Administrative Law Section Newsletter

Vol. XXVIII, No. 4 **Elizabeth W. McArthur, Editor** **June 2007**

Square Corners, Round Rooms, and Artful Dodges: Non-Rule Policy and Practical Due Process for the License Applicant

by Daniel C. Brown

Not long before the modern APA appeared on the scene, when I was a law student clerking for a state agency, an agency official explained his policymaking preference to me. He described it, not without some charm and pith, this way: "I always want to stay in that round room - - the one where I can't be cornered."

His inclination is understandable. Agency officials must administer laws that are often not precise, interact in complex ways, and must be applied to a variety of circumstances. From their point of view, a means of policymaking that maximizes regulatory flexibility is enormously attractive, perhaps almost irresistible.

Not long afterwards, the United States District Court for the Northern District of Florida, reviewing the regulatory actions of a federal agency, expressed a decidedly different perspective on the relationship between the regulator and the regulated:

> It has been aptly said that those who deal with the government must turn square corners. The converse . . . . is more compelling. The government must turn square corners with those who deal with it. Citizens in the modern age of big government have pitifully small influence upon the behemoth structure of the government. Such as they are, procedural regulations, by which the agencies are presumably bound, assuage the predicament of the citizen somewhat. They are designed to insure that the might of government is not used to overbear the citizens.

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From the Chair

by Booter Imhof

Here it is, the column that you all have been waiting for – MY LAST COLUMN! The newsletters have been published in a timely manner because of the hard work (including gently reminding the Chair to get the column in!) of Elizabeth McArthur. She has done a wonderful job in shepherding the newsletters to press on time - a Herculean feat. She has Donna Blanton in training to take over her job and Donna will have some big shoes to fill! Good luck to Donna when she takes over. Don't forget, if you have an article for the newsletter please contact Elizabeth or Donna, or if you have something you wish to submit to The Florida Bar *Journal,* please submit it to Debby Kearney. They are always looking for articles.

I believe the Section had a good year. The Pat Dore Conference was organized by Andy Bertron with the able assistance of Seann Frazier. The conference had a great turnout, as I mentioned in prior columns. While I'm on the subject, I want to give a public, personal thanks to Andy Bertron. Andy did an outstanding job as Chair-elect. Not only did he organize the Pat Dore Conference and the Section's long-range planning retreat, but he was a super right-hand man filling in for me and conducting

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CHAIR'S MESSAGE
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the Executive Council meetings in both January and March of this year. I really appreciate his help and good work. He will be an excellent Chair for the coming year.

Our two Board liaisons for the Section were also great help. Larry Sellers continues to do a superb job as the Section's liaison to The Florida Bar Board of Governors and has kept the Section informed of the important issues of the day. He has also worked tirelessly to attend the Section's meetings and relay our concerns to the Board. We have also had the pleasure of having a liaison from the Young Lawyers Division Board of Governors, Rhonda Chung-deCambre Stroman. It is a very good idea to have a liaison with the Young Lawyers Board and she served the Section well in assisting with the first Basic Administrative Law course sponsored by the Young Lawyers Division.

I had the pleasure of working with some terrific committee chairs that all did an outstanding job. Seann Frazier was our CLE Chair, Cathy Lannon was our CLE Committee liaison, Kent Wetherell chaired the Membership Committee, and Debby Kearney chaired the Publications Committee, ably assisted by Mary Smallwood as the Casenotes Editor and Mary Ellen Clark as the coordinator for agency snapshots. Linda Rigot chaired the Uniform Rules Committee, while Bill Williams, Linda Rigot, and Andy Bertron once again headed up the Legislative Committee and did an outstanding job as usual. Cathy Sellers was our liaison to the Environmental & Law Use Section, Allen Grossman was the liaison to the Health Law Section, and Bill Williams and Cathy Lannon were the liaisons to the Appellate Rules Committee.

A special thanks to Cindy Miller for chairing the Public Utilities Law Committee. She organized a first-class CLE program in conjunction with the Federal Communications Bar Association. Cindy is leaving her position, but is leaving an excellent legacy to be followed by the next Chair of the committee.

Another accolade goes to Daniel Nordby for his excellent work on our website. Over the past year, the Administrative Law Section Newsletter archive has been significantly expanded. It now includes all issues from April 1997 to the present. The newsletter's popular "Agency Snapshots" have been collected and are now readily accessible on a single page. A Section Listserv has been implemented on a trial basis for Executive Council members with positive results. The service should be expanded to the broader membership in the coming months and will prove a valuable tool for communicating news of interest to Section members. The web address is: *http://www.flaadminlaw.org/index.asp.* There is more information about Listserv in this newsletter.

Another great program that got on track this past year was the Law School Liaison activities, spearheaded by Committee Chair Cathy Sellers. As I mentioned in an earlier column, Cathy organized a program conducted at FSU College of Law that helped introduce students to the area of administrative law. The Section is hoping to duplicate that program at other law schools around the state.

I mentioned in my last column that your Executive Council was very concerned about the new budgeting process at The Florida Bar and how The Bar is allocating costs to the sections. This issue has not been resolved and I understand that the Council of Sections will be taking this issue up at its next meeting at the 2007 Annual Florida Bar Convention. The meeting is scheduled for Saturday morning, June 30, 2007 at 9:00 a.m. Mary Ellen Clark and Clark Jennings are the Section's hard-working representatives on the Council of Sections. Clark is also the Chair of the Council of Sections.

Of course, the Section would grind to a halt without the services of Jackie Werndli, our Section Administrator. She is the best. She has been fabulous to work with (or should I say for? ☺). I can't say enough about her professionalism and abilities. Thanks again, Jackie!

Last time I also mentioned that I had signed up for the Department of State's online e-Rulemaking site at *www.flrules.org*. I followed the instructions, but it took a while before I received any alerts for the departments I had picked. The search engines work very well, it is only the alert system that I had problems accessing; that problem has now been fixed and I'm getting my alerts on a regular basis.

In the words of Elizabeth McArthur, I'm going to NAG you one LAST TIME to get involved in the Section. I think you will find it both rewarding and fun. Please come to the Administrative Law Section's Annual Meeting at the 2007 Annual Florida Bar Convention at the Orlando World Center Marriott on Thursday, June 28, 2007, at 3:00 p.m. The Section is also sponsoring a reception at 6:30 p.m., which is open to everyone. I hope to see you there.

I have enjoyed serving as your Chair this past year and look forward to the good work of the Section for many years to come.

Patrick L. "Booter" Imhof *is the Staff Director for the Senate Committee on Regulated Industries. He has been employed by the Florida Legislature for over 25 years in both the Senate and the House of Representatives. Mr. Imhof received his B.A. degree in Political Science from the University of Florida in 1972 and his J.D. degree from South Texas College of Law, Houston, Texas in 1978. He is a member of The Florida Bar and the State Bar of Texas. He is currently the Chair of the Administrative Law Section of The Florida Bar.*

The Open Government Act: The 2007 Amendment to the APA

by Lawrence E. Sellers, Jr.

Author's note: As of this writing, HB 7183 has not yet been presented to the Governor. After the bill is presented, the Governor will have the opportunity to sign it, veto it or allow it to become law without his signature.

The Florida Legislature recently enacted HB 7183, which makes a number of changes to Florida's Administrative Procedure Act (APA).[1] Here's a brief summary of some of the key provisions in "The Open Government Act." Many are based on recommendations by the Joint Administrative Procedures Committee.[2]

Rulemaking

Defines Rulemaking Authority. Section 2 of the Act adds new definitions, including a definition of "rulemaking authority." The term is defined to mean "statutory language that *explicitly* authorizes or requires an agency to adopt, develop, establish, or otherwise create any statement coming within the definition of 'rule'." The purpose of defining the term reportedly is to make clear that agencies have the duty or authority to adopt rules pursuant to the APA in cases where the statutory language directs or authorizes them to "adopt policies," or "establish criteria," or the like, even though the word "rule" is not used.

Expands Statutes that may Confer Rulemaking Authority. Section 2 also revises the "flush left" language following the definition of "invalid exercise of delegated legislative authority" to eliminate the requirement that statutory language granting rulemaking authority shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred "by the same statute." The quoted language is removed.[3] Section 3 of the Act makes a similar change to s. 120.536.

Restricts Delegation of Rulemaking Responsibilities. Section 4 of the Act provides that certain rulemaking responsibilities of an agency head may not be delegated or transferred. These include approval of the notice of intended action and the filing of the approved rule with the Department of State. This appears to be consistent with the court's ruling in *Financial Services Commission v. The Florida Insurance Council, Inc.*, 938 So. 2d 545 (Fla. 1st DCA 2006), *review denied,* ____ So. 2d ____ (Fla. 2007).

Requires Certain Boards to Conduct Public Hearings. The rulemaking requirements in the APA generally provide that the agency must give affected persons the opportunity to present evidence and argument. In addition, the agency must, if requested by an affected person, schedule a public hearing on the proposed rule. Section 4 of the Act requires that if the agency head is a board created within the Department of Business and Professional Regulation or the Department of Health, Division of Medical Quality Assurance, the board shall conduct the requested public hearing itself and may not delegate this responsibility without the consent of those persons requesting the public hearing.

Requires SERCs to be Made Available. Section 4 of the Act provides that a proposed rule may not be filed with the Department of State (and therefore may *not* become effective), until the Statement of Estimated Regulatory Costs (SERC) has been provided to all persons who submitted a lower cost regulatory alternative and it has been made available to the public.

Expands JAPC Authority. Section 5 of the Act makes a number of changes to the duties and powers of the Joint Administrative Procedures Committee (JAPC). Among other things, JAPC is now authorized to review and object to unadopted agency statements. JAPC also is authorized to consider whether a SERC complies with all applicable requirements and to object to a proposed rule where the accompanying SERC does not comply.

Clarifies Cross-References to Other Rules of the Same Agency. The APA provides that a rule may incorporate material by reference but only as to material that exists on the date the rule is adopted; for purposes of the rule, changes in the material are *not* effective unless the rule is amended to incorporate the changes. As such, questions have arisen as to whether an agency rule that incorporates by specific reference another rule of that same agency automatically incorporates subsequent amendments to the referenced rule. Section 4 of the Act clarifies this by providing that an agency rule that incorporates by specific reference another rule of that agency automatically incorporates subsequent amendments to the referenced rule, unless a contrary intent is clearly indicated in the referencing rule. Any notice of amendments to a rule that has been incorporated by specific reference in other rules of that agency must explain the effect of the amendments on the referencing rules.

Limits Materials that may be Incorporated by Reference. Section 4 of the Act also provides that material incorporated by reference in a rule may not incorporate additional material by reference unless the rule specifically identifies the additional material. For rules adopted after 2008, material may not be incorporated by reference unless the full text of the material can be made available for free public access through an electronic hyperlink from the rule in the *Florida Administrative Code* making the reference, unless the agency has determined that posting of the material would constitute a violation of federal copyright law, in which case a statement to that effect, along with the address of locations at the Department of State and the agency at which the material is available for public inspection and examination, must be included in the notice.

Requires Electronic Publication of Code. Effective December 31, 2008, Section 8 of the Act requires the Department of State to publish electronically the *Florida Administrative*

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Code on an Internet website managed by the department. The electronic code is to display each rule chapter currently in effect in browse mode and must allow full text search of the code and each rule chapter.

Unadopted Rules

Defines "Unadopted Rule." Section 2 of the Act also adds a new definition for the term "unadopted rule," and defines the term to mean "an agency statement that meets the definition of the term 'rule' but has not been adopted pursuant to the [rulemaking] requirements of s. 120.54."

Effect of Filing of Challenge to Agency Statements Defined as Rules. The APA establishes a legislative preference for rulemaking, and it requires that agency statements meeting the definition of a rule must be adopted as soon as practicable and feasible. The APA also provides a procedure for challenging agency statements defined as rules. If the administrative law judge enters a final order that all or part of an agency statement violates the rulemaking requirement, then the agency is required to immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.

Agencies typically have responded to such challenges by initiating rulemaking to adopt the challenged statement, because the initiation of such rulemaking generally results in a stay of the challenge to the unadopted statement (and the subsequent adoption of the rule moots the challenge). In such cases, the agency may continue to rely upon the challenged statement if the statement meets certain requirements in s. 120.57(1)(e). The referenced provision generally requires that the agency "prove up" that the unadopted rule is not an invalid exercise of delegated legislative authority (i.e., it does not enlarge, modify, or contravene the specific provisions of law implemented, etc.) and that the rule is not being applied without due notice.[4]

Sections 9 and 10 of the Act make significant changes to these provisions. The Act provides that upon the *filing* of a petition for administrative determination that an agency statement violates the rulemaking requirement, the agency shall *immediately* discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action until either of the following occurs: (1) the proceeding is dismissed, (2) the statement is adopted and becomes effective as a rule, (3) a final order is issued that contains a determination that the petitioner failed to prove the statement constitutes a rule, or (4) a final order is issued that contains a determination that rulemaking is not feasible or not practicable. However, if the administrative law judge determines that the agency's inability to rely upon the statement during the proceeding will constitute an immediate danger to the public health, safety, or welfare, then the administrative law judge shall grant an agency petition to allow application of the statement until the proceeding is concluded.

Agencies May Not Rely on Unadopted Statements. As noted, the APA currently allows an agency to rely upon a challenged unadopted statement if the agency is proceeding expeditiously and in good faith to adopt rules that address the challenged unadopted statement and the agency complies with s. 120.57(1)(e). However, effective January 1, 2008, Section 10 of the Act repeals the "prove up" provisions in s. 120.57(1)(e) and expressly provides that an agency or an administrative law judge may not enforce any agency policy that constitutes an unadopted rule when the agency fails to prove that rulemaking is not feasible or practicable. Notably, this requirement does not preclude application of properly adopted rules and applicable provisions of law to the facts.[5]

Rule Challenges

Clarifies Deadlines for Filing Rule Challenges. Section 9 of the Act clarifies deadlines for filing challenges to proposed rules when a public hearing has been held or the agency is required to prepare a statement of estimated regulatory costs (SERC). The APA provides several "windows" for filing challenges to proposed rules. One of these "windows" is within 10 days after the final public hearing is held on the proposed rule as provided by "s. 120.54(3)(c)." Section 9 of the Act revises this reference to "s. 120.54(3)(e)2," which expressly provides that the term "public hearing" includes any public hearing held by any agency in which the rule was considered. A second "window" is within 20 days after the "preparation" of a SERC. Section 9 of the Act also revises this to conform to other provisions of the APA so that the time begins to run only after the statement "has been provided to all persons who submitted a lower cost regulatory alternative and made available to the public."

Increases Limits on Attorney's Fees. Section 11 of the Act increases from $15,000 to $50,000 the limit on

attorney's fees that may be awarded to the prevailing party in challenges to proposed and existing rules.[6] The Act also makes clear that attorney's fees are available in challenges to emergency rules.

Revises Attorney's Fees in Challenges to Unadopted Rules. While the APA always has included a limit on the attorney's fees that may be awarded in cases involving challenges to *proposed* or *existing* rules, the Legislature initially did not establish any limits on attorney's fees that may be awarded in cases involving challenges to *unadopted* rules. However, agencies typically avoided the risk of paying attorney's fees in such cases by initiating rulemaking to adopt the challenged unadopted statement. Section 11 of the Act makes two changes to the provision governing attorney's fees in cases involving challenges to unadopted rules. First, Section 11 provides that, if prior to the final hearing the agency initiates rulemaking and requests a stay of the proceedings pending rulemaking, the administrative law judge shall award reasonable costs and reasonable attorney's fees accrued by the petitioner prior to the date the agency filed its request for a stay pending rulemaking, providing the agency adopts the statement as a rule. However, a request for attorney's fees and costs may be granted only upon a finding that the agency knew or should have known at the time the petition was filed that the agency statement was an unadopted rule, and no award of attorney's fees may exceed $50,000. Second, Section 11 also provides that, if the agency prevails in the proceedings, the administrative law judge shall award reasonable costs and attorney's fees against the party if the party participated in the proceedings for an improper purpose.

Effective Date. Section 20 provides that the Act takes effect July 1, 2007, except as otherwise expressly provided.[7] Several of the sections have delayed effective dates. For example, the provisions governing challenges to agency statements defined as rules, reliance on unadopted rules, and changes to attorney's fees all become effective January 1, 2008. The provision requiring the publication of an electronic version of the *Florida Administrative Code* becomes effective December 31, 2008.

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Endnotes:

[1] HB 7183 initially was filed as Proposed Committee Bill (PCB) GEAC 07-05. As enacted, it also includes the contents of HB 7179, which initially was filed as PCB GEAC 07-04. The two House bills were similar to SB 1592 and SB 1594, both by Senator Mike Bennett (R-Bradenton).

[2] See JAPC, *Report on Unadopted Rules* (Feb. 2006), and JAPC, *Supplement to Report on Unadopted Rules* (Feb. 2007).

[3] The "by the same statute" language was an issue in *JM Auto v. DHSMV*, DOAH Case No. 07-0603RX (Final Order, April 20, 2007).

[4] For a general discussion of these provisions, see Kent Wetherell, *Rulemaking Reforms and NonRule Policy: A Catch-22 for State Agencies*, 71 Fla. B.J. 20 (Mar. 1997); Cathy M. Sellers, *Nonrule Policy and the Legislative Preference for Rulemaking*, 75 Fla. B.J. 38 (Jan. 2001); Cathy M. Sellers, *OFFA v SFWMD—An Agency Need Not Successfully Adopt a Challenged Statement to Avoid a Final Order and Attorney's Fees*, XXIV Admin. L. Section Newsletter 1 (Mar. 2003).

[5] This provision appears to be consistent with the court's ruling in *The Environmental Trust v. Department of Environmental Protection*, 714 So. 2d 493 (Fla. 1st DCA 1998),that an agency statement explaining how an existing rule of general applicability will be applied in a particular set of facts is not itself a rule. For a discussion of this decision, *see* Lawrence E. Sellers, Jr., *The Environmental Trust*: *Will the Exceptions Swallow the "Rule?,"* XX ELULS *Reporter,* No. 2 (March 1999).

[6] The new $50,000 limit is consistent with the limit on attorney's fees available under the Equal Access to Justice Act, s. 57.111(4)(d), which likewise was increased from $15,000 to $50,000 in 2003. *See* Lawrence E. Sellers, Jr., *The 2003 Amendments to the Florida APA*, 77 Fla. B.J. 74 (Oct. 2003).

[7] The Act does not indicate whether it applies to proceedings begun but not yet completed prior to the effective date. By comparison, the version of the APA originally enacted in 1974 included provisions intended to address the effect of the new Act on pending adjudicatory proceedings. The general rule is that a statute that relates only to a procedural remedy applies to all pending cases, but there can be no retroactive application of substantive law without a clear directive from the Legislature. For example, Florida courts previously have held that the right to collect attorney's fees may be substantive in nature and therefore may not be applied retroactively. In one of the first appellate decisions interpreting the 1996 APA legislation, the court concluded that certain provisions were "means and methods" by which the administrative determination is rendered, and therefore are procedural in nature. *Life Care Centers of America, Inc., v. Sawgrass Care Center, Inc.*, 683 So. 2d 609, 614 (Fla. 1st DCA 1996).

APPELLATE CASE NOTES

by Mary F. Smallwood

Rule Challenges

Hanger Prosthetics and Orthotics, Inc. v. Department of Health, 32 Fla. L. Weekly 519 (Fla. 1st DCA, February 21, 2007)

Hanger Prosthetics and Orthotics challenged a proposed rule of the Department of Health that defined the term "direct supervision." Section 468.808, Fla. Stat., provides that certain support personnel may perform delegated duties "under the direct supervision of a licensed orthotist, prosthetist, or pedorthist." The act does not define the term, however. The proposed rule required the licensed professional to physically evaluate the effectiveness and fit of all devices within the scope of the professional's licensure requirements and to approve in advance any repairs of such devices. The petitioners challenged the proposed rule as exceeding the grant of statutory rulemaking authority and enlarging, modifying, or contravening the provisions of the law being implemented. The administrative law judge concluded that the rule was not an invalid exercise of delegated legislative authority.

The appellate court affirmed. It held that the Legislature had granted the Department the authority to adopt rules governing the standards of practice for orthotists, prosthetists, and pedorthists. It concluded that defining direct supervision of unlicensed employees was a standard of practice. Further, the court held that the definition did not enlarge, modify, or contravene the statutory grant of authority by specifying what direct supervision entails.

Licensing

Barr v. Department of Health, 32 Fla. L. Weekly 923 (Fla. 1st DCA, April 11, 2007)

An administrative complaint was filed against Barr, a dentist, alleging that he had violated the statutory standard of care by failing to provide adequate treatment and by failing to keep adequate records. The administrative law judge, and the Department in its final order, concluded that Barr had provided adequate treatment with respect to a root canal but violated the standard of care statute for failing to keep adequate records.

On appeal, the court reversed. While recognizing that an agency interpretation of a statutory provision within its substantive jurisdiction is entitled to great weight, the court concluded that that interpretation failed to reconcile separate provisions of the statute. The court noted that the statutory provision that the agency relied upon authorized disciplinary action for failure to meet standards of care in "diagnosis and treatment." § 466.028(1)(x). Fla. Stat. A separate provision, not cited in the complaint, addressed a licensee's failure to keep adequate records. The Department argued that the recordkeeping failures in this case were so egregious that they rose to the level of a standard of care violation. However, the court rejected that argument on the grounds that the agency's interpretation would essentially make the separate recordkeeping provision of the statute superfluous.

Romano v. Department of Business and Professional Regulation, 32 Fla. L. Weekly 481 (Fla. 5th DCA, February 16, 2007)

Romano, a licensed real estate agent, pled guilty to several felony counts related to insurance fraud. He had leased an automobile for a friend who had poor credit. The friend then set fire to the car when he was unable to make payments. Romano reported the car as stolen to the police and the insurance company. Romano was sentenced to probation. Apparently he was a model probationer, making full restitution for the car. However, he failed to report the guilty plea to the Real Estate Commission as required by law. When it was anonymously reported, the Commission investigated and imposed sanctions, suspending Romano's license and requiring him to attend four two-day Commission meetings. On appeal, the court reversed the portion of the penalty requiring attendance at Commission meetings, finding no authority in the statute for such a penalty.

Kany v. Florida Engineers Management Corporation, 32 Fla. L. Weekly 487 (Fla. 5th DCA, February 16, 2007)

The Florida Engineers Management Corporation ("FEMC") filed an administrative complaint seeking to revoke the license of Kany, a registered engineer, for signing and sealing drawings not prepared by him or under his responsible supervision. The drawings for home renovations had been prepared by a draftsman, not in Kany's employ, and reviewed by Kany. After an administrative hearing, the administrative law judge ("ALJ") found that it was acceptable practice in the profession for a draftsman to prepare drawings and plans and submit those to an engineer for sealing so long as the draftsman is known to the engineer and the engineer reviews and approves the plans. The ALJ recommended that Kany be reprimanded for certain minor deficiencies in the plans but concluded that revocation was not warranted.

FEMC rejected the proposed penalty and revoked Kany's license. It held that its rules required an engineer to initiate concepts contained in drawings that he signs and seals to be in responsible charge.

On appeal, the court reversed. It quoted Rule 61G15-181.01(1), Fla. Admin. Code, the definition of "responsible charge," at length as it was not able to find any language in the rule requiring that an engineer initiate drawings. Instead, the court noted that there had been testimony at the hearing supporting the ALJ's findings with respect to the acceptable practice of the profession. In this case, since it involved revocation of a license, the agency had the burden of proof by a clear and convincing standard. Since the ultimate issue in the proceeding

was factual, whether Kany made the engineering decisions, FEMC could not reject the ALJ's findings unless there was no competent substantial evidence to support them.

Adjudicatory Proceedings

Simmons v. Agency for Health Care Administration, 32 Fla. L. Weekly 283 (Fla. 1st DCA, January 24, 2007)

Dr. Simmons filed an application with the Agency for Health Care Administration ("AHCA") seeking to enroll as a Medicaid provider. AHCA informed him that it would not enter into such an agreement with him, and Dr. Simmons filed a petition for an administrative hearing. AHCA did not take formal action on that petition; instead, it sent Dr. Simmons a letter stating that no action would be taken on his request as the denial of his application was of a contractual nature that could only be addressed in court.

Simmons sought a writ of mandamus compelling the agency to provide him with a clear point of entry. The court granted the writ. Without reaching the substantive question of whether Simmons was entitled to an administrative proceeding, the court held that AHCA must enter an order either granting or denying the petition for hearing.

Attorney's Fees

Osborne v. Commission on Ethics, 32 Fla. L. Weekly 486 (Fla. 5th DCA, February 16, 2007)

Dr. Milanick filed a complaint with the Commission on Ethics stating that Osborne, the former mayor of the Town of Beverly Beach, had opposed annexation of Milanick's property into the Town while mayor, based on "his own personal reasons" and because it would jeopardize his personal investment. When an investigator for the Commission requested a copy of the letter attached to the complaint, Milanick's attorney sent a slightly different version of the letter. That version alleged that Osborne owned residential property adjacent to the commercial property for which Milanick was seeking annexation.

After an administrative hearing, the ALJ found Osborne's actions had not been motivated by personal interest but by legitimate public concerns. The ALJ recommended the assessment of attorney's fees based on Section 112.317(8), Fla. Stat., which required the award of attorney's fees where the complaint contains false allegations of material fact. The Commission adopted the findings of fact but rejected the award of attorney's fees on the grounds that the false allegations were not contained in the complaint but were in the letter submitted by Milanick's attorney in response to the request of the investigator.

On appeal, the court reversed the Commission's denial of attorney's fees. It held that the complaint filed contained the crux of the false allegations in that it alleged that Osborne had acted out of personal concerns. The second version of the letter from Milanick's attorney simply fleshed out those allegations.

Appeals

Indian Trail Improvement District v. Department of Community Affairs, 32 Fla. L. Weekly 271 (Fla. 4th DCA, January 24, 2007)

Palm Beach County adopted a comprehensive plan amendment in 2004 that would allow it to act as a provider of freshwater and wastewater services in unincorporated areas of the county. Indian Trail Improvement District ("ITID") had acted as a provider of such services in the unincorporated areas of the county since 1998. When the Department of Community Affairs approved the plan amendment, ITID appealed pursuant to Section 120.68, Fla. Stat., as a party "adversely affected by final agency action." The county challenged ITID's standing to appeal, arguing that there must be an adverse impact on property for an appellant to demonstrate standing.

The court held that ITID had demonstrated standing in that the county's decision to provide water and wastewater services in competition with ITID had foreseeable operational and planning consequences on ITID.

Public Records and Government-in-the-Sunshine

Office of the State Attorney for the Thirteenth Judicial Circuit of Florida v. Gonzalez, 32 Fla. L. Weekly 1035 (Fla. 2d DCA, April 20, 2007)

Gonzalez, a prisoner, sought to obtain his litigation file from the State Attorney's Office after he became concerned that the Florida Department of Law Enforcement had improperly calculated his gain time and had posted incorrect information on its sex offender web site regarding Gonzalez. He retained an attorney to make a public records request. When more than 90 days passed without a response to the request, the attorney filed suit to obtain the documents and requested attorney's fees be awarded. The State Attorney's Office presented evidence that it had requested that the appropriate files be located for copying and that the delay was due to a clerical error as the original public records request was lost. Accordingly, the files that had been retrieved were returned to the custodian when no one was able to determine why they had been taken from archives. In closing arguments, the State Attorney's Office also argued that there was no undue delay in producing the requested documents because payment for the records had never been tendered.

The circuit court concluded that there was an unlawful delay in producing the records and that Gonzalez was entitled to reasonable attorney's fees and costs. Upon entry of the order setting attorney's fees, the State Attorney appealed.

The appellate court affirmed the order below and awarded appellate fees. The court held that the award of attorney's fees is appropriate both where the request is denied and where there is an unjustifiable delay in responding to the request, requiring the party to file suit. The court rejected the State Attorney's argument that the failure to respond was not a refusal but a mistake that could have been corrected if Gonzalez' attorney had contacted the office again to determine why a delay occurred. It held that there was no duty on the part of the requesting party to make such a contact before filing suit. The court held that the trial court had not abused its discretion in determining that the Public Records Act does not require payment of costs before records must be produced. It noted that it was only common sense that

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payment does not have to be made before costs are invoiced.

Mary F. Smallwood *is a partner with the firm of Ruden, McClosky, Smith, Schuster & Russell, P.A. in its Tallahassee office. She is a 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.

Administrative Law Section Listserv!

The Administrative Law Section Listserv is coming. Section members will soon be receiving an e-mail invitation to join the Listserv. The Listserv will initially be used to provide notification of news and events of interest to Section members. In time, the Listserv may be expanded to provide an open forum to discuss administrative law issues.

Be sure The Florida Bar has your current e-mail address so you don't miss out on this exciting new resource. You can update your e-mail address on the Bar's website, *www.floridabar.org*.

Additional information about the Listserv will soon be posted on the Section's website, *www.flaadminlaw.org*.

Agency Snapshot
Agency for Health Care Administration

The Agency for Health Care Administration (AHCA) was created by the Legislature in 1992 when its responsibilities were transferred from the Department of Health and Rehabilitative Services. The Department is headed by its Secretary, a gubernatorial appointment subject to confirmation by the Senate.

The Agency is the chief health policy and planning entity for the State. It's responsible for the administration of the Medicaid Program, health facility licensure, certification of managed care plans including prepaid health plans, the certificate of need program, and the operation of the Florida Center for Health Information and Policy Analysis.

AHCA has a budget of nearly $17 billion. The Medicaid Program alone operates under a $13 billion annual budget.

Head of the Agency:
Dr. Andy Agwunobi, Secretary
2727 Mahan Drive, Building 3
Tallahassee, FL 32308

Dr. Agwunobi is a medical doctor (a pediatrician) and holds an MBA from Stanford University. Dr. Agwunobi most recently served as the CEO of Grady Health System in Atlanta. It is the largest public hospital-based health system in the Southeast.

Agency Clerk:
Richard Shoop
(850) 922-5873

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

General Counsel:
Craig H. Smith
(850) 922-5873
smithcr@ahca.myflorida.com

The Agency's General Counsel is Craig Smith, a 1992 graduate from Nova Southeastern University (on a baseball scholarship) and a graduate with honors of Ohio State University Law School in 1996. Craig joined AHCA in January, 2007. Before joining the Agency, Craig most recently served as a partner with Hogan & Hartson in Miami. Craig is a Board-certified health lawyer.

Number of lawyers on staff: 42, including 32 in Tallahassee and 10 in other Florida offices.

Kinds of cases: The Agency's administrative cases include rule challenges, complex certificate of need proceedings, administrative litigation involving facility regulation and licensure, Medicaid audits, and appeals from all of these types of cases. The Agency also represents itself in bid protests and in complex civil litigation brought in state and federal courts.

Practice Tips:

The Agency operates with three major divisions. In addition to the Office of the Secretary, which houses the Chief of Staff and General Counsel's Office, the Agency operates a Division of Medicaid, a Division of Communications and Legislative Affairs, and a Division of Health Quality Assurance.

The Chief of Staff is Mark Thomas, (850) 922-7245. Mark is a Board-certified health lawyer. Before re-joining AHCA as its Chief of Staff, Mark served as the Chief Assistant Attorney General in the OAG's Medicaid Fraud Control Unit.

The Deputy Secretary for Medicaid is Tom Arnold. His Division oversees more than 82,000 Medicaid recipients and providers. The Medicaid Program processes more than 400,000 claims every day.

The Deputy Secretary for Communications and Legislative Affairs is Clint Fuhrman, (850) 922-5583. His Division communicates with the legislature and the public about health care legislation. The Division also oversees media relations and public records requests.

Public records requests should be sent to the Agency's Public Records Coordinator:
Will Armstrong
Public Records Coordinator
2727 Mahan Drive,
Ft. Knox Bldg. 3, Mail Stop #2
Tallahassee, FL 32308-5403
(850) 414-6044
(850) 921-9041 (fax)
email: *PublicRecordsReq@ahca.myflorida.com*

The Deputy Secretary for the Division of Health Quality Assurance, Elizabeth Dudek, has a wealth of experience and perhaps the greatest institutional knowledge of the Agency. Among other things, her Division is responsible for health facility surveys, the investigation of consumer complaints against health care facilities, managed care, plans and construction and the determination of need for certain new health care facilities and services (CON). Liz also serves as the Agency's Emergency Operations Coordinator and is a registered lobbyist providing testimony before the legislature on behalf of the Agency.

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

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Minutes — Administrative Law Section Executive Council Meeting

April 5, 2007

Tallahassee, Florida

Draft: not yet reviewed or approved by Executive Council

I. CALL TO ORDER: Executive Council Chair-Elect Andy Bertron called the meeting to order at 3:05 pm.

Present: Andy Bertron, Elizabeth McArthur, Seann Frazier, Kent Wetherell, Bill Williams, Dave Watkins, Linda Rigot, Clark Jennings, Debby Kearney, Allen Grossman, Wellington Meffert, Donna Blanton, Cynthia Miller, Cathy Lannon, Larry Sellers, Daniel Nordby, and Jackie Werndli.

Absent: Booter Imhof, Scott Boyd, Mary Ellen Clark, Cathy Sellers, Li Nelson, and Bruce Lamb.

II. PRELIMINARY MATTERS:

A. Minutes - February 9, 2007

The minutes of the February 9, 2007, Executive Council meeting and Long-Range Planning Retreat were approved with one correction to indicate that Andy Bertron is Chair-Elect.

B. Treasurer's Report

Seann Frazier reported that the Section is well ahead of budget right now, but that not all of the expenses from the 2006 Pat Dore Conference had been allocated yet, and we still do not know what impact The Florida Bar's new expense allocation system will have.

C. Chair's Report

None.

III. COMMITTEE/LIAISON REPORTS

A. Continuing Legal Education

Seann Frazier reported that the Section has been asked to co-sponsor a state and federal administrative and governmental practice certification review course to be held on August 16-17, tentatively planned for Jacksonville, along with the Government Lawyers Section and the Environmental and Land Use Law Section, with each Section bearing 1/3 of the financial responsibility. The low number of applicants to take the certification exam was noted. After discussion, on motion made and duly seconded, the council voted to agree to 1/3 co-sponsorship of this program if it is held in Tallahassee. Bill Williams and Allen Grossman abstained from this vote.

Seann Frazier reported that it looked like there would not be a basic administrative law Young Lawyers' Division seminar in spring 2008, leaving the spring 2008 slot open. Apparently a very large amount of lead time is necessary to coordinate a YLD seminar, and after discussion, it was agreed that the council should make known now its willingness to support a basic administrative law YLD seminar in spring 2009, to give enough lead time to allow this program to happen.

Seann Frazier also reported on the Government Lawyers' Section's request that the Section support and assume a 10% share of the financial responsibility of an April 2008 federal APA seminar to be held in Washington, D.C. It was noted that last year's federal APA seminar lost money, although some changes have been discussed to reduce the costs. After discussion, on motion made and duly seconded, the council voted to fully support the federal APA seminar but not to share in the financial responsibility. Support for this program will include lending the Section's name to the seminar if that is desired, and providing space to advertise for the program in the Section newsletter and on its website. Bill Williams and Allen Grossman abstained from this vote.

Jackie Werndli provided an update on CLE cost/revenue allocation issues that are being worked out and remain fluid with The Florida Bar. One change that has been agreed to is that the per-format charge for CLE audiotapes and videotapes has been reduced from $900 to $750, but that the per-order change fee is staying at $15 and the per-tape fee is going up from $10 to $15. It will be the end of the year or later, after the audited statements are reviewed, before these allocation issues are finalized.

Jackie Werndli then discussed how these allocation issues will affect the Section's financial performance from the 2006 Pat Dore Conference. If that conference is treated as a Section-sponsored program, then a problem caused by the new allocation system is that there is still the old policy adopted by The Florida Bar in 1993 when there was no allocation of direct expenses to Section seminars that a Section cannot make more than $3,000 on any one program, and if there are multiple programs in one year, then no more than $5,000 can be made in any one year, with any excess profit going back to The Florida Bar. Another negative financial impact is a new treatment of seminar tape revenues as being newly allocated to the courses (so that if there is a profit from the tape sales, then that profit is subject to the cap). If the seminar is treated as a CLE course of The Florida Bar and not of the Section, however, then the cap does not apply, but The Florida Bar will typically be in control of setting the fee for the program. It may be possible for the 2006 Pat Dore Conference to be treated as a CLE course of The Florida Bar, which may be better financially for the Section given all of the new revenue and cost allocations. On motion made and seconded, the council voted to authorize Jackie Werndli to proceed to characterize the 2006 Pat Dore Conference however yields the best financial results for the Section.

B. Publications

Debby Kearney reported that she

has several articles lined up for the next several issues of *The Florida Bar Journal*.

Elizabeth McArthur reported that the March issue of the Newsletter had just come out, and that it had a General Counsels directory instead of agency snapshots, noting that there have been several recent newsletters without any agency snapshots and volunteers are needed. Seann Frazier volunteered for an agency snapshot update on the Agency for Health Care Administration, and Allen Grossman agreed to do an agency snapshot update on the Department of Health. All members were encouraged to check the agency snapshot page of the Section's website, and to volunteer to do agency snapshots for those agencies that had not yet been covered.

C. Legislative

Bill Williams reported on APA-related bills. SB 1592 deals with unadopted rules and removes the caps on attorney's fees in rule challenges. SB 1594 deals with incorporation by reference and codifies the case holding that there is a right to a formal administrative hearing when disputed issues of fact arise during the course of an informal hearing. Linda Rigot noted that SB 1970 deals with agency exemptions, following up on the Senate Committee on Governmental Oversight's study on the need to continue existing exemptions. Not very many exemptions were identified as no longer necessary as a result of this effort.

D. Public Utilities Law

Cindy Miller reported that the seminar conducted at the Mary Brogan Museum went well, and that the different venue was well-received.

E. Membership

Kent Wetherell reported that Section membership was up by just over 100 so far this year. He will be speaking at a Young Lawyers Division – Tallahassee Bar program to be held at FSU, and he will make section brochures available there.

F. Webpage

Daniel Nordby reported that the website now has newsletters going back for 10 years, and all agency snapshots accessible on a separate page. They are working on technical issues for Listserv, and plan to get some information out in the next newsletter.

G. Uniform Rules of Procedure

Linda Rigot reported that the Joint Administrative Procedures Committee had indicated that the Governor's office had agreed to proceed with two changes to the Uniform Rules. She has signed up on the list of persons to get notice of any proposed rule amendments, and will watch for the changes. Cathy Lannon reported that the Tallahassee Women Lawyers will be doing a CLE seminar on the amendments to the Uniform Rules.

H. Board of Governors Liaison

Larry Sellers reported on the March 30 meeting of The Florida Bar Board of Governors, including its approval of a proposed advertising rule amendment on attorney and law firm websites, which now goes to the Supreme Court. The Board of Governors also approved a proposal for listing Bar members' ten-year disciplinary history on The Florida Bar's website, and approved changes to Rule 4-8.4(i) addressing sexual conduct with clients; these changes also go to the Supreme Court.

I. Law School Liaison

No report.

J. CLE Committee Liaison

Nothing new to report

K. Council of Sections

There has been no meeting since the last report.

L. Section Liaison

1. Environmental and Land Use Law – No report.
2. Health Law – Nothing new to report.
3. YLD Liaison – No report.

M. DOAH Update

No news to report.

N. Appellate Court Rules ad hoc Committee

No news to report.

IV. OLD BUSINESS

None.

V. NEW BUSINESS

Cathy Lannon requested that the Section consider sponsoring group showings of CLE videotapes so that those showings would qualify for "live" CLE presentations for purposes of qualifying for certification requirements. The council raised questions regarding costs, charges, and other issues implicated by this request, and determined that there was not enough information regarding what would be required to qualify for a live presentation. On motion, duly seconded, a majority of the council voted to authorize Jackie Werndli to find out whether it is feasible to get in-person credit for group airings of CLE tapes, and if so, what are the cost and charge issues, and report back to the council; but to not authorize any action by the Section on this request at this time. Cathy Lannon voted against the motion.

Andy Bertron announced that the next meeting would be at The Florida Bar's annual meeting, with the council meeting the afternoon of June 28, and the Section's reception held that night. Jackie Werndli noted that information about the annual meeting, with hotel and other information, was on The Florida Bar's website, and she would be sending an email reminder with a link.

On motion, duly seconded, the meeting was adjourned at 4:55 pm.

Respectfully submitted,

Elizabeth McArthur
Secretary

THE FLORIDA BAR CLE

The Florida Bar Continuing Legal Education Committee and the Administrative Law Section, Environmental & Land Use Law Section, and the Government Lawyer Section present

State and Federal Government and Administrative Practice (SFGAP) Certification Review Course

COURSE CLASSIFICATION: ADVANCED LEVEL

One Location: August 16 & 17, 2007
Tallahassee-Leon County Civic Center • 505 West Pensacola Street
Tallahassee, Florida 32301 • 850/487-1691

Course No. 0630R

The SFGAP Certification Review Course provides the administrative and government practitioner with valuable and substantive information regarding agency practice, agency rulemaking, administrative appeals, government contracting, bid protests, government litigation, open records, the Sunshine Law and government ethics.

Those who have applied to take the certification exam may find this course a useful tool in preparing for the exam. It is developed and conducted without any involvement or endorsement by the BLSE and/or Certification committees. Those who have developed the program, however, have significant experience in their field and have tried to include topics the exam may cover. Candidates for certification who take this course should not assume that the course material will cover all topics on the examination.

Thursday, August 16, 2007

1:00 p.m. – 1:30 p.m.
Late Registration

1:30 p.m. – 1:35 p.m.
Welcome and Introductions
Francine M. Ffolkes, Florida Dept. of Env. Protection, Tallahassee

1:35 p.m. – 3:20 p.m.
Federal APA Adjudication and (Rulemaking and Government Contracting)
Prof. Mark Seidenfeld, College of Law, FSU, Tallahassee

3:20 p.m. – 3:30 p.m. **Break**

3:30 p.m. – 4:20 p.m.
Public Records Act and Sunshine Law
Patricia R. Gleason, Director of Cabinet Affairs & Special Counsel for the Office of Open Government, Governor's Office, Tallahassee

4:20 p.m. – 5:30 p.m.
Federal APA Litigation, Attorneys fees, Federal Ethics and Public Records (FOIA, etc.)
T. Neal McAliley, White & Case, Miami

Friday, August 17, 2007

8:00 a.m. – 8:10 a.m.
Welcome and Introductions
Seann M. Frazier, Greenberg Traurig, LLP, Tallahassee

8:10 a.m – 9:00 a.m.
Florida APA Adjudication
Hon. John G. Van Laningham, Div. of Administrative Hearings, Tallahassee

9:00 a.m – 9:50 a.m
Competitive Procurement Under Florida APA
J. Andrew Bertron, Jr., Sutherland Asbill & Brennan, Tallahassee

9:50 a.m. – 10:00 a.m **Break**

10:00 a.m – 10:50 a.m
Florida APA Rulemaking (including Rule Challenges)
Francine M. Ffolkes, Dept. of Env. Protection, Tallahassee

10:50 a.m. – 11:40 a.m.
Other Florida APA Remedies and Principles
Seann M. Frazier, Greenberg Traurig, LLP, Tallahassee

11:40 a.m. – 12:30 p.m.
Judicial Review of Agency Action (Florida Administrative Appeals)
David Caldevilla, de la Parte & Gilbert, Tampa

12:30 p.m. - 1:30 p.m.
Lunch (included in registration fee)

1:30 p.m. – 2:20 p.m.
Sovereign Immunity/11th Amendment Immunity
Pamela Lutton, Office of the Attorney General, Tallahassee
Stephanie Daniel, Office of the Attorney General, Tallahassee

2:20 p.m. – 3:10 p.m.
Government/Tort Litigation (State and Federal)
Pamela Lutton, Office of the Attorney General, Tallahassee

3:10 p.m. – 3:20 p.m. **Break**

3:20 p.m. – 4:10 p.m.
Civil Rights Action under 42 U.S.C. Section 1983
Stephanie Daniel, Office of the Attorney General, Tallahassee

4:10 p.m. – 5:00 p.m.
Florida Ethics
Virlindia Doss, Fla. Commission on Ethics, Tallahassee

CLE CREDITS

CLER PROGRAM
(Max. Credit: 13.5 hours)
General: 13.5 hours Ethics: 1.5 hours

CERTIFICATION PROGRAM
(Max. Credit: 7.0 hours)
Appellate Practice: 1.0 hours
Civil Trial: 3.0 hours
State & Federal Gov't & Administrative Practice: 13.5 hours

Seminar credit may be applied to satisfy CLER / Certification requirements in the amounts specified above, not to exceed the maximum credit. See the CLE link at www.floridabar.org for more information.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar News or available in your CLE record on-line) you will be sent a Reporting Affidavit if you have not completed your required hours (must be returned by your CLER reporting date).

ON-LINE PROGRAMS! To view and/or listen to this and other courses on-line, or to download to your computer as a "CLEtoGo," go to **www.legalspan.com/TFB/catalog.asp**

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HOW TO REGISTER	ON-LINE: www.FLORIDABAR.org *NEW * SECURE * FASTER	MAIL: Completed form w/check	FAX: 850/561-5816 form with credit card information

REFUND POLICY: Requests for refund or credit toward the purchase of the audio/CD or course books of this program **must be in writing and postmarked** no later than two business days following the course presentation. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid. A $25 service fee applies to refund requests. Registrants who do not notify The Florida Bar by 5:00 p.m., August 9, 2007 that they will be unable to attend the seminar, will have an additional $20 retained. Persons attending under the policy of fee waivers will be required to pay $20.

Register me for the "State and Federal Government and Administrative Practice (SFGAP) Certification Review Course."
ONE LOCATION: (288) LEON COUNTY CIVIC CENTER, TALLHASSEE, FL (AUGUST 16 & 17, 2007)

TO REGISTER OR ORDER AUDIO/CD OR COURSE BOOKS, BY MAIL, SEND THIS FORM TO: The Florida Bar, CLE Programs, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831. ON-SITE REGISTRATION, ADD $25.00. **On-site registration is by check only.**

Name_____Florida Bar # _____

Address _____

City/State/Zip_____ Phone # _____

AJC: Course No. 0630R

REGISTRATION FEE (CHECK ONE):

- ❑ Member of the Administrative Law Section, Environmental & Land Use Law Section, or Government Lawyer Section: $230
- ❑ Non-section member: $255
- ❑ Full-time law college faculty or full-time law student: $138
- ❑ Persons attending under the policy of fee waivers: $20
  Includes Supreme Court, DCA, Circuit and County Judges, Magistrates, Judges of Compensation Claims, Administrative Law Judges, and full-time legal aid attorneys if directly related to their client practice. (We reserve the right to verify employment.)

METHOD OF PAYMENT (CHECK ONE):

- ❑ Check enclosed made payable to The Florida Bar
- ❑ Credit Card (Advance registration only. Fax to 850/561-5816.) ☐ MASTERCARD ☐ VISA

Signature: _____ Exp. Date: _____/_____ (MO./YR.)

Name on Card: _____ Card No. _____

❑ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

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Private taping of this program is not permitted. **Delivery time is 4 to 6 weeks after 08/17/07. TO ORDER AUDIO/CD OR COURSE BOOKS,** fill out the order form above, including a street address for delivery. **Please add sales tax to the price of tapes or books. Tax exempt entities must pay the non-section member price.**

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the course book/tapes must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

❑ COURSE BOOK ONLY	❑ AUDIOTAPES	❑ AUDIO CD
Cost $35 plus tax	(includes course book)	(includes course book)
(Certification/CLER credit is not awarded for the purchase of the course book only.)	$230 plus tax (section member)	$230 plus tax (section member)
	$255 plus tax (non-section member)	$255 plus tax (non-section member)
TOTAL $ _____	TOTAL $ _____	TOTAL $ _____

SQUARE CORNERS
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Grumman Ecosystems Corp. v. Gainesville-Alachua Cty. Reg. Elec., Water & Sewer Bd., 402 F. Supp. 582, 588-89 (N.D. Fla. 1975). The court's observations ring equally true today under the Florida APA.

Over the years, the legislature has ever more decisively embraced the viewpoint expressed in *Grumman*, and moved to square the corners of the relationship between agencies and those they govern. Each time the APA has been honed, the revisions have sharpened the command that, wherever possible, agencies should formally and explicitly articulate policy through rulemaking, and thereby give fair advance notice of their policies. The APA now overtly pronounces that rulemaking is not a matter of agency discretion, that rulemaking is presumed to be feasible and practicable,[1] and it overtly discourages agency reliance on non-rule policy as a basis for decision-making.[2] It adopts the standpoint that affected persons deserve clearly announced policy standards, and have the right to expect that agency decisions will be made in accordance with those announced standards. Through these provisions, the legislature has sought to make agencies more accountable to the public and the legislature.[3]

These sections of the APA are particularly important to license applicants. Agency license approvals are required for a host of activities, and are required for many specific activities within a licensed field. For example, real estate course instructors must have both a license to operate, and approval (a license) to offer specific instructional courses. *Phillips v. Department of Bus. & Professional Reg.*, 737 So. 2d 553 (Fla. 1st DCA 1998). Likewise, insurers must have a certificate of authority (a license) to transact insurance,[4] as well as regulatory approval of most policy forms they propose to offer, and each rate they propose to charge.[5] Applying for such approvals often requires applicants to invest considerable time, labor, and capital. Therefore, license applicants particularly need clear agency standards, delineated in advance, and a speedy and certain remedy to contest license denials, if based on an invalid non-rule policy. However, in the licensing context, the APA's non-rule policy remedies do not always appear to meet the legislature's expectations fully.[6]

Section 120.56(4) is sometimes helpful to encourage agencies to formally develop and announce policies through rules. But in practicality, it is cold comfort for an applicant who is denied a license on invalid non-rule policy grounds that the agency might be swayed by a section 120.56(4) proceeding to initiate rulemaking, where, eventually, the agency may have to defend the underlying policy. All the while, the resources the applicant has invested pursuing license approval remain idle and unproductive.

In theory, section 120.57(1)(e) offers aggrieved license applicants more hope of a swifter remedy with real teeth. When an agency makes a decision, such as a license denial, that determines substantial interests based on an unadopted rule, section 120.57(1)(e) contemplates that the agency will be required to defend its decision, not just commence rulemaking, and that, to sustain its decision, the agency bears the burden to show that underlying non-rule policy satisfies all the APA requirements of a valid rule.[7] The legislature apparently regards the prospect of such immediate scrutiny under section 120.57(1)(e) as an important counterweight to non-rule policymaking.

But the allure of non-rule policymaking persists, and agencies do not always relish debating their informal policies head-on. When confronted with a challenge by a license applicant, they sometimes gravitate toward the edges, in an effort to deflect the scrutiny intended by these statutes. In short, practice sometimes confounds theory.

This article examines a few examples. They are drawn from experience, but they are stylized and conceptual, not literal. I raise them for three reasons. First, similar circumstances have arisen with some frequency. Second, they have not been considered in reported appellate decisions, so far as I can ascertain. Third, the fact that circumstances like these have not been the subject of appellate review may suggest that license applicants facing them become discouraged or exhaust their resources, and simply give up. That prospect, itself, is reason to encourage a conversation about whether such agency responses are truly consistent with the APA's intent, and if not, what relief might be available.

1. <u>The applicant's non-rule policy challenge is just irrelevant.</u>

Suppose this set of facts. A law encourages the manufacture of a new product of great social value, in the expectation that it will be widely used. The law provides for a state agency to review and approve the prices to be charged. Though the product has great social value, its nature is such that producers will be exposed to a high and widely varying risk of liability. It is known that this risk exposure will increase with the number of units a manufacturer produces and sells, but pricing the product to fairly cover that risk exposure is a challenge. The product is so new, and its potential applications are so varied, that no existing database of information can help a producer closely predict the cost of its risk exposure at any particular production level or in any particular configuration of market distribution. There are no tested quantitative methods to reliably measure and account for the risk in setting a reasonable price or in evaluating pricing. The enabling legislation so declares, and experts concur. All agree that producers' exposure to risk will vary greatly, producers will not be able to avoid the risk or practically control their risk exposure, and producers will accordingly need pricing flexibility to offer the product, if they are to protect their solvency.

The state agency nevertheless adopts an internal policy that no price greater than a modest price of "x" will be approved, unless the applicant can justify a greater price using generally accepted methods.[8] There is overwhelming evidence that the agency has adopted and applied the non-rule policy. An application for approval of a price exceeding "x" is disapproved. The applicant seeks a formal hearing under section 120.57, including a section 120.57(1)(e) challenge to this non-rule policy.

At the formal hearing, the ap-

plicant proves the existence of the non-rule policy, and puts on a prima facie case for the reasonableness of its price. The applicant's case is not based on a quantitative approach since, as all acknowledge, statistical databases and reliable quantitative methods do not yet exist. The applicant's case consists of testimony by knowledgeable people in the field and the informed, but necessarily non-quantitative opinions of qualified experts.

In light of section 120.57(1)(e), one might expect the formal hearing would then unfold along these lines: The agency would defend the legitimacy of the non-rule policy underlying its decision, or come forward with de novo evidence sufficient to sustain its decision on other grounds, or both. The Division of Administrative Hearings would determine whether the non-rule policy is valid under section 120.57(1)(e)'s tests. If invalid, the Division would find that the agency is not permitted to rely on it as the basis for disapproval. S*ee* §§ 120.56(4)(e)1., 3., (f)., 120.57(1)(e), Fla. Stat. To sustain its decision in that case, the agency would then need to come forward with persuasive de novo evidence directly meeting and overcoming the applicant's evidence.

But what if the agency simply denies or ignores the non-rule policy and offers no defense of it, despite the overwhelming evidence that it exists and is invalid? Suppose the agency simply tenders this case: (1) The applicant bears the burden to show its application should be approved. (2) The applicant's case is based on non-quantitative methods, and professional judgments about the applicant's price need vary considerably. (3) Deference is owed to the agency's discretion. (4) The agency decision should be upheld, since the evidence is in equipoise.

A case might be made along such lines. After all, ordinarily, an applicant has the burden of persuasion, and the courts normally accord deference to the agency's judgment in such matters. *See, e.g., Astral Liquors, Inc. v. State, Dep't of Bus. Reg.*, 432 So. 2d 93 (Fla. 3rd DCA 1983); *Lakeland Regional Med. Center, Inc. v. State*, 917 So. 2d 1024 (Fla. 1st DCA 2006); *Big Bend Hospice, Inc. v. Agency for Health Care Admin.*, 904 So. 2d 610 (Fla. 1st DCA 2005). So, if the agency can simply ignore the actual basis for its decision to deny the license (the non-rule policy), if it can defend only on such generalized propositions, then the non-rule policy is simply irrelevant to the ultimate decision to approve or disapprove the license application.

Should such an analytical approach be endorsed? There are good reasons to conclude not.

First, it reduces section 120.57(1)(e) to an irrelevant, time-wasting trifle, not the brake on non-rule policymaking obviously intended by the legislature. If the non-rule policy which was the actual basis for the agency's decision can be ignored, if denying a license because of an invalid non-rule policy has no effect in the proceeding, then an agency acting on invalid non-rule policy is no worse off than one which has not. Without consequences, section 120.57(1)(e) serves

continued...

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no purpose, and has no practical effect, which is an interpretational result to be avoided if possible. *See, e.g., Smith v. Florida Dep't of Corrections,* 920 So. 2d 638 (Fla. 1st DCA 2005); *Hawkins v. Ford Mtr. Co.*, 748 So. 2d 993 (Fla. 1999).

Second, this approach depends on accepting the premise that the agency's license denial decision is entitled to deference. However, deference is ordinarily accorded to an agency's judgment because it is presumed the agency has meaningfully brought some expertise to bear. *See generally, Orange Ave. Charter School v. St. Lucie County School Bd.*, 763 So. 2d 531 (Fla. 4th DCA 2000). If an agency denies a license based on invalid non-rule policy, a fair case can be made that the agency has not exercised expertise or legitimate discretion at all. Instead, it has made the decision in a manner and on a basis denounced by law. Under those circumstances, perhaps the agency should have no genuine claim to deference toward its decision.

Third, it does not square easily with the terms of section 120.57(1)(e). Section 120.57(1)(e) provides:

> a. Any agency action that determines the substantial interests of a party and that is based on an unadopted rule is subject to de novo review by an administrative law judge.
>
> b. The agency action shall not be presumed valid or invalid. The agency must demonstrate that the unadopted rule [satisfies the enumerated criteria for finding it valid]. (Underscoring added.)

Section 120.57(1)(e) thus posits three central propositions that should be kept in mind when considering how to apply it to an agency's license denial decision.

- It is the agency action (*i.e.*, the license denial decision) - - not just the underlying non-rule policy - - that is subject to de novo scrutiny when the action is based on non-rule policy.
- The validity of the agency's decision is not a separate question under section 120.57(1)(e). It is statutorily bound up with, and stands or falls on, the validity of the underlying non-rule policy on which it was based.
- The agency bears the burden of persuasion to show that its non-rule policy is valid.

In view of these considerations, the case that an agency's invalid policy may be regarded as irrelevant to the ultimate licensing decision is highly questionable. While it seems at first blush to have some appeal, on closer inspection it appears to be an artful way to sidestep the consequences intended by the legislature when an agency chooses to rely on non-rule policy as a basis for its decision-making. In the licensing context, this reading deprives section 120.57(1)(e) of any practical force as a device to implement the legislature's objective.

A different analytical approach is available. Section 120.57(1)(e) can be fairly read as removing any claim of deference an agency otherwise has when the agency chooses to deny a license based on invalid non-rule policy. It may fairly be understood to intend that, in such circumstances, the agency must assume the burden of proof to sustain the legitimacy of its decision. Under this analytical approach, if the evidence is in equipoise at the conclusion of such a de novo proceeding, the license applicant should prevail.

This approach has much to recommend it. It is consistent with the terms of the statute, and it promotes the legislature's clear objectives of discouraging reliance on non-rule policy and encouraging agencies to make policy by rulemaking.[9]

2. Propose a half-a-loaf rule to abate a section 120.56(4) challenge.

Assume the same facts as above, but suppose the applicant also brings a section 120.56(4) challenge. One might expect that the combined force of sections 120.57(1)(e) and 120.56(4) would surely oblige the agency to formally embrace and defend its non-rule policy, or disavow it and cease relying on it. But, in practice, that expectation might be disappointed.

The non-rule policy in this example has two related parts: (1) No price greater than "x" will be approved, unless (2) the applicant can support a greater price through "generally accepted" methods. The core of the policy is the first part. The second part is ancillary. The applicant challenges the entire policy.

But what if the agency responds to the applicant's section 120.56(4) petition by proposing a rule that only deals with the second part? Suppose the proposed rule essentially says this: "We have no policy regarding what constitutes an acceptable pricing method. Use whatever method you feel is appropriate, and we will consider it." Suppose the agency then moves to stay the 120.56(4) proceeding. Might this strategy succeed? Perhaps so. It is plausible to argue that the agency has initiated rulemaking that responds, at least in some degree, to the challenged policy, and therefore satisfies the conditions for abating the 120.56(4) proceeding.

However, there is cause to question whether such an approach should be endorsed. It does not appear to square fully with the language and intent of section 120.56(4). Section 120.56(4)(e)2. allows for abeyance of the section 120.56(4) proceeding, "pending the outcome of rulemaking," if the agency promptly engages in rule development that "addresses the statement." Read in context, that provision appears to intend that, if the agency does not wish to defend its informal policy under section 120.56(4) it must do one of two things: formally articulate the challenged policy as a proposed rule (and, if challenged, defend it under section 120.56(2)), or formally disavow it and refrain from further using it. To acquit that choice, it seems apparent that an agency should propose a rule that directly and formally articulates and embraces the specific substance of the informal policy actually being challenged, or formally renounce it.

That understanding of the requirement to "address[ ] the statement" seems fairly clear and unmistakable. "Address," as a verb, is commonly defined to mean "to speak, write or otherwise communicate directly to" a matter. *E.g., Webster's Third New International Dictionary of the English Language (Unabridged)*, Merriam & Co. (1976). For example, consistent with that definition, lawyers admonished by a court to "address the question the court has asked"

know exactly what that admonition means: "Answer the question actually posed; do not avoid it; and do not reformulate it to your liking before answering."

Although the agency's proposed rule in this example might be said to address part of the challenged non-rule policy, it does not address the core element at all. It does not embrace it, and it does not disavow it, leaving the agency free to continue relying upon it, if it so chooses, without placing it under the light of rulemaking scrutiny.

Thus, there is good reason to reject this approach. It risks too easily condoning an illusion that an agency has made the choice the legislature intends, when it has merely made a half-hearted nod in that direction. If an agency is relieved of the obligation to defend its non-rule policy under section 120.56(4) simply by proposing a rule that is merely in the general vicinity of the challenged policy, but does not actually address its core elements, there is a real risk that section 120.56(4)'s effectiveness will be substantially compromised. If possible, such a result should be avoided. *See generally,* 48A *Fla. Jur. 2d*, Statutes, § 154, and cases there cited.

Instead, there is good reason to insist that agencies hew closely to the common meaning of "address" when deciding whether an agency has "addressed the [non-rule] statement" sufficiently to warrant postponing the obligation to defend non-rule policy under section 120.56(4).

3. The "round room," pure and simple.

In my experience, circumstances like those in the following example may bedevil license applicants more frequently than any other. These sorts of circumstances may result from agency neglect of rulemaking, more often than from purposeful choice. But whether they arise from conscious choice or simple neglect, they pose the same predicament for the license applicant.

Suppose an applicant seeks a license under a statute that directs the licensing agency to consider whether the applicant is "competent and trustworthy" and to consider the applicant's "business conduct" in that connection. Suppose the applicant has some negative financial history. The agency concludes that he is not competent and trustworthy largely because of his financial history, and denies his application.

This and similar statutes have been on the books for many years. The agency has long administered them, and has passed upon a substantial number of license applications, but has not developed rules to refine the standards it will use in deciding whether an applicant is competent and trustworthy. Nor has the agency developed rules treating the question of when and under what conditions negative financial incidents are reason to deny a license, and when they are not.

Discovery reveals that the agency apparently has not systematically considered those questions internally, either. However, the agency has considered and approved a fair number of license applications where the applicants' financial histories are remarkably similar to the current applicant's. When pressed to reconcile these previous approvals with the decision to deny the license in the present case, the agency responds by saying, "We consider each application on a case-by-case basis;" "It depends on the totality of the circumstances;" and "Each application is considered separately on its own merit, we don't compare it to other applications."

Is there any practical relief for an applicant facing this situation? It does not seem so at first blush. Section 120.56(4) and section 120.57(1)(e) do not seem to apply, since the agency has not adopted any systematic policy position, even informally. Section 120.54(7) allows affected persons to petition the agency to initiate rulemaking. But of what practical value is that to the license applicant who finds himself denied a license under these circumstances? Section 120.54(7) might be a useful proactive tool in the hands of organized groups who advocate preventatively on behalf of their members to fill such policymaking gaps. But, many are not fortunate enough to have such groups and associations looking out for their interests. As a practical matter, a license applicant likely will discover that he faces this situation only after he has already invested time and resources in applying for the license and been turned down.

Perhaps the most this applicant can do is to make the case that he is trustworthy in a section 120.57(1) proceeding, and hope the trier of fact finds his evidence more persuasive than the subjective, un-channeled judgment of the agency. Yet, one might legitimately wonder: Is that the position in which the legislature truly intends to leave a license applicant who faces these circumstances?

After all, for some time now, the APA has declared that rulemaking "is not a matter of agency discretion," is "presumed feasible" and "presumed practicable." § 120.54(1), Fla. Stat. The agency has administered this law for a long time, has applied it in reviewing a substantial number of applications, and thus would appear to be in a position — as it is presumed to be — to adopt rules that give prospective applicants fair advance notice of the benchmarks they will have to meet, before they make a substantial investment in seeking a license. But the agency has not done so. It continues to act purely on a "case-by-case basis."

There is precedent for bringing some practical judicial relief to bear here. Article V courts, like the legislature, possess the power to fashion evidentiary presumptions. *See, e.g., McDonald v. Department of Business & Prof. Reg.*, 582 So. 2d 660, 663 (Fla. 1st DCA 1991); *B.R. v. Department of Health & Rehab. Servs.,* 558 So. 2d 1027, 1029 (Fla. 2d DCA 1989), *review denied,* 567 So. 2d 434 (Fla. 1990). They have exercised that power to impose burden-shifting presumptions when necessary to promote an important social policy. *E.g., Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596 (Fla. 1987); *Beal Bank, SSB v. Almand and Assoc.*, 780 So. 2d 45 (Fla. 2001). The APA's stated preference for agencies to develop policy by rulemaking seems to be just such an important social policy. It has been the subject of repeated legislative directives. Might it not be fairly said that such a burden-shifting presumption is appropriate here? If an agency has long neglected the legislative directive to channel its discretion through rulemaking, it may be entirely reasonable and appropriate for the courts to require the agency to assume the burden of prov-

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ing a material difference between applicants it has approved and the disapproved applicant to sustain its decision.

The Division of Administrative Hearings, on the other hand, does not have the authority to fashion a presumption. Nevertheless, the Division may be warranted in drawing an inference adverse to the agency's decision, and in the applicant's favor, if the agency fails to demonstrate such a material difference under these circumstances. *See generally, Rocky Mountain Helicopters, Inc. v. F.A.A.*, 975 F.2d 736, 737–738 (10th Cir. 1992) (agency decision arbitrary when the record contains no satisfactory explanation for the discrepancy in treatment of similar matters). *Cf., Allis-Chalmers Credit Corp. v. State, Dep't of Rev.,* 408 So. 2d 703 (Fla. 1st DCA 1982); *J.H.S. Homes, Inc. v. County of Broward*, 140 So. 2d 621 (Fla. 2nd DCA 1962).

Conclusion

It is worth noting, in closing, that the legislature has shown particular concern that license applicants be extended a full measure of fairness and due process protection. *See* § 120.60(3), Fla. Stat.; *Aguilera v. Department of Health, Bd. of Psychology*¸ 2000 WL 855090, *9 (Fla. Div. of Admin. Hrgs., June 16, 2000); *Silverstone v. Agency for Health Care Admin.*, 1997 WL 1052863, *5 (Fla. Div. of Admin. Hrgs., June 13, 1997). *See generally, Verleni v. Department of Health*, 853 So. 2d 481 (Fla. 1st DCA 2003). In light of that legislative concern, such modes of judicial relief should be considered. They may be just what the legislature has in mind.

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Endnotes:

[1] § 120.54(1)(a), Fla. Stat. (2005).

[2] §§ 120.56(4), 120.57(1)(e), Fla. Stat.

[3] Hopping, Wade L., *Rulemaking Reforms and Nonrule Policies: A "Catch-22" for State Agencies?,* 71 Fla. B.J. 20, 24 (March 1997).

[4] § 624.401, Fla. Stat.

[5] *See, e.g.,* §§ 627.062, 627.401, Fla. Stat. Each of these required approvals is a "permit . . . .or similar form of authorization required by law," which section 120.52(9), Florida Statutes, defines as a license.

[6] The 2007 legislature passed HB 7183. It has not yet been presented to the Governor. *See*, Sellers, Larry, *The Open Government Act: The 2007 Amendment to the APA*, in this issue. If HB 7183 becomes law, it may affect the future architecture of circumstances like the first and second examples discussed in this article, and will somewhat affect the analysis discussed below. These amendments, however, will not insure against an agency seeking to deflect scrutiny away from the non-rule policy basis for a license denial, by asserting that it is not "relying upon" the challenged non-rule policy for license denial, *see* § 9, HB 7183 [amending120.56(4)(a), Fla. Stat.], and that the license denial is not "based on" the challenged non-rule policy, *see* § 10, HB 7183 [amending120.57(1)(e), Fla. Stat.]. However, pertinent cases strongly suggest that an agency's action should be considered to be "based upon" or in reliance upon non-rule policy if the non-rule policy was a substantial factor in bringing about the agency's decision. *See, e.g., United States v. Bank of Farmington*, 166 F.3d 853, 863-864 (7th Cir. 1999) ("based upon" connotes information playing any part in a course of action); 38 *Fla. Jur. 2d*, Negligence, § 56 (legal cause connotes that which is a substantial factor in bringing about a result.)

[7] Section 120.56(4) makes it clear that commencing rulemaking does not excuse non-rule policy from immediate review under section 120.57(1)(e), when used as a basis for an agency decision, even though commencing formal rulemaking is a defense to a section 120.56(4) challenge. Section 120.56(4) stipulates that, even if rulemaking is begun, an agency may not rely on its non-rule policy as the basis for present decisions unless the non-rule policy "meets the requirements of s. 120.57(1)(e)." Section 120.56(4) further makes it clear that a person presently aggrieved by a decision based on non-rule policy may contest it in a section 120.57(1)(e) proceeding, irrespective of whether the agency has commenced rulemaking. *Compare* § 120.56(4)(e) 1.-.3, Fla. Stat., *with* § 120.56(4)(f), Fla. Stat.

[8] Since there are no such generally accepted methods, Captain Yossarian's famous observation might spring to mind: "That's some catch, that Catch-22." Joseph Heller, Catch-22.

[9] Of course, such an approach would not cast the initial licensing decision in stone. Licensing statutes routinely provide for the licensing authority to revisit the original approval if the licensee does not comply with regulatory requirements and conditions in its operations. *E.g.,* §§ 458.331 (1) (g), (s), (nn); 561.29 (1) (a), (e), (g); 627.062 (2) (g), Fla. Stat.

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