Administrative Law Section Newsletter

Vol. XXVII, No. 4 **Elizabeth W. McArthur, Editor** **June 2006**

From the Chair

by Deborah K. Kearney

It's that time of year for goodbyes and for expressing thanks and I have lots of thanks to spread around. The Administrative Law Section is very fortunate for our active, experienced, and yes, weathered, Executive Council membership. And, for our active, experienced, and weathered staff administrator, Jackie Werndli.

Thank you, Jackie, for the long hours you put in to make us look good, to get us through our business, and to help us maneuver through the intriguing and foreign bureaucracy of the Bar. The Section is very fortunate to enjoy Jackie's dedicated service. I have learned to shut off the alarm on my Blackberry so Jackie's late night business doesn't wake me up!

I would especially like to thank Council members, Andy Bertron, Bill Williams, and Administrative Law Judge Linda Rigot, rock-solid colleagues who were always willing, always giving of their time, to provide incredibly excellent work and advice. I believe Andy supported virtually every undertaking of the Section this year. Even the duties he undertook as Council Secretary were daunting this term. Andy also chaired the CLE Committee. Judge Rigot and Bill Williams continued providing the thorough review required as co-chairs of the Legislative Committee and Andy has joined them this year in that endeavor. All were active in developing our recommendations for updating the Uniform Rules of Procedure—an effort spearheaded by Chris Moore.

All were also intimately involved with the certification program. Andy

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Standards of Review Under the Florida Administrative Procedure Act[1]

by Donna E. Blanton

A standard of review describes the amount of deference a reviewing court will give an agency decision under review. Inquiries as to the appropriate standard of review under sections the Administrative Procedure Act ("APA") always begin with section 120.68, Florida Statutes, the provision in the APA governing judicial review.

Section 120.68(7) establishes different levels of review for issues of fact, procedure, law, and policy. Florida courts have interpreted each of these provisions, so court decisions always must be considered in conjunction with the plain language of the statute.[2]

Statutory Requirements

Section 120.68(7) provides:

> The court shall remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds that:
>
> (a) There has been no hearing prior to agency action and the reviewing court finds that the valid-

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always introduced the balanced, clear-headed approach and Bill undertook the difficult negotiations with the Government Lawyers Section to resolve what seemed to be an impasse with that Section on our joint certification program. Judge Rigot was constantly available to provide guidance, as well as to dig in and produce work product on our projects. I've never called a judge at home so often.

Cathy Sellers has done an amazing job of heading up the Law School Outreach program. As an adjunct professor in Administrative Law at both FSU and UF, Cathy is discovering new ways to introduce the topic of administrative law *and* the Administrative Law Section to law students throughout the state.

Many thanks to Elizabeth McArthur for again producing the Section's newsletter, to Mary Smallwood for contributing the Appellate Case Notes, and to Mary Ellen Clark for coordinating the Agency Snapshots pieces. The newsletter is a terrific publication and I sincerely appreciate the time and the energy Elizabeth puts into its production.

Cathy Lannon brings new meaning to the concept of working collegially. You can always count on Cathy to provide input and share her views.

Looking to the future, some changes to our bylaws should help to make the Section even stronger and should work to involve more Section members in leadership roles, in CLE planning and execution, and in conducting operations more efficiently. The approved bylaws as amended are published in this newsletter. Our newly formed Nominating Committee will be bringing a new slate of officers and of council members to the annual meeting in June. While the Section has always concentrated on including lawyers from the public and private sectors, we hope to achieve a better balance of the divergent backgrounds of administrative law practitioners.

Booter Imhof promises to be a great Chair and even better, a lot of fun. Booter's sense of responsibility, along with his in-depth experience in Florida Bar matters and his terrific sense of humor, will make the Executive Council a rewarding experience in the coming year. As I have throughout the year, I would encourage all who are interested to act on your interest in Section activities and join with the Executive Council to help us produce more and better articles and continuing education programs, to improve our website, and to find new and better ways to advance our shared interest in administrative law.

Thanks to all of the Executive Council members for your fine efforts and to our membership for your support.

Deborah K. Kearney *is the Chair of the Administrative Law Section. She graduated from the Florida State University College of Law and currently serves as the General Counsel of the Florida House of Representatives. Debby can be contacted at* debby.kearney@ myfloridahouse.gov.

Annual Convention of The Florida Bar

June 21-24, 2006
Boca Raton Resort & Club

Administrative Law Section Schedule

Thursday, June 22
6:30 p.m. – 7:30 p.m.
Section Reception

Friday, June 23
10:30 a.m. – 12:30 p.m.
Executive Council/Section Annual Meeting

APPELLATE CASE NOTES

by Mary F. Smallwood

Adjudicatory Proceedings

Fuller v. Department of Education, 31 Fla. L. Weekly 900 (Fla. 1st DCA, March 27, 2006)

Fuller sought an administrative hearing challenging the reclassification of her position at the Department of Education from Career Service to Select Exempt Service and her subsequent termination. The administrative law judge issued a recommended order finding that the Department had erroneously reclassified the position as the evidence indicated that her duties were not managerial, confidential, or supervisory. The Department rejected the Department's findings of fact and made substituted findings.

On appeal, the court reversed on the grounds that the Department had not complied with Section 120.57(1)(l), Fla. Stat. The court noted that there had been substantial testimony before the administrative law judge regarding Fuller's duties and responsibilities, culminating in a 33-page recommended order.

Licensing

Cartaya v. Department of Business and Professional Regulation, 31 Fla. L. Weekly 221 (Fla. 3d DCA, January 18, 2006)

The Department of Business and Professional Regulation filed an administrative complaint against Cartaya alleging a number of violations of law relating to conducting real estate appraisals. The administrative law judge in the formal proceeding found Cartaya guilty of three unintentional violations and not guilty of the other counts in the complaint. The judge recommended a thirty-day suspension of her license and one year of probation. The Florida Real Estate Appraisal Board adopted the findings of facts in the recommended order, but increased the penalty to two years' suspension of her license.

On appeal, the court reversed and remanded. It agreed with Cartaya that the Board had failed to state with particularity the grounds for rejecting the proposed penalty under Section 120.571)(l), Fla. Stat.

Scherer v. Department of Business and Professional Regulation, 31 Fla. L. Weekly 320 (Fla. 5th DCA, January 27, 2006)

Scherer challenged a final order of the Department of Business and Professional Regulation denying his application for a general contractor's license on the grounds that he had been convicted of a felony and had not had his civil rights restored. In reaching its decision, the Construction Industry Licensing Board cited Section 112.011(1)(b), Fla. Stat., which provides that a person convicted of felony cannot be denied a license based solely on that conviction where the person's civil rights have been restored.

On appeal, the court reversed. It noted that nothing in the licensing statute, Chapter 489, Fla. Stat., required a restoration of a felon's civil rights. Instead, Section 489.111, Fla. Stat., requires that an applicant for a license must demonstrate "good moral character" related to the professional responsibilities of the applicant. The court noted that conviction of a felony was not evidence of lack of good moral character, and lack of a conviction was likewise not evidence of good moral character. The court rejected the Department's argument that it should give deference to the Department's interpretation of the Section 112.011, noting that it was general Florida law, not a statute specifically within the Department's realm of responsibility.

(Note: The First District Court of Appeal reached the same conclusion on this question in *Yeoman v. Construction Industry Licensing Board*, 31 Fla. L. Weekly 48 (Fla. 1st DCA, December 22, 2005).

Bid Protests

Hadi v. Liberty Behavioral Health Corporation, 31 Fla. L. Weekly 912 (Fla. 1st DCA, March 29, 2006)

The Department of Children and Families ("DCF") issued a Request for Proposals ("RFP") to construct a civil commitment facility for sexually violent predators where such offenders could be committed under the Jimmy Ryce Act. Liberty Behavioral Health Corporation ("Liberty") filed a petition for a formal hearing to challenge certain specifications in the RFP. It also filed a circuit court action seeking a temporary injunction to prevent DCF from enforcing the provisions of Section 287.042(2)(c), Fla. Stat., requiring the posting of a bond in the amount of one percent of the estimated contract price (in this case $5,062,550.00) prior to challenging a specification of the RFP. The trial court granted the request for a temporary injunction.

With respect to the request for a formal hearing, DCF, after hearing argument of counsel, concluded that there were no disputed issues of material fact. The specifications Liberty alleged were arbitrary and capricious required that the facility be constructed to meet prison security standards and that any bidder demonstrate that it received a substantial portion of its annual revenues from operating an American Correctional Association accredited correctional facility. Liberty alleged that these specifications would disqualify it from responding to the RFP, even though it presently operated such a facility under contract with the state. DCF concluded that there were no disputed issues fact as the only issues raised by Liberty were whether the challenged specifications were arbitrary and capricious and contrary to competition. After an informal hearing, DCF concluded that the specifications were reasonable and within the agency's discretion.

On appeal, the court considered the validity of the circuit court's temporary injunction and reversed. The majority held that the circuit court

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had not provided any factual basis for its conclusion that Liberty met the four-part test for a temporary injunction. The majority also held that DCF was correct in concluding that there were no disputed issues of fact. With respect to the validity of the specifications, the court held that requiring prison level security and experience in operating correctional facilities was not unreasonable in light of the purpose of the Jimmy Ryce Act to commit persons predisposed to commit sexually violent offenses to continued civil incarceration after release from prison.

In a separate decision, Judge Benton concurred in part and dissented in part. He agreed that the temporary injunction was inappropriate on the grounds that Liberty failed to exhaust administrative remedies. However, he would have granted Liberty a formal hearing to contest the specifications after posting of the required bond.

Immediate Final Orders
Henson v. Department of Health, 31 Fla. L. Weekly 701 (Fla. 1st DCA, March 3, 2006)

The Department of Health entered an immediate final order suspending Dr. Henson's license to practice osteopathic medicine. The final order alleged that Dr. Henson had prescribed excessive amounts of narcotic drugs to three of his patients.

On appeal, the court remanded for further proceedings. It held that the order should have been more narrowly tailored to prohibit Dr. Henson from treating those three patients and prescribing narcotic drugs as there was no finding in the immediate final order that he provided inadequate care for his other patients.

Informal Hearings
Keen v. Department of Business and Professional Regulation, 31 Fla. L. Weekly 533 (Fla. 5th DCA, February 17, 2006)

Keen appealed from an order of the Florida Real Estate Appraisal Board ("FREAB") suspending his real estate appraisal license for one year. The initial administrative complaint included counts I through IV. Keen indicated in his election of rights that he disputed certain material facts with respect to Counts I and IV but that there were no disputed facts with respect to Counts II and III. Subsequently, the Department voluntarily dismissed Counts I and IV. Keen and the Department then jointly moved for an informal hearing on Counts II and III. The Department then sent a notice requesting that a hearing be set on the remaining counts and stating that the hearing, if granted, would be held immediately. The hearing was held, but neither Keen nor his counsel was present.

On appeal, Keen argued that he should be granted a new hearing because he did not receive notice that the hearing had been granted within 15 days of the request in violation of Section 120.569(2)(a), Fla. Stat. That section provides that "[a] request for a hearing shall be granted or denied within 15 days after receipt."

The court affirmed the final order. It held that since the remaining counts were governed by Section 120.57(2), Fla. Stat., the notice requirement was that reasonable notice be provided.

Agency Authority
Aetna Health, Inc. v. 21st Century Oncology, Inc., 31 Fla. L. Weekly 244 (Fla. 1st DCA, January 20, 2006)

Aetna Health appealed a final order of the Agency for Health Care Administration ("AHCA") finding in favor of 21st Century Oncology in a claims dispute. The final order adopted a recommended order issued by the contract dispute resolution firm retained by AHCA pursuant to Section 408.7057, Fla. Stat. During the course of the appeal, the parties resolved the dispute and jointly requested that the appellate court vacate the final order. The court denied the request but relinquished jurisdiction to AHCA to consider the request. AHCA entered an order concluding that it did not have jurisdiction under the statute to vacate the order as agencies only have such powers as are conferred upon them by statute. AHCA noted that the statute provided that the agency "shall adopt the recommended order as a final order." Section 408.7057(4), Fla. Stat. AHCA's order suggested that the parties request that the district court vacate the order.

When the matter returned to the district court, it again rejected the parties' motion to vacate and remanded to AHCA with directions to vacate the order. The court noted that the statutory provision only applied to disputes not resolved by the health care provider and the health plan. Citing *Reich v. Department of Health*, 868 So. 2d 1275 (Fla. 1st DCA 2004), the court held that agencies have inherent power to reopen or rehear a case where the proceeding is essentially judicial in nature.

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

Declaratory Statements

National Association of Optometrists and Opticians v. Department of Health, 31 Fla. L. Weekly 780 (Fla. 1st DCA, March 14, 2006)

Dr. Haines, an optometrist who leased space from Wal-Mart, sought a declaratory statement from the Department of Health, Board of Optometry, regarding whether certain provisions included in a draft lease violated requirements of Chapter 463, Fla. Stat., and Rule 64B-13, Fla. Admin. Code. During the course of negotiations with Wal-Mart, the contested provisions were deleted from the draft lease. However, counsel for Dr. Haines argued to the Board that it should still issue a declaratory statement to provide guidance to Dr. Haines with respect to such provisions for purposes of possible future lease negotiations. Over the objections of Wal-Mart, the Board issued a declaratory statement holding that certain of the provisions would violate the statutory and regulatory requirements by allowing a corporation to exercise control over Dr. Haines' practice of optometry.

On appeal, the court reversed, holding that the declaratory statement did not apply to Dr. Haines' particular set of circumstances as required by Section 120.565, Fla. Stat. While it noted that Dr. Haines might have been entitled to a declaratory statement at the time the challenged lease provisions were still in the draft lease, once those provisions were removed, she was no longer potentially faced with disciplinary action by the Board. The court rejected Dr. Haines' argument that the declaratory statement was appropriate because it allowed her select a proper course of action in advance.

Emergency Rules

Hartman-Tyner, Inc. v. Department of Business and Professional Regulation, 31 Fla. L. Weekly 826 (Fla. 1st DCA, March 17, 2006)

The Division of Pari-Mutuel Wagering adopted an emergency rule repealing Rule 61D-11.027, Fla. Admin. Code, on the grounds that the repealed rule could mislead licensees to believe that the rule authorized no-limit poker tournament play. The Division concluded that an emergency rule was justified as there was an immediate danger to the public health, safety and welfare. The Division attached to the rule justification one advertisement from one pari-mutuel facility for a no-limit poker tournament. Several pari-mutuel wagering licenseholders appealed the emergency rule.

On appeal, the court agreed with the licensees that there was no justification for an emergency rule. It found that the Division did not show that there was an immediate danger to any particular member of the public.

Government-in-the-Sunshine and Public Records

Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation, 31 Fla. L. Weekly 883 (Fla. 5th DCA, March 24, 2006)

Memorial Hospital-West Volusia ("Memorial") filed an action in circuit court seeking a determination that it was no longer subject to the Public Records and Government-in-the-Sunshine Laws (the "Laws") after it purchased the hospital from the West Volusia Hospital Authority. The purchase agreement contained covenants requiring that Memorial forgive the Authority's unpaid debt to Memorial, maintain a certain level of health care services, provide indigent care, fund the employee pension plan, and grant the Authority first refusal rights to repurchase the hospital should Memorial decide to sell. Under the agreement, the Authority was obligated to reimburse Memorial for indigent care services.

Prior to purchasing the hospital, Memorial had operated it on behalf of the Authority under a lease agreement. The Fifth District had previously determined that, under the lease arrangement, Memorial was subject to the Laws because it was acting on behalf of the Authority. *See New-Journal Corp. v. Memorial Hospital-West Volusia, Inc.*, 695 So. 2d 418 (Fla. 5th DCA 1997). That decision was affirmed by the Florida Supreme Court in *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 729 So. 2d 373 (Fla. 1999).

The Supreme Court, in *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992), adopted a "totality of factors" test to determine when a private entity is acting on behalf of a public entity and, thus, subject to the Laws. It identified nine factors to be considered. Subsequently, the Fifth District held that the totality of factors analysis was unnecessary where a public agency has clearly transferred or delegated its powers and responsibilities to a private entity. *Stanfield v. Salvation Army*, 695 So. 2d 501 Fla. 5th DCA 1997). That court distinguished between a situation where the private entity merely contracted with the public entity to provide services and a situation where the private entity contracted to provide services *in place of* the public entity.

News-Journal argued that the sale constituted a delegation of the Authority's responsibilities and no analysis of the totality of factors was required. The circuit court agreed. It held that the only difference between the prior case and the present one was that Memorial leased the facilities in the first instance and owned them here.

On appeal, the court reversed. It found the circumstances to be much more complicated than the circuit court suggested and applied the totality of factors test. In evaluating each of the nine factors, the court reached a different conclusion under the sale scenario than it had under the lease scenario. Of particular importance, the court found that there was an insignificant expenditure of public funds as the Authority no longer expended funds on hospital operations. The reimbursement of indigent care expenses constituted less than 5% of the total net patient revenues of the hospital. Likewise there was no longer significant commingling of funds, the activities were not being conducted on publicly owned property, the services being provided were not ones that the Authority would otherwise necessarily be providing, and the private entity was not created by the public entity.

J.I. v. Department of Children and Families, 31 Fla. L. Weekly 741 (Fla. 4th DCA, March 8, 2006)

J.I., the father, challenged an order of the circuit court terminating

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his parental rights. The order had been issued after a permanency staffing meeting within the Department of Children and Families recommended termination. Rule 65C-13.020(2), Fla. Admin. Code, identifies the individuals who are to participate in permanency staffing meetings. They include the foster care supervisor, foster care counselor, adoption supervisor, District program specialist, the foster parent, the guardian ad litem, and various professionals who may be involved. The purpose of the meeting is to determine how to get the child into a permanent home as soon as possible. The father had argued to the circuit court that the permanency staffing meeting should have been held in the sunshine. The court terminated parental rights without addressing that argument.

On appeal, the court affirmed the order below. It held that the permanency staffing review is not a meeting of a board or commission within the meaning of the Government-in-the-Sunshine Law. It concluded that no formal decision-making occurs at the meeting. Further, the decision to file a petition for termination of parental rights is confidential and all records related thereto are exempt from disclosure under Chapter 39, Fla. Stat. Under those circumstances, the court concluded it would not make sense to make the meetings open to the public.

Conflict of Interest
Fanizza v. Commission on Ethics, 31 Fla. L. Weekly 844 (Fla. 4th DCA, March 22, 2006)

Fanizza appealed an order of the Commission on Ethics fining her and imposing sanctions for alleged violations of Section 112.313(7), Fla. Stat., which prohibits a public official from holding employment or having a contractual relationship that will "create a continuing or frequently recurring conflict" between the official's private interests and her performance of her public duties. Two situations were addressed by the Commission. First, two years before being elected to the City Commission of Wilton Manors, Ms Fanizza represented local citizens in challenging a rezoning action of the City. At the time of her election the only matter unresolved was the action of the circuit court to set the amount of attorney's fees owed to the successful plaintiffs. Ms. Fanizza recused herself from the vote of the Commission on the agreement on attorney's fees. In the second case, Fanizza was the lone dissenting vote on the City Commission on a request to grant a special exception to allow townhouses in a single family zoning district. Subsequent to the Commission's approval of the special exception, Fanizza agreed to represent a number of residents in challenging the action without charging the clients. She was ultimately successful before the circuit court, and the City agreed to reimburse her court costs. She was not awarded attorney's fees.

On appeal, the court reversed. It concluded that there was no continuing or frequently recurring conflict in the first case as her representation occurred prior to her election to the Commission and the only issue left to be decided after election was the amount of attorney's fees to be awarded. The court had more difficulty on the second case. It noted that her representation of citizens challenging the special exception while a member of the Commission was a violation of Florida Bar Rule 4-1.11(a) as she was representing a private client without the consent of the City. However, the court ultimately concluded that the single incident did not constitute a continuing or frequently recurring conflict.

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.

Seeking Nominations for APA Top 10 Lists

In celebration of the 10-year anniversary of the 1996 re-write of the Administrative Procedure Act, Kent Wetherell is putting together a pair of "Top 10" lists. He is looking for Section members (and anyone else who may be interested) to nominate cases for inclusion on the lists.

The first list will contain the "Top 10" cases decided in the past 10 years under the revised APA. The second list will contain the "Top 10" Florida APA cases of all time.

The cases that should be considered for nomination are those that can be characterized as "seminal" APA decisions (even if they have been subsequently overruled by legislative action) and/or cases that have come to be known as "the case" for a particular point of administrative law. The cases should interpret the APA and/or decide an important or interesting principle of administrative law, as distinguished from cases that decide an important issue of substantive law that just happened to arise under the APA.

If all goes well, the "Top 10" lists will be revealed at the 2006 Pat Dore Conference, which is currently scheduled for October 19-20 in Tallahassee. Please e-mail your case nominees to *kent_wetherell@doah.state.fl.us* no later than **July 30**.

The Clocks at DOAH are No Longer Three Minutes Fast

by T. Kent Wetherell, II[1]

In a 1998 article published in this newsletter,[2] I recounted the story of how the clocks at the Division of Administrative Hearings (DOAH) were three minutes fast according to the sworn affidavits of two Tallahassee lawyers and a "source of undisputable accuracy." The article concluded with the admonition that "administrative law practitioners should govern themselves accordingly" because it was "unknown whether DOAH has reset its clocks to 'actual time.'"

The effect of DOAH's clocks being three minutes fast was that a document delivered to the DOAH Clerk's office at 5:00 p.m. "actual time" would be file-stamped at 5:03 p.m. (assuming there was someone at the front desk to receive the filing at the time), and pursuant to the Uniform Rules of Procedure, the document would not be considered "filed" until the next regular business day.[3] The same would have been true for a document received by fax (or e-filing[4]) at 5:00 p.m. "actual time."[5]

The practical significance of the time discrepancy in DOAH's clocks is somewhat limited because very few initial pleadings (for which filing deadlines are most critical[6]) are filed at DOAH.[7] Nevertheless, I thought the time discrepancy was an issue that administrative law practitioners would be interested in or, at least, somewhat amused by.

Although I have been at DOAH for over four years now, I had more or less forgotten about the "problem" with DOAH's clocks until one of the lawyers whose affidavit I quoted in the 1998 article appeared before me. In an effort to satisfy my curiosity (and as a service to the administrative bar), I set out to determine whether the clocks at DOAH are still three minutes fast.

To do so, I first set my watch to "actual time" based upon the time announcement given by the U.S. Naval Observatory Master Clock recording at (202) 762-1401. That recording is the "source of undisputable accuracy" referred to in one of the affidavits quoted in the 1998 article. I tried to verify that time against a local time recording as was done in the affidavit, but the phone number 844-1212 is no longer in service. I did not take the time to further calibrate my watch based upon the start-time of "All Things Considered" on the local public radio station, which was the source that the other affidavit quoted in the 1998 article relied upon in determining that the DOAH clocks were three minutes fast. Next, I compared the time shown on my watch to the times shown on the three primary devices used by the DOAH Clerk's office to record the filing of documents: the machine used to file-stamp documents received by mail or hand delivery; the fax machine that receives all of the documents filed by fax; and the computer that receives all of the e-filed documents.

I found that the time shown on each of those devices corresponded to the time shown on my watch, which led me to the conclusion that the clocks at DOAH are no longer three minutes fast, but rather are set to "actual time." Thus, administrative law practitioners can now rest easily knowing that the clocks at DOAH are correct.

Practitioners can have confidence that DOAH's clocks will remain correct because, according to the DOAH Clerk, the clocks are checked and reset as necessary on a weekly basis to correspond to "actual time."[8] Nevertheless, I encourage practitioners not to wait until 5:00 p.m. on the last day of the filing-period to file documents, both as a matter of good practice and in an abundance of caution in the unlikely event that DOAH's clocks happen to differ from "actual time" at some point in the future.

Endnotes:

[1] Administrative Law Judge, Division of Administrative Hearings.

[2] Kent Wetherell, *"The Clocks at DOAH are 3 Minutes Fast": A True Story*, Admin. Law Section Newsletter, December 1998, at 8-9.

[3] See Fla. Admin. Code R. 28-106.104(3) ("Any document received by the office of the agency clerk after 5:00 p.m. shall be filed as of 8:00 a.m. on the next regular business day.").

[4] E-filing was not available at DOAH in 1998 when my prior article was published. It is relatively new, but appears to have been well-received and is being well-utilized. Florida attorneys can sign up for e-filing at DOAH's website, *www.doah.state.fl.us*.

[5] *See* Fla. Admin. Code R. 28-106.104(9) ("The filing date of an electronically transmitted document shall be the date the agency clerk receives the complete document.").

[6] *See, e.g.*, § 120.569(2)(c), Fla. Stat. (untimely petition for administrative hearing "shall be dismissed"); Fla. Admin. Code R. 28-106.111(4) ("Any person who receives written notice of an agency decision and who fails to file a written request for a hearing within 21 days waives the right to request a hearing on such matters."); *Patz v. Dept. of Health*, 864 So. 2d 79 (Fla. 3d DCA 2003) (affirming dismissal of an untimely petition for administrative hearing that was received by the agency one day late even though the agency's fax machine was allegedly not available to receive the petitioner's fax the prior day); *Whiting v. Dept. of Law Enforcement*, 849 So. 2d 1149 (Fla. 5th DCA 2003) (refusing to set aside default entered against doctor on an administrative complaint where the doctor's request for hearing was filed 43 days late); *Cann v. Dept. of Children & Family Servs.*, 813 So. 2d 237 (Fla. 2d DCA 2002) (affirming dismissal of a petition for administrative hearing filed one day late and concluding that the doctrine of excusable neglect no longer saves an untimely petition for administrative hearing).

[7] Most administrative cases are initiated by filing a petition with the agency, not DOAH. *See* § 120.569(2)(a), Fla. Stat.; Fla. Admin. Code R. 28-106.201, 28-106.111(2). There are, however, some cases that are initiated by filing a petition with DOAH. *See*, *e.g.*, §§ 57.111(4)(b)1-2 (small business party attorney's fees), 120.56 (rule challenge), 163.3187(3)(a) (challenge to small-scale comprehensive plan amendment), 766.301(1) and 766.313, Fla. Stat. (compensation from the Florida Birth-Related Neurological Injury Compensation Plan).

[8] The Clerk's office relies on the "official U.S. time" reflected on *www.time.gov/timezone.cgi?Eastern/d/-5/java*, which corresponds to the time on the U.S. Naval Observatory Master Clock.

Recap of Previously Published Agency Snapshots

- Agency for Health Care Administration (Jun 04)
- Agency for Workforce Innovation (Jun 05)
- Department of Agriculture and Consumer Services (Mar 04)
- Department of Business and Professional Regulation (Sep 05)
- Department of Community Affairs (Jun 05)
- Department of Environmental Protection (Mar 06)
- Department of Financial Services (Oct 04)
- Department of Health (Dec 03)
- Department of Highway Safety & Motor Vehicles (Jun 04)
- Department of Juvenile Justice (Dec 05)
- Department of Management Services (Dec 04)
- Department of Transportation (Mar 04)
- Department of Transportation (Districts) (Mar 05)
- Division of Administrative Hearings (Sep 05)
- Florida Parole Commission (Dec 03)
- Florida Public Service Commission (Dec 05)

Editor's Note: Our agency snapshots project has finally hit a lull this quarter, with no volunteers coming out of the woodworks to prepare a snapshot for an agency not yet covered. So we thought we would take this opportunity to recap for you the agencies for which snapshots have been published, with a cross-reference to the newsletter issue where you will find the snapshot.

Special thanks to Daniel Nordby, a section member who took Debby Kearney up on her drum-beat effort for new volunteers. Daniel has undertaken the long-needed task of updating our section website, including adding links on the resources page for all of the previously published agency snapshots.

Now we need your help: Please look over this list, and note which agencies have not yet been covered. We could use volunteers to help complete agency snapshots for these agencies. In addition, it has now been 3 years since we started this project, so there are at least parts of the published snapshots that are out of date: there might be new general counsels to profile, new contact information, a new twist on helpful hints to practitioners, etc. If you want to volunteer to update an old agency snapshot, we could begin mini-snapshot updates to augment this feature. Please contact Mary Ellen Clark at *Mary_Ellen_Clark@oag.state.fl.us* and she will be happy to put you to work!

STANDARDS OF REVIEW
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ity of the action depends upon disputed facts;

(b) The agency's action depends on any finding of fact that is not supported by competent, substantial evidence in the record of a hearing conducted pursuant to ss. 120.569 and 120.57; however, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact;

(c) The fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure;

(d) The agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action; or

(e) The agency's exercise of discretion was:

1. Outside the range of discretion delegated to the agency by law;

2. Inconsistent with agency rule;

3. Inconsistent with officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency; or

4. Otherwise in violation of a constitutional or statutory provision;

but the court shall not substitute its judgment for that of the agency on an issue of discretion.

Section 120.68 further provides that unless the court finds a ground for setting aside, modifying, remanding, or ordering agency action or ancillary relief under a specified provision of section 120.68, it must affirm the agency's action.[3]

Section 120.68 itself, thus, establishes different levels of deference for different types of agency action. Agency actions depending on fact require some deference under the plain language of the statute. The statute provides that the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. If there has been no hearing prior to the agency action and the court finds that the validity of the action depends upon disputed facts, the court must remand or set aside the action. The court examines the record, but it must set aside the action or remand only if the action depends on a finding of fact not supported by competent substantial evidence.[4]

The plain language of section 120.68 requires no deference to agency actions with respect to procedure. The statute provides that the court must review the procedures and determine whether a material error either impaired the fairness of the proceedings or the correctness of the action. If so, the court is to remand the case. The statute suggests that the court must make its own independent determination. Similarly, no deference is required concerning questions of law under the plain language of section 120.68.

However, much deference is required by a reviewing court in the area of policy. The statute states that a court shall not substitute its judgment for that of the agency on an issue of discretion. Thus, as one commentator has noted, the APA "requires strict review of the way an agency makes a decision, strict review over whether it is lawful, less strict review over whether it is right, and virtually no review over whether it is smart."[5]

Section 120.68(7) does not distinguish among the various forms of agency action, such as final orders arising from proceedings under sections 120.569 and 120.57, rule adoptions, and declaratory statements. Under the plain language of the statute, all agency action is to be reviewed pursuant to standards outlined in that statute.

Appellate Court Decisions

Many court decisions interpret the statutory standards of review in section 120.68. The cases discussed in this article are merely illustrative.

Findings of Fact and Agency Policy Considerations

As the statute requires and numerous courts have noted, findings of fact must be supported by competent substantial evidence.[6] Competent substantial evidence is defined in *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957), a case that is frequently quoted by the courts.[7]

The First District Court of Appeal has described competent evidence as evidence admissible over objection in civil actions and has concluded that any type of competent evidence may support a finding of fact so long as it is substantial in light of the record as a whole.[8] The court explained that in considering the "substantiality" of evidence, the court takes into account whatever in the record fairly detracts from the weight of the evidence.[9]

Courts have encountered difficulties, according to the Fifth District Court of Appeal, when an administrative law judge's findings are supported by competent substantial evidence that are then rejected or modified by an agency's adoption of its own findings, which also are supported by competent substantial evidence.[10] Under those circumstances, "the agency's order must be reversed because it 'did not follow established principles of law when it discarded findings of its hearing officer which were supported by competent substantial evidence.'"[11] If a court concludes that both the administrative law judge's findings and the agency's substituted or modified findings are supported by competent substantial evidence, the findings made by the administrative law judge must prevail and the agency's order rejecting or modifying them must be reversed.[12]

Despite this general principle, the "deference rule" recognizes that policy considerations left to the discretion of an agency may take precedence over findings of fact by an administrative law judge.[13] Matters of overriding policy considerations include instances where an agency must interpret one of its own rules or where a statute confers broad discretionary authority upon the agency that depends on whether certain criteria are found by the agency to exist.[14] Courts also have repeatedly held that an agency's factual findings in an area where an agency has special responsibility are entitled to deference.[15] In such instances, courts may allow an agency to substitute its

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findings of fact for those of the administrative law judge.

But where issues are determinable by ordinary methods of proof through the weighing of evidence and the judging of the credibility of witnesses, they are solely the prerogative of the administrative law judge.[16] Additionally, the issue of whether an individual violated a statute or deviated from a standard of conduct is generally an issue of fact to be determined by the administrative law judge based on the evidence and testimony.[17]

Section 120.57(1)(l), Florida Statutes, governs situations when an agency may reject or modify an administrative law judge's factual findings. The agency must state with particularity which factual determinations are being rejected, why those determinations are not based on competent substantial evidence, and why the procedures did not comply with the essential requirements of law. An agency's final order that does not do so will be vacated.[18]

Procedural Issues

As previously noted, section 120.68(7)(c) provides that a matter may be remanded to an agency or that agency action may be set aside if the "fairness of the proceedings or the correctness of the action [has] been impaired by a material error in procedure or a failure to follow prescribed procedure." Courts have held that reversal is mandated when a procedural error is material to the fairness of the proceedings.[19]

A variety of procedural errors have been found to require remand,[20] but procedural error alone is not evidence that the fairness of the proceedings have been impaired. The appellant must also prove that the error impaired the fairness of the proceedings.[21] Thus, section 120.68(7)(c) has operated as a harmless error rule.

Issues of Law and Deference to Legal Interpretation

Pure questions of law are reviewed *de novo*, and appellate courts are generally not required to defer to lower tribunals on issues of law.[22] However, courts often are highly deferential to agency interpretations of statutes the agency is charged with enforcing.[23] If an agency's interpretation is within the range of possible and reasonable interpretations, it is not considered "clearly erroneous" and it will be affirmed.[24] Some courts have gone so far as to simply state that "[t]he standard of review is whether the agency's interpretation of the law is clearly erroneous."[25]

At least one court has imported the "competent substantial evidence" standard of review in reviewing an agency's interpretation of law. In *Metropolitan Dade County v. State Dep't of Envtl. Prot.*, 714 So. 2d 512, 515 (Fla. 3d DCA 1998), the court stated that "a reviewing court must defer to an agency's interpretation of an operable statute as long as that interpretation is consistent with legislative intent and is supported by substantial, competent evidence."[26]

However, a court need not defer to an agency's construction or application of a statute if special agency expertise is not required or if the agency's interpretation conflicts with the plain and ordinary meaning of the statute.[27] Deference to an agency's construction of a statute also is not required if the statute "is unrelated to the regulatory functions of the agency."[28] Thus, if a statute involves no policy "considerations for which" an agency has been entrusted "special responsibility," the agency "is in no better position than the court to interpret such a statute."[29] Additionally, an agency's discretion to construe its own statutes and rules is more limited when the provision being interpreted authorizes sanctions or penalties against a person's professional license. Such statutes are considered penal, and they are strictly construed.[30]

Although section 120.68 itself does not distinguish among the various forms of agency action, it is sometimes appropriate and helpful to consider cases involving particular forms in order to understand the standard of review. For example:

• Determinations as to whether agency rules or proposed rules constitute an invalid exercise of delegated legislative authority as defined in section 120.52(8), Florida Statutes, are questions of law and will be reviewed *de novo*.[31]

• The First District Court of Appeal has found that the standard of review in section 408.039(6)(b), Florida Statutes, for certificate of need orders should be read *in pari materia* with section 120.68(7). Thus, as the court stated in *Big Bend Hospice v. Agency for Health Care Admin.*, 904 So. 2d 610, 611 (Fla. 1st DCA 2005), the Agency for Health Care Administration "will be accorded the same degree of deference an agency is accorded when we review its interpretation of a statute which it is charged with administering."

• Declaratory statements by agencies may not be reversed by a reviewing court unless they are "clearly erroneous."[32]

• So long as a penalty imposed by an administrative agency is within the permissible range provided for in the statute, the appellate court will not disturb the penalty unless the administrative findings are reversed in whole or in part.[33]

Courts have struggled with language added in the 1990s to section 120.57(1)(l), Florida Statutes, which prohibits agencies from rejecting or modifying conclusions of law over which the agency does not have substantive jurisdiction. In *Barfield v. Dep't of Health*, 805 So. 2d 1008, 1009-10 (Fla. 1st DCA 2001), the court held that the Board of Dentistry lacked substantive jurisdiction to reject an administrative law judge's conclusion of law that grading sheets were inadmissible hearsay. The holding was based on a determination that agencies do not have jurisdiction to modify or reject rulings on the admissibility of evidence. The court then reversed that portion of the Board's order. The court went on, however, to rely on its jurisdiction over any issue that may affect the case to agree with the Board's decision that the grading sheets were admissible evidence under the business-records exception to the hearsay rule. The court stated:

> In reaching our decision, we are aware that an administrative agency may now be uncertain re-

> garding what avenue of judicial review is available if it considers itself aggrieved by an ALJ's conclusions of law that are beyond the agency's substantive jurisdiction. Nevertheless, we cannot conceive that it was the legislature's intention, by reason of the 1999 amendments to section 120.57(1)(l), to make such conclusions immune from further review. If we were to interpret the statute as having such an effect, the ALJ, in a case such as this, would become the final decision-maker in determining the fitness of applicants for licensure, despite an agency's otherwise broad powers of regulation; in this case, the authority of the Board of Dentistry to license the practice of dentistry. . . .
>
> Section 120.68(1), Florida Statutes (1999), providing the avenue of judicial review to parties adversely affected by agency action, implies that an agency harmed by recommended conclusions which it is powerless to reject has the option of either entering a final order under protest and thereafter appealing from its own order as a party adversely affected, or of seeking immediate judicial review from the ALJ's recommended order. The latter alternative is available only if 'review of the final agency decision would not provide an adequate remedy' to the agency. § 120.68(1), Fla. Stat. . . .
>
> Due to the uncertainty, however, that attends the 1999 amendments to section 120.57, we respectfully commend to the legislature the adoption of a specific appellate remedy available to an agency that considers itself aggrieved by an ALJ's conclusions of law over which it does not have "substantive jurisdiction."[34]

Other courts have also found that agencies lack substantive jurisdiction to reject certain conclusions of law.[35] The Legislature has not accepted the First District Court of Appeal's invitation in *Barfield* to provide a specific appellate remedy, and agencies continue to struggle with how to proceed in circumstances when the agency does not have jurisdiction over a legal conclusion by the Administrative Law Judge with which the agency disagrees.[36]

Conclusion

Section 120.68(7) always provides the starting point for assessing the standard of review in a case arising under the APA. However, numerous courts have interpreted that subsection, and many decisions have elaborated on – some would say modified – the plain language of the statute. Thus, before advising an appellate court of the standard of review in an APA case, practitioners should review not only the statutory section, but also the relevant case law.

Endnotes:

[1] This article is adapted from a presentation that was part of the *Administrative Appeals* Continuing Legal Education program on April 7, 2006. The CLE program was co-sponsored by the Appellate Practice Section and the Administrative Law Section.

[2] The author wishes to acknowledge the work of F. Scott Boyd, *A Traveler's Guide for the Road to Reform*, 23 Fla. St. U. L. Rev. 247 (1994). Section III.D. of that article relating to "Deference and Standards of Review" was particularly helpful. Although certain portions of the article address statutory language and court cases that have been superceded by changes to the APA in 1996 and 1999, Mr. Boyd's approach to how courts have grappled with the requirements of section 120.68 remains instructive. Additionally, Margaret-Ray Kemper's article on Judicial Review in the Florida Administrative Practice Manual, particularly Section IV. on "Standards of Review," is a good resource. Margaret-Ray Kemper, *Judicial Review*, Florida Administrative Practice § 12 (The Fla. Bar CLE, 7th ed. 2004).

[3] § 120.68(8), Fla. Stat.

[4] *See also* section 120.68(10), Fla. Stat. ("If an administrative law judge's final order depends on any fact found by the administrative law judge, the court shall not substitute its judgment for that of the administrative law judge as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside the final order of the administrative law judge or remand the case to the administrative law judge, if it finds that the final order depends on any finding of fact that is not supported by competent substantial evidence in the record of the proceeding.")

[5] F. Scott Boyd, 22 Fla. St. U. L. Rev. at 262.

[6] *E.g., Gross v. State*, 819 So. 2d 997, 1002 (Fla. 5th DCA 2002).

[7] The court stated:

> We have used the term "competent substantial evidence" advisedly. Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. . . . In employing the adjective "competent" to modify the word "substantial," we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. . . . We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the "substantial" evidence should also be "competent."

[8] *Miller v. State, Div. of Ret.*, 796 So. 2d 644, 646 (Fla. 1st DCA 2001).

[9] *Id., quoting Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488 (1951).

[10] *Gross*, 819 So. 2d at 1002.

[11] *Id.*, *quoting City of Umatilla v. Public Employees Relations Comm'n*, 422 So. 2d 905, 907 (Fla. 5th DCA 1982); *see also Schrimsher v. School Brd. of Palm Beach County*, 694 So. 2d 856, 861 (Fla. 4th DCA 1997); *McDonald v. Dept. of Banking & Finance*, 346 So. 2d 569, 584-85 (Fla. 1st DCA 1997).

[12] *Gross*, 819 So. 2d at 1003.

[13] *Id.* at 1002; *Baptist Hosp., Inc. v. Dep't of Health & Rehab. Servs.*, 500 So. 2d 620, 623 (Fla. 1st DCA 1986).

[14] *Gross*, 819 So. 2d at 1002.

[15] *E.g., Schrimsher*, 694 So. 2d at 862; *Fla. Dep't of Ins. & Treasurer v. Bankers Ins. Co.*, 694 So. 2d 70, 72-74 (Fla. 1st DCA 1997).

[16] *Gross*, 819 So. 2d at 1002.

[17] *Bush v. Brogan*, 725 So. 2d 1237, 1239-40 (Fla. 2d DCA 1999) (Whether the facts found by an administrative law judge constitute a violation of a rule or a statute or of a standard of conduct is considered an ultimate finding of fact within the administrative law judge's fact-finding discretion.) *But see* § 456.073(5), Fla. Stat. ("The determination of whether or not a licensee has violated the laws and rules regulating the profession, including a determination of the reasonable standard of care is a conclusion of law to be determined by the board, or department when there is no board, and is not a finding of fact to be determined by the administrative law judge.").

[18] *Fla. Power & Light v. State*, 693 So. 2d 1025, 1027 (Fla. 1st DCA 1997).

[19] *Schrimsher*, 694 So. 2d at 862-63.

[20] A good discussion of the types of procedural errors that have required remand can be found in Margaret-Ray Kemper, *Judicial Review*, Florida Administrative Practice § 12.28, p. 12-33 – 12-35.

[21] *Fla. League of Cities, Inc. v. Dep't of Envtl. Regulation*, 603 So. 2d 1363, 1368-69 (Fla. 1st DCA 1992).

[22] *Knight v. Winn,* 910 So. 2d 310, 312 (Fla. 4th DCA 2005); *Parlato v. Secret Oaks Owners Ass'n*, 793 So. 2d 1158, 1162 (Fla. 1st DCA 2001).

[23] *Fla. Hosp. v. Agency for Health Care Admin.*, 823 So. 2d 844, 847-48 (Fla. 1st DCA 2002); *see also Sullivan v. Florida Dep't of Envtl. Prot.*, 890 So. 2d 417, 420 (Fla. 1st DCA 2004)

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(agency afforded wide discretion in the interpretation of a statute the agency must administer).

[24] *Fla. Dep't of Educ. v. Cooper*, 858 So. 2d 394, 396 (Fla. 1st DCA 2003).

[25] *Roman Fedo, Inc. v. Dep't of Highway Safety & Motor Vehicles,* 889 So. 2d 179, 180 (Fla. 4th DCA 2004), *quoting Novick v. Dep't of Health*, 816 So. 2d 1237, 1240 (Fla. 5th DCA 2002).

[26] The court was quoting *Martinson v. Breit's Tower Serv., Inc.*, 680 So. 2d 599, 599 (Fla. 3d DCA 1996).

[27] *Doyle v. Dep't of Bus. Reg.*, 794 So. 2d 686, 690 (Fla. 1st DCA 2001).

[28] *Health Options, Inc. v. Agency for Health Care Administration,* 889 So. 2d 849, 851 (Fla. 1st DCA 2004).

[29] *Id., quoting Chiles v. Dep't of State, Div. of Elections,* 711 So. 2d 151, 155 (Fla. 1st DCA 1998), and *McDonald v. Dep't of Banking & Finance*, 346 So. 2d 569, 579 (Fla. 1st DCA 1977).

[30] *Whitaker v. Dep't of Ins. & Treasurer*, 680 So. 2d 528, 531 (Fla. 1st DCA 1996).

[31] *Fla. Bd. of Med. v. Fla. Acad. of Cosmetic Surgery, Inc.,* 808 So. 2d 243, 254-55 (Fla. 1st DCA 2002); *Southwest Fla. Water Mgmt. District v. Save the Manatee Club, Inc.*, 773 So. 2d 594, 597 (Fla. 1st DCA 2000); *State Bd. of Trustees of the Internal Improvement Trust Fund v. Day Cruise Ass'n, Inc.*, 794 So. 2d 696, 701 (2001).

[32] *Chiles v. Dep't of State, Div. of Elections*, 711 So. 2d 151, 155 (Fla. 1st DCA 1998).

[33] *Locklear v. Fla. Fish & Wildlife Conservation Comm'n*, 886 So. 2d 326, 329 (Fla. 5th DCA 2004).

[34] 805 So. 2d at 1012-13.

[35] *See, e.g., Deep Lagoon Boat Club, Ltd. v. Sheridan,* 784 So. 2d 1140, 1141-42 (Fla. 2d DCA 2001) (agency's substantive jurisdiction did not extend to ALJ's decision relating to collateral estoppel); *G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So. 2d 1257, 1263-64 (Fla. 5th DCA 2004) (agency does not have substantive jurisdiction over legal issue relating to attorney's fees under section 120.595).

[36] For interesting commentary on the issues raised in *Barfield*, see Lisa S. Nelson, *Insulated from Review: Barfield v. Department of Health, Board of Dentistry*, 23 Admin. Law Section Newsletter (March 2002); Robert P. Smith, *Be Not Amazed! At the Lessons of Barfield v. Department of Health, Board of Dentistry*, 23 Admin. Law Section Newsletter (June 2002); Robert C. Downie, *Agency Substantive Jurisdiction – The More Things Change*, 76 Fla. B.J. 79 (June 2002).

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BYLAWS OF THE ADMINISTRATIVE LAW SECTION

Article I
DESCRIPTION

Section 1. Name. The name shall be "Administrative Law Section, The Florida Bar."

Section 2. Purposes. The purposes of this section are:

(a) to provide an organization within The Florida Bar open to members thereof in good standing having an interest in administrative law and procedure on both the state and federal levels, and

(b) to provide a forum for discussion and exchange of ideas leading to the improvement and development of the fields of administrative law and procedure and agency practice, and to serve the public generally and The Florida Bar in interpreting and carrying out the professional needs and objectives in these fields.

Section 3. Aspirational Goal. It is an aspirational goal to achieve fair balance between government attorneys and private practitioners among the executive council members of the section.

Article II
MEMBERSHIP

Section 1. Eligibility. Any member in good standing of The Florida Bar interested in the purposes of this section is eligible for membership upon application and payment of this section's annual dues. Any member who ceases to be a member of The Florida Bar in good standing shall no longer be a member of the section.

Section 2. Administrative Year. The administrative year of the section shall run concurrently with the administrative year of The Florida Bar.

Section 3. Annual Dues. The annual dues shall be the amount fixed by the executive council and approved by The Florida Bar. After an applicant has become a member, dues shall be payable in advance of each membership year and shall be billed by The Florida Bar at the time that regular dues of The Florida Bar are billed.

Section 4. Affiliate Membership.

(a) Eligibility. Any person who is not a member of The Florida Bar but who has an interest in administrative law and processes may become an affiliate member of the Administrative Law Section. Such persons may include but are not limited to members of administrative boards, agency staff, law students, legal assistants, members of the legislature and legislative staff, and other administrative personnel.

(b) Privileges and Responsibilities. Affiliates shall be members of this section only. Affiliates shall have all the privileges accorded to members of the section except that affiliates shall not be entitled to vote on any matter or to hold any section office. Affiliate members shall pay annual dues as determined by the executive council.

(c) Membership Limits and Administrative Expenses. The number of affiliate members shall not exceed one-third of the section membership. The section shall reimburse the bar for expenses incurred by the bar in administering this section's affiliate membership.

Article III
OFFICERS

Section 1. Officers. The officers of this section shall be a chair, a chair-elect, a secretary and a treasurer.

Section 2. Duties of Officers. The duties of the officers shall be as follows:

(a) Chair. The chair shall preside at all meetings of the section and at all meetings of the executive council. The chair shall appoint all committees and committee chairs with the approval of the executive council, be responsible for all reports to be submitted to The Florida Bar, and perform all duties as customarily pertain to the office of chair. The chair shall be an ex-officio member of each committee of the section.

(b) Chair-elect. The chair-elect shall become chair in the event of the death, resignation, or failure of the chair to serve for whatever reason; provided, however, that in the case of temporary disability or absence of the chair, the chair-elect shall serve as acting chair only for the duration of the chair's disability or absence. The chair-elect shall be responsible for such other duties as the chair may designate. The chair-elect shall be an ex-officio member of each committee of the section.

(c) Secretary. The secretary shall be responsible for all permanent files and records of the section, including the minutes of the meetings of the section and the executive council and all committee reports. The secretary shall keep accurate minutes of the proceedings of all meetings of the section and the executive council and shall furnish copies of said minutes to the executive director of The Florida Bar and to the section coordinator.

(d) Treasurer. The treasurer shall serve as liaison to The Florida Bar and other sections on matters involving section finances and shall have the responsibility of accounting for all funds of the section, shall approve all disbursements, shall prepare annual financial statements under the supervision of the executive council and shall prepare budget requests and amendments in a timely manner in accordance with the procedures of the budget committee of The Florida Bar.

Section 3. Term of Office.

(a) Chair. The term of office of the chair shall begin at the conclusion of the next annual meeting of the section after the chair was elected chair-

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elect and shall end at the conclusion of the next succeeding annual meeting. Upon expiration of the chair's term, the chair shall be automatically succeeded by the chair-elect.

(b) Other officers. The terms of office of the other officers shall run concurrently with that of the chair.

Section 4. Election of Officers. The chair-elect, secretary and treasurer shall be elected by a plurality of the membership of the section in attendance at its annual meeting. Nominations shall be made by the nominating committee of the executive council and may be accepted from the floor.

Section 5. Vacancies. Any permanent vacancy occurring in an office shall be filled for the balance of the unexpired term by vote of the executive council at its next meeting.

Article IV
EXECUTIVE COUNCIL

Section 1. Governing Body. There shall be an executive council composed of 14 members of the section, plus the chair, chair-elect, immediate past chair, secretary, treasurer, and chair of the public utilities law committee, who shall be ex-officio voting council members. The executive council shall be the governing body of the section between the annual meetings of the section. The chair of the section shall be the chair of the executive council and the secretary of the section shall be the secretary of the executive council. It shall have general supervision and control of the affairs of the section, subject to the provision of the Rules Regulating The Florida Bar and the bylaws of this section. It shall authorize all commitments or contracts which entail the payment of money and it shall authorize the expenditures of all section funds. It shall not, however, authorize commitments, contracts or expenditures involving amounts of money in excess of the total amount which is anticipated as receipts from dues during the fiscal year plus the amount that has been previously collected from dues and remains unexpended. As the governing body of the section, it shall be vested with the power and authority to formulate, fix, determine and adopt matters of policy concerning the affairs and purposes of The Florida Bar. All recommendations of the section to The Florida Bar, any branch of the judiciary or to any other group or body to which recommendations by the section are authorized to be made, must first be approved by the executive council. Any recommendation made to other than The Florida Bar shall have the prior approval of The Florida Bar.

Section 2. Term of Office. All members of the executive council, excluding ex-officio voting council members, shall serve for a term of 2 years, the terms of the members being staggered so that 7 members shall take office at the conclusion of every other annual section meeting and shall serve until the conclusion of the annual meeting of the section 2 years thereafter, and 7 members shall take office at the conclusion of every other annual meeting and shall serve until the conclusion of the annual meeting of the section 2 years thereafter.

Section 3. Election of Executive Council Members. The members of the executive council to be elected each year for 2-year terms shall be elected by a plurality vote of the membership in attendance at the annual meeting of the section. Nominations shall be made by the executive council and may be accepted from the floor.

Section 4. Vacancies. Except as is otherwise provided herein, any permanent vacancy occurring in the membership of the executive council shall be filled for the balance of the expired term by vote of the executive council at its next meeting.

Section 5. Duties. In addition to attending meetings of the executive council and of the section, executive council members shall participate in at least 1 standing or ad hoc committee or serve as an executive council liaison to other Florida Bar committees or sections.

Article V
MEETINGS

Section 1. Meetings of the Membership.

(a) The annual meeting of the section shall be held at each annual meeting of The Florida Bar. The active members of the section attending any meeting of the section shall constitute a quorum for the transaction of business and a majority vote of those present shall be binding.

(b) Special meetings of the entire membership of this section may be called by the executive council provided 30 days' notice thereof shall be given to each member of the section.

Section 2. Meetings of the Executive Council.

(a) There shall be at least 3 meetings of the executive council each year, 1 of which shall be held in conjunction with the annual meeting of The Florida Bar.

(b) Regular meetings of the executive council shall be subject to call by the chair of the section upon 15 days' written notice to the members of the executive council.

(c) Special meetings of the executive council shall be subject to call by the chair of the section upon written notice that is reasonable under the circumstances. For a special meeting, the purpose of the meeting must be stated in the call of the chair and no vote may be taken on business other than that stated in the call.

(d) The executive council shall conduct its business at regular and special meetings as provided for in these bylaws; provided, however, the business of the executive council between regular meetings may be conducted by correspondence to the extent authorized by the chair.

(e) Those participating in a meeting or in transacting business by cor-

respondence as authorized above shall constitute a quorum and majority vote of those participating shall be binding.

(f) In the event a member of the executive council is absent from any 2 regular meetings during the fiscal year, the member's office shall be deemed vacant, and such vacancy shall be filled as otherwise provided in these bylaws.

Article VI
COMMITTEES

Section 1. There shall be the following permanent, standing committees within the section:

(a) Budget Committee. The budget committee shall prepare and revise proposed budgets for submission to the executive council for approval. The budget committee shall be composed of the section chair, immediate past chair, chair-elect and treasurer.

(b) Long Range Planning Committee. The long range planning committee shall develop long-range goals for the section, review the present activities of the section and submit reports thereof and recommendations to the executive council for adoption. The long range planning committee shall be composed of the chair-elect of the section and such other persons as the chair may appoint.

(c) Legislative Committee. The legislative committee shall be composed of 3 members, appointed by the chair, who will also name the chair of the committee.

(1) Legislative Positions. The legislative committee shall from time to time make recommendations to the executive council regarding requests for the section to adopt a legislative position. Such position shall require a 2/3 vote of the executive council to be adopted as the section position.

(2) Legislature in Session. When the legislature is in session, the chair of the committee shall consult with the chair and, if available, the chair-elect of the section. The chair of the committee may then act upon pending or proposed legislation in accordance with section legislative positions if it is not reasonably possible or feasible for the executive council to act. The chair of the section shall notify all members of the executive council of such action taken as soon as it is reasonably possible to do so.

(d) Publications Committee. The publications committee shall be composed of the chair of the committee and the editors of the section's column in The Florida Bar Journal and the section's newsletter and any other section members appointed by the chair. The chair of the section will appoint the chair of the committee each year. The chair of the committee will appoint the editors for the section's publications, who will be responsible for the timeliness, quality, and contents of those publications.

(e) Public Utilities Law Committee. The public utilities law committee's purpose is to gather and disseminate information, share expertise and advise its members on the legal, technical, and economic issues related to regulated utilities providing electric, gas, water, sewer, and telephone services. Any member of the section may become a member of the committee by so notifying the chair of the committee in writing. The committee may present at least 1 CLE program which receives Bar approval for CLE credits each year. All CLE presentations must be approved by the executive council. The committee shall also be provided space in the section's newsletter featuring the committee's own column for matters of special interest to its members.

(f) Law School Outreach Committee. The law school outreach committee shall be composed of members appointed by the chair. The committee shall coordinate section activities with Florida law schools to stimulate students' interest in administrative law with the goal of increasing the number of law students with an interest in administrative law.

(g) Nominating Committee. There shall be a nominating committee composed of 3 executive council members appointed by the chair to determine and propose a slate of candidates for any vacancy which occurs either during an executive council member's term or at the conclusion of any executive council member's term. For any executive council member seeking re-appointment at the expiration of that member's term, consideration for reappointment will be based upon that member's contributions to the executive council during the term that is about to expire.

Section 2. Ad Hoc Committees. The chair shall establish ad hoc committees from time to time as the need arises.

Article VII
MISCELLANEOUS

Section 1. Action of The Florida Bar. No action of the section shall be represented or construed as the action of The Florida Bar until the same has been approved by The Florida Bar.

Section 2. No member of the section nor any committee thereof shall take any action or espouse any position as being the action or position of the section except as otherwise provided in these bylaws.

Section 3. Financial Obligations. Before payment, all financial obligations must first be approved in the manner specified by the executive council.

Section 4. Compensation and Expenses. No salary or other compensation shall be paid to any member of the section for performance of services to the section but the chair may authorize the payment of reasonable out-of-pocket expenses resulting from performance of such services.

Section 5. Amendments. These bylaws may be amended only by The Florida Bar upon recommendation made by the executive council of the section.

Section 6. No action of this section shall be contrary to the policies of The Florida Bar.

THE FLORIDA BAR

The Florida Bar
651 E. Jefferson St.
Tallahassee, FL 32399-2300