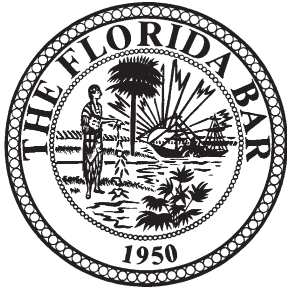

Administrative Law Section Newsletter

Vol. XXVI, No. 4 Elizabeth W. McArthur, Editor June 2005

Appellate Attorney's Fees Under Section 120.595, Florida Statutes

Residential Plaza at Blue Lagoon, Inc. v. Agency for Health Care Administration, 891 So. 2d 604 (Fla. 1st DCA 2005)

by Paul H. Amundsen

Among the statutory provisions for attorney's fees in Florida's Administrative Procedure Act is Section 120.595(5), Florida Statutes. This statute provides for attorney's fees not only for frivolous or meritless appeals, but also where "the agency action which precipitated the appeal was a gross abuse of the agency's discretion."

There is no objective standard to identify a "gross abuse of agency discretion." Examples of such a finding are: *Titzel v. Department of Professional Regulation*, 599 So. 2d 279 (Fla. 1st DCA 1992)(revocation of engineer's license where agency conceded it was error to do so); *Doctors' Osteopathic Medical Center v. Department of Health & Rehabilitative Services*, 498 So. 2d 478 (Fla. 1st DCA 1986)(changing the hearing officer's recommendation under the totality of the circumstances) and *University Community Hospital v. Department of Health & Rehabilitative Services*, 493 So. 2d 2 (Fla. 2nd DCA 1986)(arbitrary denial of certificate of need application).

Recently the First District Court of Appeal applied Section 120.595(5), Florida Statutes, and held that the Agency for Health Care

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From the Chair

by Robert C. Downie, II

As the year winds down, and the weather begins to heat up, let me first say what a privilege and a pleasure it has been to be Section Chair. Seems like a short time ago that I was elected into the Treasurer's slot, wondering and worrying how I could lead such an august group of judges and lawyers in a mere three years. Actually, I'm still wondering, but I have given up on the worrying because it is too late to do anything about it. I deeply appreciate all the help I received this year from the Executive Council, our Bar Liaison Mike Glazer, and of course, Jackie Werndli, administrator extraordinaire.

To update the certification process, our Section and the Government Lawyers Section have reached consensus on the certification proposal for Administrative and Government Law. Please believe me when I say that the road to consensus was rocky and contained a few detours, but the trip was worth it. Barring unforeseen issues, the Board of Legal Specialization and Education will be voting on the proposal at the Florida Bar meeting in June. If all goes according to schedule, the Board of Governors will act on the proposal next January. Depending on how long it takes to set up the program, we could be certifying lawyers in Administrative and Government Law in 2006-07. As I have said before, forecasting is risky business, but these projections look pretty solid.

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FROM THE CHAIR
from page 1

Although I'd like to provide an update on legislation, as of the time this article is being written it is still too early in the session to start making bold predictions. In my limited legislative experience, the day before session ends is often too early. Suffice it to say that the Administrative Procedure Act has not been the subject of as many bills as in years past, although there will likely be some changes with respect to publication of the Florida Administrative Weekly, as well as contemplation of equitable tolling with respect to timely filing petitions. One bill that drew immediate attention would have required legislative approval of every agency rule change. This proposal was later replaced with language dealing with the role of JAPC. My advice is to read future newsletter issues for legislative updates.[1]

It looks as though the Board of Governors will approve changes in the way the Bar finances and Section finances will intermix. Although the actual changes have been sort of a moving target, the basics are that in the future, starting in 2006-07, (1) the Bar will charge each Section a line item expense for some general overhead, a charge the Bar up until now has collected but rebated to the Sections; (2) each Section must contribute, from dues, $17.50 per member, up from $12.50; and (3) the Bar and the Sections will split CLE proceeds on a net, rather than gross, profit basis (i.e., if a CLE course does not make money, the Section will make no money). The changes should not have too great an impact on our Section, although we have already voted to raise dues by $5 to $25 per member. Otherwise, we would have faced either raising dues further or possibly sustaining a year-end loss.

One thing I will not miss as Chair is writing these quarterly columns. I frequently nod off while doing so, and I can only imagine how many other cases of insomnia I have cured. For those of you who "bore" with me (get it?), I appreciate your dedication and admire your fortitude. In an effort to reward such effort with something useful, here is a top ten list of strategies I found really helped me this year as Chair:

1. On difficult issues, have lots and lots and lots of meetings.
2. Figure out who your friends are, and then tick them off.
3. Stay [on] the [golf] course.
4. Use the Chair's column as a way to communicate with the Section and watch the responses roll in!
5. Have a clear message. Something like, "Hello, I am out of the office right now so please leave your name and . . . ."
6. Find a good scapegoat (not as easy as it sounds).
7. Remember that history repeats itself, and it's always five o'clock somewhere.
8. Make sure you are surrounded by capable, bright, energetic, gullible people.
9. Take "no" for an answer, as long as the question is, "Do you mind if I pull rank on you?"
10. Practice holding your breath for an entire legislative session.

Hope everyone has a great summer.

Endnotes

[1] Larry Sellers in years past has been kind enough to provide newsletter and Bar Journal articles on APA legislative activity, although for Larry this is often akin to writing "What I Did During Spring Break."

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

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Apples and Oranges

Kerper v. Department of Environmental Protection, 894 So. 2d 1006 (Fla. 5th DCA 2005)

by Sam Power

Counsel for a state agency may find her/himself defending the agency's free form decision[1] in a Section 120.57(1)[2] hearing when, unexpectedly, her opponent challenges the validity of the free form decision asserting the applicable agency policy or statutory interpretation (hereinafter "unadopted rule")[3] meets the definition of a rule but has not been adopted as a rule. A timely objection on the grounds that the proceeding is not a rule challenge under Section 120.56 should keep the proceeding on track, but what if the objection is overruled? Even worse, what if an unadopted rule issue is raised for the first time on appeal?

Since 1993 the APA has mandated rulemaking[4] when feasible, but the APA leaves open a small window in Section 120.57(1)(e) for using an unadopted rule in a Section 120.57(1) proceeding. Furthermore, the APA provides that the exclusive remedy for a violation of the rulemaking mandate is a Section 120.56(4) challenge proceeding. *See* §120.56(4)(f). If a Section 120.56(4) challenger is successful, the agency must immediately cease all reliance on the unadopted rule. *See* §120.56(4)(d).

Consider the *Kerper* opinion. Mr. Kerper and his business initiated a Section 120.57(1) proceeding to challenge the Department of Environmental Protection's ("DEP") free form determination that he was obligated to clean up contamination caused by used motor oil spilled on his business premises. DEP prevailed at the Division of Administrative Hearings ("DOAH") and adopted the recommended order. DEP's failure to adopt the applicable policy as a rule was not raised at DOAH.

Mr. Kerper appealed to the Fifth District Court of Appeal. The Court reversed DEP's final order on two grounds: **first**, the lack of competent substantial evidence supporting the free form determination; and **second**, DEP's failure to adopt as a rule the policy it used in making its free form determination. Had the Court stopped with the first grounds for reversal, the opinion would raise no concerns about inconsistency with the APA or precedent.

What does the APA say about an agency relying on an unadopted rule in a Section 120.57(1) proceeding? It is permitted, so long as the agency is able to explicate the unadopted rule before the Administrative Law Judge (hereinafter ALJ) as set forth in Section 120.57(1)(e). In contrast to an adopted rule, the unadopted rule enjoys no presumption of validity. Subsection (1)(e)2. describes the showing required of the agency's counsel to explicate an unadopted rule before the ALJ. The *Kerper* opinion does not mention this option.

The APA allows a person substantially affected by a proposed rule, an existing rule, an emergency rule, or **an unadopted rule** to initiate a rule challenge proceeding in which the ALJ, <u>not</u> the agency, has final order authority. *See* §120.56(1) through (5). Counsel for the substantially affected party in a Section 120.57(1) proceeding is well advised to initiate a concurrent Section 120.56 challenge if there is a substantial issue about the validity of a rule, adopted or unadopted, relied on by the agency. For a case where such a strategy was successfully used, see *Department of Children and Family Services v. I.B. and D.B.,* 891 So. 2d 1168 (Fla. 1st DCA 2005).

In a Section 120.56(4) proceeding, agency counsel can defend the continued use of an unadopted rule only by proving that rulemaking is neither feasible nor practicable. To prevail, agency counsel must persuade the ALJ that the unadopted rule is truly incipient and evolving policy,[5] or that adjudication on a case by case basis is the more effective means of implementing the underlying statute.[6] Section 120.54(1)(a) describes the factual basis an agency must prove to establish that rulemaking is neither feasible nor practicable. If agency counsel is unsuccessful in defending an unadopted rule in a Section 120.56(4) proceeding, the agency must "immediately discontinue all reliance" on the unadopted rule, <u>**and**</u> pay the challenger's attorney's fees! *See* §§120.56(4)(d) and 120.595(4). In fact, agency counsel's best course of action in a Section 120.56(4) proceeding is usually to advise his client to retreat, *i.e.,* prior to the final hearing the agency may initiate rulemaking and thereby avoid the risk of a slam dunk by the challenger. *See* §120.56(4)(e); *Osceola Fish Farmers v. South Florida Water Management District,* 830 So. 2d 932 (Fla. 4th DCA 2002). Contrast this slam dunk outcome to a Section 120.57(1) proceeding where, subject to the explication requirement, an agency may rely on an unadopted rule.

In *Exclusive Investment v. Agency for Health Care Administration***,** 21 F.A.L.R. 1742 (AHCA 1999); *aff'd without opinion,* 731 So. 2d 1275 (Fla. 1st DCA 1999), the ALJ used the rule challenge "feasibility" test in a Section 120.57(1) proceeding to reject the agency's free form decision based on an unadopted rule. The agency rejected the recommended order, successfully relying on *Christo v. Department of Banking and Finance,* 649 So. 2d 318 (Fla. 1st DCA 1995); *rev. dismissed*, 660 So. 2d 712 (Fla. 1995) [Citing the plain language of the statute, the Court held that a Section 120.56(4)[7] proceeding is the exclusive APA remedy for challenging an agency's use of an unadopted rule]. In *Manasota-88, Inc. v. Department of Environmental Regulation,* 481 So. 2d 948 (Fla. 1st DCA 1986), the Court remanded for further Section 120.57(1) proceedings to allow DEP's predecessor agency the opportunity to explicate the unadopted rule it relied on to make the free form decision at issue. The *Manasota* opinion includes citations going as far back as the venerable opinion in *McDonald v. Department of Banking and Fi-*

continued...

APPLES AND ORANGES
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nance, 346 So. 2d 569, 577 (Fla. 1st DCA 1977), on the explication of an agency's policy statement which has not been adopted as a rule.

The bottom line: Agency counsel should strongly advise his agency to formally adopt a policy or statutory interpretation when rulemaking is feasible. But if he finds himself in a Section 120.57(1) final hearing in which his agency has relied on an unadopted policy or statutory interpretation, he should have a witness standing by prepared to give testimony explicating the unadopted rule.

Endnotes:

[1] A "free form decision" is a decision by an agency's staff, which has ripened to the point where written notice to the substantially affected person must be given along with notice of the right to initiate an adjudicatory proceeding under Sections 120.569 and 120.57. *See e.g.,* Capeletti Brothers v. Dept. of Transportation, 362 So. 2d 346 (Fla. 1st DCA 1978)(Free form proceedings are the "every day" way that an agency makes its regulatory decisions, as distinguished from legally structured adjudicatory proceedings under the Administrative Procedure Act.)

[2] References to Chapter 120, Florida Statutes, are abbreviated by using the "APA".

[3] In the evolution of the APA, this has been referred to variously as policy, "nonrule policy," "incipient policy," and "incipient rulemaking."

[4] The rulemaking mandate is now found at Section 120.54(1)(a).

[5] For more on incipient agency policy, see *Christo v. Department of Banking and Finance,* 649 So. 2d 318, 320 (Fla. 1st DCA 1995); *rev. dismissed,* 660 So. 2d 712 (Fla. 1995).

[6] *Cf., Department of Legal Affairs v. Father and Son Moving & Storage,* 643 So. 2d 22 (Fla. 4th DCA 1994); *rev. den.*, 651 So. 2d 1193 (Fla. 1995).

[7] Formerly Section 120.535.

***Sam Power** graduated from the University of Florida, for both undergraduate and law school. He has been working extensively with the APA since 1985. He has served as agency clerk at both HRS and AHCA, and presently serves as agency clerk at the Department of Health. As agency clerk at those agencies, his duties have included drafting the final orders for Section 120.57(1) and (2) proceedings.*

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THE FLORIDA BAR

APPELLATE CASE NOTES

by Mary F. Smallwood

Rulemaking

Kerper v. Department of Environmental Protection, 30 Fla. L. Weekly 215 (Fla. 5th DCA, January 14, 2005)

Kerper operated an auto parts salvage operation on land leased from Donald Joynt. After a property dispute between the parties, Kerper vacated the property prior to an inspection performed by the Department of Environmental Protection ("DEP"). During that inspection, Joynt told DEP that Kerper was responsible for a leaking 55 gallon drum, containing what appeared to be used oil, and other materials disposed of on site. DEP issued a Notice of Violation against both parties. Joynt settled with DEP, but Kerper requested an administrative hearing.

The administrative law judge found that Kerper was guilty of one count of failing to respond to used oil discharges, and DEP entered a final order adopting the recommended order. The final order provided that Kerper was jointly and severally liable with Joynt to conduct activities set forth in DEP's Corrective Actions for Contaminated Site Case. That document contains specific actions that must be performed by responsible parties where there is contamination at a site, including assessment of the contamination and remedial activities.

On appeal, Kerper argued that the Corrective Actions document was an unpromulgated rule. The court agreed and reversed. The court held that the Corrective Actions were clearly statements of general applicability under Section 120.52(15), Fla. Stat., and created mandatory duties for respondents in enforcement actions by DEP. It rejected arguments by DEP that Section 376.30701, Fla. Stat. (2003), gave DEP the authority to use the Corrective Actions. That statute was adopted to provide that DEP use risk based corrective action in a variety of cleanup situations. In fact, the court noted that Section 376.30701 specifically required the agency to adopt implementing rules by July 2004.

Kerper also argued that there was insufficient evidence to support a finding that he was responsible for the used oil contamination. Again, the court agreed. It found that there was no evidence that the discharge from the 55 gallon drum occurred before Kerper vacated the property. Moreover, the court was concerned that DEP staff simply presumed the discharged materials were used oil based on site observations without conducting laboratory sampling. While it did not decide whether DEP must conduct analytical testing in every enforcement case, it rejected DEP's reasoning that doing so would be too expensive.

Department of Children and Family Services v. I.B. and D.B., 30 Fla. L. Weekly 306 (Fla. 1st DCA, January 31, 2005)

I.B. and D.B. challenged a rule of the Department of Children and Family Services providing that individuals attempting to adopt foster children did not have the right to challenge a decision of the Department placing the children in another home. In this case, the petitioners had been foster parents to the child for more than six months and applied to adopt the child when parental rights were terminated. The Department, however, placed the child with other relatives. At the time the foster parents' application was denied, the Department's rules required that applicants be notified of the Department's decision with respect to an adoption application and be given notice of their right to a Section 120.57 hearing. I.B. and D.B. filed a request for formal hearing which was referred to the Division of Administrative Hearings. Subsequent to that referral, the Department adopted the challenged rule, and the petitioners filed the rule challenge.

The administrative law judge in the rule challenge held that the rule was an invalid exercise of delegated legislative authority, concluding that the Department did not have specific statutory authority to adopt the rule. The court affirmed.

The Department had cited Sections 120.57 and 120.68, Fla. Stat., in conjunction with Sections 409.026(8) and 409.145, Fla. Stat., as the law being implemented by the rule. The court concluded that the cited provisions of the Administrative Procedure Act provided no authority for an agency to unilaterally exempt itself from the Act. It noted that Section 409.026(8) had been repealed prior to the rule being proposed. Finally, Section 409.145 conferred only broad powers and duties on the Department and contained no language that would give the Department the right to eliminate a substantially affected person's right to a hearing.

Review of Recommended Order

Roche Surety and Casualty Co., Inc. v. Department of Financial Services, 30 Fla. L. Weekly 386 (Fla. 2d DCA, February 9, 2005)

Roche and Willie David, a bail bondsman, entered into an agreement under which Roche held build-up funds to secure open bail bond liabilities. That agreement was terminated by the parties in June 2000. A year later, David complained to the Department that Roche had not returned the funds, in violation of Section 648.29(3), Fla. Stat. The relationship between David and Roche became acrimonious, and Roche filed a lawsuit alleging that David engaged in defamation and civil extortion.

On March 3, 2003, the Department sent Roche a letter advising it that David had discharged all of his liabilities on August 23, 2002, making repayment of the build-up funds due on February 23, 2003. Roche immediately filed a motion in circuit court seeking a prejudgment writ of attachment for the build-up funds to protect its interests. While the court conducted a hearing on the motion in

continued...

APPELLATE CASE NOTES
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March, it did not enter an order granting the request until August 2003. David consented to the entry of that order.

In September 2003, the Department entered an order to show cause against Roche alleging that it had violated Section 648.29(3) by failing to repay the build-up funds in a timely manner. Roche requested a formal administrative hearing. After a final hearing, the administrative law judge entered a recommended order finding that there had not been a willful violation as required by Section 648.29(3) and concluding that Roche was entitled to keep the funds until the circuit court order was modified or withdrawn.

The Department adopted the findings of fact, but disagreed with what it deemed a conclusion of law, that Roche's holding of the funds between February 25, 2005, and the entry of the circuit court order in August was a willful violation of the statute. It imposed a $10,000 penalty in the final order.

On appeal, the court reversed. It held that the Department had incorrectly characterized the determination of willfulness as a conclusion of law when it was a factual determination within the sole purview of the administrative law judge.

Standing

Toth v. South Florida Water Management District, 30 Fla. L. Weekly (Fla. 4th DCA, February 9, 2005)

Toth, a chief environmental scientist for the Water Management District, challenged an action of the District demoting him and transferring him to another regional office of the District. The District dismissed the petition on the grounds that his substantial interests had not been affected. On appeal, the court affirmed.

The court held that since Toth had no employment contract with the District, he had no substantial rights being affected. It rejected Toth's reliance on *Hasper v. Department of Administration*, 459 So. 2d 398 (Fla. 1st DCA 1984), where a Senior Management Service employee was allowed to challenge the agency's dismissal because at that time there was a statutory right to file a challenge. Here, the court noted, there was no statute authorizing such a challenge.

Dillard & Associates Consulting Engineers v. Department of Environmental Protection, 30 Fla. L. Weekly 512 (Fla. 1st DCA, February 22, 2005)

The Department of Transportation ("DOT") and Dillard & Associates entered into an agreement under which Dillard & Associates operated five DOT wastewater treatment plants. Under the agreement, Dillard & Associates was to obtain necessary regulatory permits. The agreement further provided that Dillard & Associates would pay any fines or penalties related to the operation of the plants. The Department of Environmental Protection ("DEP") determined that certain violations of its rules, including failure to obtain a required permit, had occurred. To resolve these alleged violations, DOT entered into a consent order with DEP under which it agreed to pay penalties of $45,000.

Dillard & Associates filed a petition for formal administrative hearing challenging whether a penalty should be imposed on DOT and whether the amount of the penalty should be mitigated or reduced. DEP dismissed the petition with prejudice, concluding that Dillard & Associates' substantial interests were not affected by the consent order between DEP and DOT.

The court affirmed. It agreed with the DEP that Dillard & Associates was not bound by the consent order since it had not been afforded an opportunity to appear. Accordingly, Dillard's substantial interests were not affected. Instead, Dillard could contest the factual basis for its liability as an indemnitor in circuit court.

Timeliness

Department of Corrections v. Chesnut, 30 Fla. L. Weekly 160 (Fla. 1st DCA, January 7, 2005)

Chesnut, a career service employee of the Department of Corrections, was notified that his position was being reclassified to select exempt service. Shortly thereafter, he received notice of his termination from employment. That notice, which did not give a reason for his dismissal, stated that as a select exempt employee he had no right to appeal his termination to the Public Employees Relations Commission (PERC). Chesnut did not file an appeal of his dismissal.

Approximately a year later, he learned that the Department had informed the Criminal Justice Standards and Training Commission that Chesnut had been dismissed because of substantiated charges of sexual harassment. He requested a formal administrative hearing to contest those charges and clear his name. The administrative law judge found that the charges were not substantiated and that Chesnut's name should be cleared. While the Department adopted most of the findings of fact, it rejected the judge's conclusions of law as to what constitutes sexual harassment and his recommendation that Chesnut's name be cleared. Chesnut did not appeal.

Subsequent to these events, the First District issued its opinion in *Dickens v. Department of Juvenile Justice*, 830 So. 2d 135 (Fla. 1st DCA 2002), holding that a public employee has the right to appeal a suspension where the events resulting in the suspension arose while the employee was career service even though the position was subsequently reclassified as select exempt. Based on this decision, Chesnut filed an appeal with PERC of his 1999 termination.

The PERC hearing officer concluded that the time for filing the appeal should be equitably tolled based on *Machules v. Department of Administration*, 523 So. 2d 1132 (Fla. 1988). PERC agreed, ordering Chesnut reinstated and awarding back pay. PERC concluded that the termination letter was clearly misleading about Chesnut's rights to appeal his termination.

On appeal, the Department argued that the letter was not clearly misleading and that *Dickens* could not be applied retroactively. The court agreed and reversed. The court held that the termination letter was an accurate statement of the law at the time it was sent. Therefore, the conclusion that the letter was misleading essentially resulted in the retroactive application of the *Dickens* case. It held that retroactive applica-

tion is only appropriate when the issue has been raised in the lower tribunal and the case is either pending or not yet final.

Licensing
Residential Plaza at Blue Lagoon, Inc. v. Agency for Health Care Administration, 30 Fla. L. Weekly 259 (Fla. 1st DCA, Jan. 24, 2005).

See feature article.

Emergency Orders
Daube v. Department of Health, 30 Fla. L. Weekly 514, Order Granting Motion for Stay (Fla. 1st DCA, February 22, 2005)

Daube challenged an emergency order of the Department of Health suspending his license to practice medicine. The emergency order was issued based on Daube's use of an unapproved product for wrinkle reduction procedures without his patients' knowledge. Daube argued that he had immediately ceased use of the product when he became aware of reports of danger associated with the product and destroyed his remaining supply.

The court granted Daube's motion to stay the emergency suspension of his license, and issued an opinion to explain its ruling. It concluded that the order was overly broad. It noted that the order did not allege that any of the patients were injured or harmed by the use of the product. Therefore, the court granted the stay on condition that Daube halt all use of the product, and the Department was authorized to oversee Daube's compliance with the provisions of the stay.

Attorney's Fees
Daniels v. Department of Health, 30 Fla. L. Weekly 143 (Fla., March 10, 2005)

Daniels prevailed in an administrative enforcement action by the Department of Health when the Department voluntarily dismissed its complaint prior to a final hearing. She then sought attorney's fees under Section 57.111, Fla. Stat., the Florida Equal Access to Justice Act. The Administrative Law Judge denied that request, finding that she was not a "small business party" as that term is defined in Section 57.111(3)(d), relying on *Florida Real Estate Comm'n v. Shealy*, 647 So. 2d 151 (Fla. 1st DCA 1994). The Third District affirmed; and Daniels appealed, alleging conflict with *Albert v. Department of Health*, 868 So. 2d 1130 (Fla. 4th DCA 1999) and *Ann & Jan Retirement Villa, Inc. v. Department of Health and Rehabilitative Services*, 580 So. 2d 278 (Fla. 4th DCA 1991).

Daniels was the sole owner of South Beach Maternity Associates, Inc., a subchapter-S corporation. In affirming the decision below, the Court concluded that the language of Section 57.111, Fla. Stat., was clear and unambiguous. A small business party is defined as either "a sole proprietor of an unincorporated business" or "a partnership or corporation." In this case, the administrative complaint was directed at Daniels in her individual capacity, not at her corporation. Thus in this case, Daniels did not fit under either statutory category. The court noted that the result of this interpretation might be seen as unfair by preventing a prevailing party from collecting attorney's fees where the action was brought against the individual. However, it further noted that the federal Equal Access to Justice Act, upon which the state law was based, very specifically provided for an award to an individual regardless of whether a corporation was involved. It concluded that the Florida Legislature could easily have provided for such an award in the state act.

Statutory Construction
Osorio v. Board of Professional Surveyors and Mappers, 30 Fla. L. Weekly 712 (Fla. 5th DCA, March 11, 2005)

Osorio, who had attended the National University of Costa Rica and obtained the equivalent of an Associate in Science degree, applied to take the licensure examination for land surveying. He asserted that he qualified to take the exam under Section 472.013(2)(a), Fla. Stat. After an informal hearing, the Board denied his request on the grounds that he did not have a four-year degree.

Section 472.013(2)(a) provided that an applicant was eligible to take the licensure exam where he was a graduate of an approved course of study in surveying and mapping and had 4 or more years of specific experience as a subordinate to a professional surveyor in the active practice of surveying and mapping. The course of study must include a minimum of 32 semester hours of study in the area of surveying and mapping. In contrast, Section 472.013(2)(b) required that the applicant have a degree from a 4-year course of study other than in surveying and mapping, together with 6 years of experience. The Board argued that Section 472.013(2)(a) was ambiguous as to whether the applicant must have a 4-year degree and the interpretation of the provision was within the discretion of the agency.

On appeal, the court reversed. It concluded that the Legislature clearly required a 4-year degree in Section 472.013(2)(b) and could have done the same in subsection (2)(a). It rejected the Board's argument that a "course of study" at a university or college would necessarily result in a 4-year degree.

Public Records
Doe v. State of Florida, 30 Fla. L. Weekly 807 (Fla. 4th DCA, March 23, 2005)

"John Doe" filed an emergency petition for a writ of prohibition to prevent the State Attorney's Office from releasing unredacted documents that would reveal his identity. He stated that he had written to the State Attorney's Office alleging possible illegal activity involving the Mayor of Lighthouse Point with respect to local building code violations. After the investigation was complete, the State Attorney found no illegal activities had occurred, although building code violations did occur. The State Attorney then indicated that certain materials would be made public since the investigation was finished.

The circuit court concluded that since there was no definition under Section 119.07(3)(c) of the Public Records Act of a "confidential source," the agency could exercise its own discretion in determining whether to keep the source of the initial complaint confidential. The judge declined to disturb the State Attorney's decision with respect to confidentiality.

On appeal, the district court re-

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APPELLATE CASE NOTES
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versed. It relied on two cases that it found to be analogous, although neither addressed the state Public Records Act. In *State v. Natson*, 661 So. 2d 926 (Fla. 4th DCA 1995), the court had construed the provisions of Florida Rule of Criminal Procedure 3.220(g)(2) regarding disclosure of the identity of a confidential informant who was not going to be called as a witness in a criminal proceeding. In *Department of Justice v. Landano*, 508 U.S. 165 (1993), the United States Supreme Court construed the meaning of "confidential source" under the federal Freedom of Information Act. Here, the district court concluded that John Doe was justified in inferring that his identity would be confidential even though the State Attorney never expressly guaranteed that confidentiality. The court noted that he had informed the State Attorney at every step of the process that he required confidentiality and was never told that it would not be assured.

Cubic Transportation Systems, Inc. v. Miami-Dade County, 30 Fla. L. Weekly 921 (Fla. 3rd DCA, April 6, 2005)

The case arose on an order of the trial court compelling production of documents. The appellant argued that the documents in question were trade secrets and exempt from disclosure. The district court agreed with the trial court that appellant had failed to take reasonable efforts to claim a trade secret privilege. In this situation, Cubic Transportation had failed to mark the documents as confidential and continued to supply them for some time to the county without claiming a privilege.

Administrative Jurisdiction

Mendez v. Department of Revenue, 30 Fla. L. Weekly 741 (Fla. 2d DCA, March 16, 2005)

Mendez received a notice from the Department of Revenue to establish administrative support for three minor children. The notice specifically stated that neither the Department nor the Division of Administrative Hearings had jurisdiction to establish paternity in the administrative proceeding and that a circuit court hearing would be provided if requested. Mendez returned the notice and indicated that he wanted a circuit court hearing "for DNA testing" before agreeing to support payments.

The Department subsequently issued a proposed administrative support order which advised Mendez of his right to request an administrative hearing. After an administrative hearing, the administrative law judge ordered him to pay support for all three children.

On appeal, the court reversed. It found that Mendez was clearly challenging paternity by requesting DNA testing in his response to the initial order. Since the Department had no authority to make a determination of paternity, Mendez should have been afforded a circuit court hearing for that purpose.

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

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Agency Snapshots

Agency for Workforce Innovation

The Florida Legislature created the Agency for Workforce Innovation (AWI) in 2000 as the state agency responsible for ensuring that workforce funds and programs are appropriately administered. Florida's landmark Workforce Innovation Act of 2000 consolidated workforce programs into a single point of policy accountability at the state level (see sections 20.05 and 445.004, Florida Statutes). In its support role, AWI is responsible for ensuring that workforce funds and programs are appropriately administered. While the Governor appoints AWI's Executive Director, the Agency operates under a performance-based contract with Workforce Florida, Inc. (WFI). The Agency carries out its duties and responsibilities through cooperative agreements with each of the state's 24 Regional Workforce Boards (RWBs). The contracts are structured to allow for local innovation and service delivery through the One Stop Career Centers, while ensuring the federal funds that the RWBs receive are spent appropriately and generate desired results. Primarily, contracted service providers selected by each Regional Workforce Board now provide workforce services in partnership with state employees, contracted employees, and RWB employees.

The Workforce Innovation Act of 2000 also transferred the Unemployment Compensation Program from the former Department of Labor and Employment Security to AWI. The Agency is responsible for administering the program (see Chapter 443, Florida Statutes), the purpose of which is to provide temporary wage replacement benefits to qualified individuals who are unemployed through no fault of their own. The Workforce Innovation Act of 2000 also directed the Agency to contract with the Department of Revenue for unemployment tax collection services. In 2002, the Unemployment Appeals Commission (UAC or Commission) was transferred to AWI from the former Department of Labor and Employment Security. The Commission is housed in AWI for administrative support purposes. Pursuant to Chapter 443, Florida Statutes, the Commission, a quasi-judicial administrative appellate body, is the highest level of administrative review for contested unemployment compensation cases.

In addition to administering workforce and unemployment compensation ("UC") programs, in 2001, the Legislature transferred the Florida Partnership for School Readiness (FPSR or Partnership) and the responsibility for administering school readiness programs to AWI. Established in section 411.01, Florida Statutes, the mission of the Partnership is to ensure that all children are emotionally, physically, socially and intellectually ready to enter school and ready to learn.

Effective January 2005, pursuant to House Bill 1A, the Florida Partnership for School Readiness was abolished. All powers, duties, functions, property and funds were transferred to the Agency for Workforce Innovation, Office of Early Learning. In addition, the legislation tasked the Agency with the administrative and operational requirements of the voluntary pre-kindergarten (VPK) education program.

Agency Head's name, title, address and telephone number

- Susan Pareigis, Director
- Agency for Workforce Innovation
  Office of Director
  107 East Madison St.
  Caldwell Building, MSC#100
  Tallahassee, FL 32399-4122
  (850) 245-7298

Whether the agency is a cabinet or gubernatorial agency

- AWI is a Governor Agency.

General Counsel's name, address and telephone number

- Gary Holland
- Agency for Workforce Innovation
  Office of General Counsel
  107 East Madison St.
  Caldwell Building, MSC#110
  Tallahassee, FL 32399-4122
  (850) 245-7150

Educational Background of General Counsel

• Gary Holland attended the United States Military Academy at West Point from 1968 through 1972 where he received a Bachelor of Science degree, with a concentration in National Security and Public Affairs. He graduated from Stetson University College of Law, *Magna Cum Laude*, in 1979. He received his Master's degree equivalent (with honors) at the U.S. Army Command and General Staff College and his LL.M. equivalent (with honors) at the Judge Advocate General's School. Mr. Holland served 29 years on active duty in the US Army before returning to Florida to begin his state employment.

Agency Clerk's name, telephone, physical location for filing, hours of operation

• Veronica Moss; (850) 245-7150

• The agency clerk is housed in the Office of General Counsel. Hours of operation are 8:00 a.m. until 4:30 p.m.

Number of lawyers on staff

• When fully staffed, AWI has 6 attorneys on staff.

Kinds of cases handled by the Agency; percentage that involves use of the APA

• As a pass-through agency for federal grant monies, AWI is responsible for resolving a grant recipient's year-end audit. This process may involve AWI disallowing grant monies if it is determined that these funds were not properly expended. In cases of such a disallowance, a grant recipient has a right to challenge that determination at the Division of Administrative Hearings ("DOAH"). Other types of cases include Unemployment Compensation hearings, hearings at the Public Employee Relations Commission, Risk Management cases, Labor and Employment arbitrations, federal bankruptcy and foreclosure cases and any resulting appeals.

Florida's Workforce Services pro-

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AGENCY SNAPSHOTS
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gram has been set up in a way that AWI makes few agency decisions that adversely affect a substantial interest. As such, AWI has a very small percentage of cases involving the APA. However, this is likely to change with the addition of the Early Learning program to AWI.

How does Chapter 120 affect the mission of the Agency?

• AWI's mission is to "Advance Economic Prosperity." The Agency for Workforce Innovation provides innovative and timely support services to Florida's Workforce and School Readiness Systems to create a globally competitive workforce and advance Florida's economic prosperity. Chapter 120 has little effect upon the mission of the agency.

• The Office for Early Learning, housing both the School Readiness and VPK programs, became a part of AWL in January 2005. The mission of this program is to establish a unified approach and specific strategies for systemic change – through local early learning coalitions and interagency partnerships – to ensure that all children are emotionally, physically, socially and intellectually ready to enter school and ready to learn, fully recognizing the crucial role of parents as their child's first teacher.

How does the rulemaking process affect the Agency?

• AWU has promulgated workforce grievance rules using the adoption of federal standards as authority. (See s. 120.54(7)). AWI has longstanding UC rules and recently promulgated School Readiness rules. The Agency is now beginning to formulate rules for the VPK program.

What changes to the APA are desirable?

• Due to the privatization of many functions of the government to either private non-profits or legislatively created corporations, boards, commissions etc., the definition of "agency" may need to be reviewed if the legislative intent is for the APA to apply to private entities carrying out governmental functions.

Tips for practice before the agency.

• Be aware of and familiar with the relationships the agency has with the various private organizations that partner in administering the workforce programs and early learning programs.

Department of Community Affairs

The Department of Community Affairs, headed by a Secretary who is appointed by the Governor, is probably best known as the agency with primary responsibility for state oversight of growth management. This past hurricane season, the agency's role in coordinating emergency response thrust DCA into the spotlight as the state responded to 4 major hurricanes. The Department is also noted for its significant housing and community development grant programs. DCA is organized according the following divisions: Division of Community Planning, Housing & Community Development, and Emergency Management. In addition, the Department supports the Florida Communities Trust, the Florida Building Commission, Front Porch Florida, and a Special District Information Program.

Head of the Agency:
Thaddeus L. Cohen, A.I.A., Secretary
850-488-8466

Agency Clerk:
Paula Ford
850-488-0410

Hours of Operation:
M-F; 8:00 a.m. to 5:00 p.m.

Mailing Address:
2555 Shumard Oaks Boulevard
Tallahassee, FL 32399-2100

General Counsel:
Heidi Hughes
850-488-0410

After graduating from Emory University School of Law, Heidi Hughes entered private practice in Atlanta, concentrating in the area of commercial litigation. Since her arrival in Florida about seven years ago, Heidi has served as an Assistant General Counsel for the Agency for Health Care Administration and for the Department of State. Prior to being named General Counsel for the Department of Community Affairs, she served as Deputy General Counsel to Governor Jeb Bush.

Kinds of Cases: Most cases are growth management cases involving chapters 163 and 380 and virtually all are subject to the APA.

Number of Lawyers on Staff: 12 positions all located in Tallahassee.

Practice Tips: DCA program staff and attorneys are always willing to discuss issues and potential problems to avoid litigation where possible. Their practice includes meeting with prospective litigants in an effort to resolve matters.

Be aware that in the growth management area, Chapter 120 procedures interface with unique procedures in chapters 163 and 380. So it is important to check all applicable chapters.

APPELLATE ATTORNEY'S FEES
from page 1

Administration's interpretation of a statute was so erroneous and illogical that it was a gross abuse of agency discretion. Consequently, the court awarded attorney's fees to the appellant assisted living facility ("ALF"). *Residential Plaza at Blue Lagoon, Inc. v. Agency for Health Care Administration,* 891 So. 2d 604 (Fla. 1st DCA 2005).

The facts leading up to AHCA's erroneous statutory interpretation are relevant to the attorney's fee award. Residential Plaza at Blue Lagoon, Inc. ("RPBL") holds a standard ALF license, and also has an Extended Congregate Care ("ECC") license. An ECC license allows an ALF to maintain, in a residential environment, residents whose mental or physical conditions otherwise disqualify them from residing in an ALF. In June 2001, an AHCA survey resulted in two Class II deficiencies. The surveyor recommended no sanctions and shortly thereafter AHCA noted by letter that RPBL corrected the deficiencies. In September 2001, AHCA issued an ECC license to RPBL. In the following December, after another AHCA survey, AHCA sent a letter to RPBL stating that a recommendation for renewal of the ECC license would be forwarded to Tallahassee. The ECC license would be due for renewal September 22, 2003.

In August 2002, over a year after AHCA identified and seemingly disposed of the Class II deficiencies, AHCA filed an administrative complaint seeking a $1,000 fine and a $500 survey fee as a sanction for the same June 2001 Class II deficiencies. There was no hearing and RPBL paid the fine and survey fee. Then, in July 2003, AHCA sent notice to RPBL that it proposed to deny the renewal of RPBL's ECC license based on AHCA's conclusion that RPBL failed to meet licensure standards because it had been sanctioned for a Class II deficiency during the previous two years.

RPBL filed a detailed petition for a formal administrative hearing on the denial. Attached to and incorporated into the petition were various documents from AHCA's files that chronicled the above chain of events. AHCA, however, denied the request for hearing and dismissed the petition with prejudice. AHCA's position was that denial of the ECC license was mandatory under Section 400.407(3)(b)1, Florida Statutes. Therefore, AHCA concluded that RPBL's petition was incurably defective.

On appeal, RPBL contended that AHCA seriously misinterpreted the statute, which provides, in part:

> Existing facilities qualifying to provide extended congregate care services must have maintained a standard license and may not have been subject to administrative sanctions during the previous 2 years, or since initial licensure if the facility has been licensed for less than 2 years, for any of the following reasons:
>
> a. A class I or class II violation.

On appeal, RPBL argued that this so-called statutory "two year look-back" applied only to *initial* applications for ECC licensure, but *not renewals*. The two year look-back, RPBL asserted, is presented in the section of Chapter 400 that deals with initial ECC licensure. Renewals of ECC licenses are covered elsewhere, in Section 400.417, Florida Statutes. Nothing in Section 400.417 discusses or alludes to the two year look-back in Section 400.407, Florida Statutes. Further, the administrative rules promulgated pursuant to Chapter 400, Florida Statutes, make it clear that the two year look-back in Section 400.407 applies to those facilities desiring to "establish" ECC services rather than the renewal of an ECC license. *See* Rules 58A- 5.014 and 58A-5.015, Fla. Admin. Code.

The court agreed, correctly noting that by statute ECC licenses are to be renewed every two years; therefore, under AHCA's interpretation of the statute, any Class II violation would automatically require renewal to be denied. The court found that AHCA's interpretation of the statute was "illogical and patently inconsistent with other statutory provisions that specifically address license renewals and sanctions for violations." 891 So. 2d at 606.

On the award of attorney's fees, the court noted that AHCA did not respond to any of RPBL's substantive arguments, but merely asked the court to remand the case to AHCA for an informal hearing. The court observed:

> [T]his appeal should have never ensued. As a result of this appeal, the administrative process has been delayed; monies, both public and private, have been expended in a non-essential manner; and the resources of the judicial system have been taxed without purpose. Accordingly, and reiterating the conclusions we have reached in the body of this opinion, we find that the action which precipitated this appeal was a gross abuse of agency discretion.

891 So. 2d at 607.

The finding of a "gross abuse of discretion" in this case involved something more than AHCA's clearly erroneous interpretation of the statute. Other conduct by AHCA before the court included the following:

- The dismissal of RPBL's petition for hearing, with prejudice; then, later, asserting that an informal hearing should have been convened;
- Failure to respond to any of RPBL's substantive arguments;
- The seemingly haphazard, inconsistent conduct relating to the deficiencies in question, chronicled in the court's opinion.

This case, therefore, presents yet another example of what a reviewing court considers a "gross abuse of discretion." But also, for the administrative law practitioner, the critical thing this case teaches is the importance of the record on appeal. Facts are an essential ingredient to any finding of a "gross abuse of agency discretion." A clearly erroneous reading of the statute, alone, does not appear to be sufficient. *See Ocampo v. Department of Health*, 806 So. 2d 633 (Fla. 1st DCA 2002)(agency statutory interpretation found to be clearly erroneous without discussion of agency abuse or attorney's fees). In the present case, there was no evidentiary hearing and thus no hearing record. RPBL's petition, however, was lengthy and detailed. Attached to it

continued...

APPELLATE ATTORNEY'S FEES
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were all documents that could be located to establish the chronology of relevant conduct by RPBL and AHCA. Because judicial review was sought on AHCA's final order dismissing RPBL's petition for hearing, the facts alleged in the petition, including those incorporated by way of attachments to the petition, were taken as true. *See, e.g., Sterman v. Florida State University*, 414 So. 2d 1102, 1103 (Fla. 1st DCA 1982).

Here, the allegations in the petition and facts shown by the attached documents provided a sufficient factual record to assist the court not only in ruling in favor of RPBL on the interpretation of the statute, but also in finding that AHCA's conduct was a gross abuse of agency discretion. Without this factual record, a finding of a gross abuse of discretion would have been more difficult to make. The court may have been more inclined to remand the matter for further proceedings to develop a record.

***Paul H. Amundsen** served as lead counsel for the appellant in the above case. Paul practices administrative law at the Tallahassee firm of Amundsen & Gilroy, P.A. Admitted to practice in 1978, Paul has represented clients in numerous DOAH hearings and in appeals arising from proceedings under Florida's Administrative Procedure Act, all in the private sector. Paul extends his thanks John F. Gilroy and Julia E. Smith for their collaboration.*

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