under the Public Records Act and had, in fact, previously provided the same types of documents to the public voluntarily. The court rejected DAC's argument that it had relied upon a legal opinion from independent outside counsel that the records were not subject to the Act, finding that DAC had withheld relevant factual information from its counsel as to the subject matter of the lobbyists' activities.

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# Administrative Law Section Executive Council Meeting
## March 1, 2002
# Minutes

**I. Call to Order**

The meeting was called to order at 2 p.m. by Executive Council Chair Dave Watkins.

Present: Li Nelson, Booter Imhof, Charlie Stampelos, Paul Rowell, Debby Kearney, Catherine Lannon, Donna Blanton, Robert Downie, Christiana Moore, Cliff Mayhall and Jackie Werndli.
Absent: Dan Stengle, Mary Smallwood, Bill Williams, Linda Rigot, Allen Grossman, Seann Frazier, Clark Jennings, Ralph DeMeo, and Elizabeth McArthur.

**II. Preliminary Matters**

A. The minutes of the October 12, 2001, meeting and long-range planning retreat were approved.

B. The Treasurer's report was given by Bobby Downie and Jackie Werndli. One budget amendment was approved.

C. Chair Dave Watkins gave a report noting that Clark Jennings will serve as liason to the Environmental and Land Use Section for purposes of planning a joint CLE program. Dave also noted that the Section's annual report is due to the Florida Bar on Aril 1, 2002. He congratulated Li Nelson and Dan Stengle for a successful CLE program that was held on January 16, 2002.

**III. Committee Reports**

A. Li Nelson gave the CLE Committee report. She said 105 people attended the CLE conference in January. She also reported on plans for the Pat Dore conference. It was agreed that the conference would be postponed from the Spring of 2002 until the Fall. One problem is finding a suitable location. The Center for Professional Development is no longer allowing groups not affiliated with Florida State University to hold events there. It was agreed that Donna Blanton and Charlie Stampelos would inquire about the CPD situation and ask the FSU Law School to co-sponsor the conference with the section. Several dates in September and October were discussed as possible dates for the conference. Donna Blanton reported that Jim Rossi, the Pat Dore professor at the FSU Law School, is leaving the university to take a position in North Carolina.

B. Charlie Stampelos and Debby Kearney gave the Publications Committee Report. Several articles are planned for the Bar Journal. Ideas for additional articles were discussed. Council members also discussed whether articles should be written objectively or from an advo-

cacy point of view and whether attorneys litigating a particular case should be permitted to write about that case.

C. Linda Rigot gave the Legislative Committee report by telephone. She discussed several bills under consideration in the 2002 legislative session, including one relating to the Certificate of Need process. There also was discussion of legislation supported by the Department of Management Services that would affect the bid protest process, and a proposal that would abolish the Elections Commission and transfer its functions to the Division of Administrative Hearings.

D. No one was present to give the report for the Public Utilities Law Committee.

E. Membership Committee: Booter Imhof reported that the section has 1,206 members.

F. Dave Watkins said that Seann Frazier intends to send flyers to the law schools concerning the Section's student writing contest. The project is expected to intensify in the Fall.

G. Council of Sections: No report.

**IV. Old Business**

Bobby Downie introduced Diann Bradley, of Applied Computing Solutions, Inc., to discuss the possibility of designing a new website for the Section. Ms. Bradley has experience with designing websites for trade associations, the Legislature, and other Bar sections. Her primary focus is on websites for membership organizations. Ms. Bradley discussed several features she could include in a Section website. She also discussed how the site would be updated, and noted that the Section would have much flexibility in the site's content. Following Ms. Bradley's presentation, Bobby Downie moved that the Executive Council hire Applied Computing Solutions to design a Section website. The motion carried. It was agreed that Bobby Downie would serve as the contact with Applied Computing Solutions, Inc. and would circulate information on the project to other Executive Council members.

**V. New Business**

Dave Watkins reported that Ralph DeMeo has resigned from the Executive Council. Discussion was had concerning a possible replacement. Mary Ellen Clark was nominated to replace Ralph DeMeo. It was agreed that she would be invited to serve. Members also noted that Rick Ellis had expressed interest in serving on the council, and it was agreed that he would be considered for the next vacancy.

Council members were reminded that comments on possible changes to the Uniform Rules of Procedure are due to Dan Stengle by April 1, 2002.

**VI. Adjournment**

The meeting was adjourned at 4:30 p.m.

Respectfully submitted,
Donna E. Blanton
Secretary

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**CHAIR'S MESSAGE**

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intent on limiting the due process rights of private parties to challenge agency action.

During the 2002 session, several bills were introduced that would have severely penalized private parties seeking to challenge the preliminary decisions of administrative agencies, or to appeal agency final orders. The Section played a significant role in opposing those bills, and others that would have eroded the APA's due process protections. Once again our Section's legislative co-chairs, Bill Williams and Linda Rigot, are to be commended for their outstanding work in keeping track of all bills that would impact the APA, and in effectively communicating the Section's adopted legislative positions to our lawmakers.

In addition to fending off assaults on the APA, the Section continued its tradition of offering outstanding CLE programs. In January, the Section sponsored the "Ins and Outs of the Administrative Procedure Act," which featured an impressive array of seasoned and talented practitioners. Co-chairs Li Nelson and Dan Stengle are to be commended for their fine work in putting together an extremely successful program. As Chair-elect of the Section, Li is already well along in her planning for the Pat Dore Administrative Law Conference to be held later this fall.

Publications have long been an important focus of the Section, and this year was no exception. As Chair of the Publications Committee, Charlie Stampelos did an outstanding job in coordinating the efforts of the Section's Bar Journal (Debby Kearney) and Newsletter (Elizabeth McArthur) editors. Many thanks to both Debby and Elizabeth for the great job they continue to do in soliciting, editing, and publishing the quality articles that administrative law practitioners have come to expect from the Section.

Under the leadership of Membership Committee co-chairs Booter Imhof and Christiana Moore, the Section has now grown to over 1,100 members. However, the focus has not simply been on numbers, but rather to expand the membership to include a broad range of administrative law practitioners and law students. By all indications, this effort has been successful.

Particularly gratifying was the progress made this year toward the implementation of the Section's website. At its March meeting, the executive council voted approval of the site development plan presented by a local web-design firm. Overseeing the development plan has been Treasurer Bobby Downie, who has devoted untold hours in researching other section websites, interviewing website designers, and identifying content most likely to be of interest to site visitors. The site is expected to become operational later this spring, and initially will focus on links most likely to be of use to the administrative law practitioner, as well as past *FBJ* articles relating to administrative law.

As has become a tradition, the Section's annual retreat was held in

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**CHAIR'S MESSAGE**
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October at Melhana Plantation, in Thomasville, Georgia. This retreat continues to provide an opportunity for the Section to discuss long-range planning ideas and goals in a relaxed, informal setting. My thanks to the many executive council members who participated in the retreat...they were rewarded with the beautiful and tranquil setting of the plantation which seems to be so conducive to long-range planning. Again, special thanks to Li Nelson for serving as coordinator of the retreat.

I have enjoyed serving as your Section Chair this year, and I look forward to watching the continued progress that will be made under the leadership of Li Nelson and the continued involvement of a very able and talented executive council. Finally, thanks to our Section Administrator, Jackie Werndli, for her support throughout the year.

**Mark your calendars!**

# 2002 Pat Dore Administrative Law Conference

**October 24 - 25, 2002**
**Turnbull Conference Center**
**Tallahassee, Florida**

Watch the Bar *News* for details.

**The Florida Bar**
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