ADMINISTRATIVE LAW SECTION NEWSLETTER

Vol. XXXI, No. 4 **Amy W. Schrader, Editor** **June 2010**

Rules, Orders, and "Exempt Decisions": An ALJ Defines a New Category of Agency Decisionmaking

by Donna E. Blanton

Courts have long told us that state agencies act by rule or by order.[1] Recently, however, an Administrative Law Judge ("ALJ") at the Division of Administrative Hearings ("DOAH") has defined another category of agency decsionmaking called an "exempt decision."[2] Such decisions may not be challenged in an administrative hearing under chapter 120, the judge ruled, even if there is no question that the agency has determined a party's substantial interests.[3]

The case, *Pasco CWHIP Partners, LLC v. Florida Housing Finance Corporation*, arose as a result of the drastic revenue shortfalls affecting the 2008-09 state budget. Legislators met in a special session in January 2009 to cut the budget. Particularly hard hit by those cuts was the Florida Housing Finance Corporation ("Florida Housing"), a state agency that awards federal income tax credits and state and federal funds for the development of affordable housing through a variety of programs. In addition to slashing the budget, the Legislature swept trust fund balances, transferred certain funds among programs, and most significantly, directed Florida Housing to pay $190 million of "unexpended funds" to the state treasury no later than June 1, 2009.[4] This represented approximately 40 percent of the funds then available for allocation to the various Florida Housing programs.[5]

The Legislature granted Florida Housing discretion in determining how to find the $190 million and authorized the agency to adopt emergency rules

See "Decisionmaking," page 10

From the Chair

by Seann M. Frazier

Whether you run a business or participate in an organization, a presence on the World Wide Web is key to staying relevant. For many, the virtual storefront of an organization is its website. The site is often the single most defining characteristic of that organization. I am very happy to report that, after a major overhaul, the Administrative Law Section's presence on the web reflects the quality of its membership and the breadth of the Section's efforts.

In June of this year, the Section unveiled a wholly-revamped webpage thanks to the tireless efforts of our Webpage Committee, headed by Daniel Nordby, as well as the never-ending efforts of our Florida Bar Administrator, Jackie Werndli. Dan and Jackie gathered input on what a well-designed page should include, solicited proposals from qualified vendors and struck a relationship with a designer that offered the best combination of design and cost-effectiveness for the Section. As a result of their efforts, the revised site offers access

See "Chair's Message," page 12

INSIDE:

The 2010 Amendments to the APA: Governor Vetoes Bill that Would Require "Million Dollar Rules" to be Ratified by the Legislature

by Lawrence E. Sellers, Jr.

During the recently-concluded Regular Session, the Florida Legislature enacted HB 1565,[1] which includes several changes to the Administrative Procedure Act (APA). One of the changes provided that rules with a "million dollar" impact could not take effect until ratified by the Legislature. Although the bill passed with little, if any, opposition it subsequently sparked considerable controversy. On May 28, 2010, Governor Crist vetoed the bill, claiming that the measure "encroaches upon the principle of separation of powers" and that if the bill became law, "nearly every rule would have to await an act of the Legislature to become effective. This could increase costs to businesses, create more red tape, and potentially harm Florida's economy."

Having been vetoed, HB 1565 joins the ranks of at least three other bills amending the APA that were also vetoed.[2] In each case, a substantially similar measure was enacted the following year and became law.[3] As such, it is possible, perhaps even likely, that some or all of the provisions in HB 1565 will be considered again in 2011. And, of course, the Legislature has the authority to override the veto of HB 1565.[4]

Here is a brief summary of some of the key provisions in HB 1565:

Revises Rules that Require SERC. Since 2008, agencies have been required to prepare a SERC for each proposed rule that will have any impact on small business.[5] Section 1 of HB 1565 revises this requirement in two respects. First, it limits the requirement to those cases where the proposed rule will have an "adverse" impact on small businesses. Second, it requires a SERC where the proposed rule is likely to directly or indirectly increase regulatory costs in excess of $200,000 in the aggregate in the state within one year after the implementation of the rule.

Expands Contents of SERC to Include Economic Analysis. A SERC is required to include: (1) a good faith estimate of the number of individuals and entities likely required to comply with the rule and a description of these individuals; (2) a good faith estimate of the cost to the agency and to other state and local governmental entities in implementing and enforcing the rule, including any anticipated effect on state and local revenues; (3) a good faith estimate of transactional costs likely to be incurred by individuals and entities in order to comply with the rule; and (4) an analysis of the rule's impact on small businesses and small counties and cities.

Section 2 of HB 1565 amends section 120.541, Florida Statutes, to require the SERC to also include an economic analysis if the proposed rule is likely to directly or indirectly increase regulatory costs in excess of $200,000 in the aggregate within one year after the implementation of the rule. The economic analysis is to indicate whether the proposed rule directly or indirectly: (1) is likely to have an adverse impact on economic growth, private-sector job creation or employment, or private-sector investment in excess of $1 million in the aggregate within five years after the implementation of the rule; (2) is likely to have an adverse impact on business competitiveness, including the ability of persons doing business in the state to compete with persons doing business in other states or domestic markets, productivity, or innovation in excess of $1 million in the aggregate within five years after the implementation of the rule; or (3) is likely to increase regulatory costs, including any transactional costs, in excess of $1 million in the aggregate

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within five years after the implementation of the rule.

Prohibits Certain Rules from Taking Effect Until Ratified by the Legislature. Section 2 of HB 1565 also provides that if the adverse impacts or regulatory costs of the rule exceed any of these three criteria, then the rule must be submitted to the President of the Senate and Speaker of the House of Representatives no later than 30 days prior to the next regular session, and the rule may not take effect until it is ratified by the Legislature.[6]

Exception for Emergency Rules. Section 2 of HB 1565 provides that the requirement to prepare an economic analysis — and presumably the requirement for legislative ratification — does not apply to the adoption of emergency rules adopted in accordance with section 120.54(4), Florida Statutes. This subsection states that, if an agency finds that an immediate danger to the public health, safety, or welfare warrants emergency action, the agency may adopt any rule necessitated by the immediate danger. It also establishes restrictions on such emergency rules.

The bill further provides that an emergency rule may remain in effect longer than the usual 90 days, and may be renewable, when the agency has initiated rulemaking to adopt rules addressing the subject of the emergency rule and the proposed rules are awaiting ratification by the Legislature.

Exception for Adoption of Federal Standards. The requirements to prepare an economic analysis and for legislative ratification also do not apply to the adoption of federal standards pursuant to section 120.54(6), Florida Statutes. This subsection establishes an expedited process for adopting rules substantively identical to regulations adopted pursuant to federal law in the pursuance of state implementation, operation or enforcement of federal programs.

Expands "Transactional Costs" to Include Any Costs to Comply. Section 2 of HB 1565 expands the definition of "transactional costs" that must be considered as part of the SERC, to include any other costs necessary to comply with the rule.

Revises Effect of Failure to Prepare SERC. Section 2 of HB 1565 provides that the failure of an agency to prepare a SERC or to respond to a written lower cost regulatory alternative is a material failure to follow the applicable rulemaking procedures and requirements set forth in the APA, and the rule therefore may be determined to be an invalid exercise of delegated legislative authority on this ground. Significantly, the bill provides that this is a material failure "notwithstanding s.120.56(1)(c)." That paragraph states that the agency's failure to follow the applicable rulemaking procedures or requirements is presumed material, but the agency may rebut this presumption by showing that the substantial interests of the petitioner and the fairness of the proceedings have not be impaired. It appears that the "notwithstanding" language in HB 1565 is designed to eliminate the agency's ability to rebut this presumption.

Revises Limits on Challenges to Rules Based on SERC. Section 2 of HB 1565 provides that an agency's failure to prepare a SERC or to respond to a written lower cost regulatory alternative may not be raised in a rule challenge proceeding unless raised no later than one year after the rule's effective date and then only by a person whose substantial interests are affected by the rule's regulatory costs.

Revises Limits on Challenges to Rules Based on Section 120.52(8)(f), Florida Statutes. Section 2 of HB 1565 similarly limits rule challenges on the ground that the rule imposes regulatory costs on the regulated person, county or city that can be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives. Rules may not be declared invalid on this ground unless: (1) the issue is raised in an administrative proceeding within one year after the effective date of the rule; (2) the challenge is to the agency's rejection of a lower cost regulatory alternative; and (3) the substantial interests of the person challenging the rule are materially affected by the rejection.

Requires Agency to Revise SERC if any Change to the Proposed Rule Increases Regulatory Costs. Section 2 of HB 1565 requires the agency to revise a SERC if any change to the proposed rule increases the regulatory costs of the rule.

Requires Agency to Provide Revised SERC. Section 2 of HB 1565 requires that, at least 45 days before filing the rule for adoption, an agency that is required to revise a SERC must provide the SERC to the person who submitted the lower cost regulatory alternative and to the Joint Administrative Procedures Committee. The agency also must publish notice on the agency's website that the revised SERC is available to the public.

Extends Time for Challenging Rules After Preparation of SERC. Section 3 of the bill extends from 20 to 44 days the time after the SERC has been prepared and made available for filing challenges to the proposed rule.

Deletes References to Contracts in Connection with Challenges to Statements Defined as Rules. The APA provides that if the administrative law judge enters a final order that all or part of an agency statement violates the rulemaking requirement in section 120.54(1)(a), Florida Statutes, the agency must immediately discontinue all reliance upon this statement, or any substantially similar statement, as a basis for agency action. In 2008, section 120.56(4)(d), Florida Statutes, was revised to create an exception, providing that "this paragraph shall not be construed to impair the obligation of contracts existing at the time the final order is entered," apparently seeking to change the result in a specific case.[7] In that case, the administrative law judge concluded that the agency "cannot escape the rulemaking requirements of section 120.54, Florida Statutes, merely by labeling the generally applicable agency statements as contract provisions rather than rules."[8] Section 3 of the bill amends section 120.56(4)(d) by deleting this exception enacted in 2008.

Licensing. Section 4 of HB 1565 makes three changes to section 120.60, Florida Statutes, relating to the processing of applications for licenses.

Authorizes Agencies to Establish by Rule the Time for Submitting Additional Information. First, HB 1565 authorizes an agency to establish by rule the time period by which the applicant must respond to any request for additional information.[9] The bill further requires that the agency must grant the applicant's request for an extension of this prescribed time for

continued, next page

AMENDMENTS TO THE APA
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submitting the additional information for good cause shown.

Authorizes Applicant to Request that Agency Process the Application. Second, HB 1565 provides that if the applicant believes the agency's request for additional information is not authorized by law or rule, the applicant may demand that the agency process the application.

Clarifies that Notice of Agency Action Must be Provided to Those Who Made a Written Request. Third, HB 1565 clarifies that the persons to whom the agency must provide notice are those who have made a *written* request for notice of agency action.[10]

The Governor's veto message mentioned only the provision requiring legislative ratification. Many of the other parts of the bill were the result of discussions with the Governor's office. Accordingly, look for some or all of these provisions to be considered again in 2011.

Endnotes

[1] HB 1565 was filed by Rep. Chris Dorworth (Rep. Heathrow). The companion Senate bill, SB 1844, was filed by Sen. Mike Bennett (Rep. Bradenton). Several provisions in the bill that was ultimately enacted are contained in SB 2140, a bill filed by Sen. Arthenia Joyner (Dem. Tampa), Chair of the Joint Administrative Procedures Committee.

[2] *See* SB 536 (1995) (vetoed on July 12, 1995), SB 1010 (2005) (vetoed on June 22, 2005) and HB 7182 (2007) (vetoed on June 27, 2007).

[3] *See* Chapters 96-159, 2006-82 and 2008-104, Laws of Florida.

[4] *See* Art. III, s. 8, Fla. Const.

[5] Section 120.541 describes the required contents of a SERC. For a discussion of the 2008 changes, *see* Fred R. Dudley, *The New Role of a Statement of Estimated Regulatory Costs in the Rulemaking Process*, Fla. Bar Admin. Law Section Newsletter, Vol. XXXI, No. 2 (Jan. 2010).

[6] For a discussion of other statutory provisions requiring legislative ratification, *see* Dan R. Stengle & James Parker Rhea, *Putting the Genie Back in the Bottle: The Legislative Struggle to Contain Rulemaking by Executive Agencies*, 21 Fla. St. U. L. Rev. 415, 427-430 (1993). *See also* Karen M. Disbennett, *Legislative Oversight of Administrative Rulemaking: A Preview of Potential Reform*, Fla. Bar Admin. Law Section Newsletter, Vol. XV, No. 2, p. 3 (Jan. 1994).

[7] For a brief discussion of this exception, *see* Lawrence E. Sellers, Jr., *The 2008 Amendments to the APA: The Open Government Act,* 82 Fla. Bar J. 43 (Dec. 2008).

[8] *Disability Support Svcs., Inc. v. Fla. Dep't of Children & Families, et al.*, DOAH Case No. 96-5104RU, aff'd per curiam, 722 So. 2d 195 (Fla. 1st DCA 1998).

[9] A number of rules establishing such time periods are already on the books, including Rules 40A-1.1020, 40A-1.203, 40B-1.6051, 58A-5.015(1)(b), 59C-1.010 (3)(a), 62-4.055(1), 62-17.570(2), 62-45.060(3)(a), 62B-49.005, 69K-1.005, 69V-40.031, 69V-40.100 and 69V-180.030, Florida Administrative Code.

[10] This change was prompted in part by the case of *Earthmark Southwest Florida Mitigation, LLC v. Resource Conservation Holding, Inc.* + *Department of Environmental Protection*, DOAH Case No. 08-5950 (Final Order Feb. 12, 2009).

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APPELLATE CASE NOTES

by Mary F. Smallwood

Adjudicatory Proceedings

Raven v. Manatee County School Board, 32 So. 3d 126 (Fla. 2d DCA 2009) (Opinion filed December 2, 2009)

Raven, a teacher in Manatee County, was directed to appear before an investigator for the School Board's Office of Professional Standards ("OPS") after allegations were made regarding possible inappropriate interaction between Raven and a student. The investigator directed Raven to report to OPS for an investigatory interview. He was told not to bring legal counsel with him. When Raven arrived for the interview with counsel, he was again told his attorney could not be present for the interview; he declined to participate under those circumstances.

The school superintendant recommended that Raven's employment be terminated for misconduct, gross insubordination and violation of the School Board's policy requiring cooperation with OPS. Raven challenged his termination, and a final hearing was held before the Division of Administrative Hearings.

The administrative law judge entered a recommended order holding that Raven was entitled to have counsel present at the interview pursuant to section 120.62(2), Fla. Stat., which provides that a person "compelled to appear … before a presiding officer or agency in an investigation" has the right, at his own expense, to be represented by counsel. The judge concluded that the School Board's adopted policy establishing OPS in effect delegated the Board's investigatory authority to the OPS investigator.

The School Board entered a final order rejecting the judge's conclusion that the OPS investigator was acting as a "presiding officer" or as the "agency." The Board held that it had not delegated its investigatory authority to OPS and could, in fact, conduct its own investigation.

The court reversed and remanded. It noted that the Board's Policy 6.13 provided, inter alia, that "[a]ll complaints concerning employee misconduct or other matters that need investigation … shall be forwarded to OPS for investigation." While agreeing with the School Board that it could conduct its own investigation, the court found that the Board never does so. It held that the evidence introduced at hearing supported the judge's finding that the Board had delegated its authority to OPS. The court concluded that the investigation conducted by OPS constituted "an agency investigation" under section 120.62(2).

Miami-Dade County v. Department of Community Affairs, 29 So. 3d 1210 (Fla. 1st DCA 2010) (Opinion filed March 17, 2010)

On appeal, the court recognized that a complete failure of an agency to consider each exception to a recommended order renders the order non-final. However, the court declined to extend that ruling to the circumstances of this case where the lower tribunal considered exceptions but did not make a ruling on each exception individually.

Seavor v. Department of Financial Services, 32 So. 3d 722 (Fla. 5th DCA 2010) (Opinion filed April 9, 2010)

Seavor failed to file a timely petition for hearing on an administrative complaint suspending her license for alleged statutory and regulatory violations. On appeal, she argued that the petition should be accepted based on the doctrine of excusable neglect. The court denied the request, noting that excusable neglect was no longer available since the Administrative Procedure Act was amended in 1998 to require that a petition be dismissed if not timely filed. In this case, Seavor had not alleged any basis for an equitable tolling defense. However, the agency conceded on appeal that the penalty was excessive under the applicable provisions of law and amended the penalty.

Rulemaking

Office of Insurance Regulation v. Life Insurance Settlement Association, 31 So. 3d 953 (Fla. 1st DCA 2010) (Opinion filed April 9, 2010)

The Life Insurance Settlement Association challenged certain proposed rules of the Office of Insurance Regulation ("OIR") regulating viatical settlements. Following an administrative hearing, the administrative law judge issued a final order which, inter alia, held that a provision of the rules requiring providers to state in annual reports filed with OIR whether their method of operation had changed since the filing of the last plan of operations filed with OIR, was an invalid exercise of delegated legislative authority.

On appeal, the court reversed. It noted that OIR had cited section 626.9925, Fla. Stat., as authority for the rule. That provision authorized the agency to adopt rules administering the act "including rules providing for the collection of data." In addition, OIR cited several rules as provisions being implemented, including section 626.9913(2) (requiring providers to file annual reports), section 626.9912(3) (requiring license applicants to submit organization documents) and section 626.9912(5) (providing that an applicant for a license submit a detailed plan of operation).

The court held that OIR's authority to require certain information during the license application process necessarily extended to requiring information about substantive changes made by licensed providers after obtaining a license.

Appeals

Roadrunner Construction, Inc. v. Department of Financial Services, 33 So. 3d 78 (Fla. 1st DCA 2010) (Opinion filed March 25, 2010)

Roadrunner Construction, Inc. filed an appeal of an order of the

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Department of Financial Services requiring it to pay $667,000 into the Workers' Compensation Administrative Trust Fund. The agency final order was rendered on November 24, 2009, and the appeal was filed with the agency clerk on December 28, 2009, with a duplicate copy sent to the District Court by mail. It was received by the court on December 29, 2009. The Department moved to dismiss the appeal as untimely as it was filed more than 30 days after entry of the final order. Roadrunner argued on appeal that the appeal should be found timely since the District Court was closed on December 24th even though that was not listed in Rule 9.420(f), Fla. R. App. Proc., as an official holiday. It was established that the clerk of the agency was open on December 24th.

The court dismissed the appeal as untimely. Rule 9.110(c) requires that the original of the appeal be filed with the lower tribunal, in this case the agency, within 30 days of rendition with a copy of the notice of appeal and filing fees being filed with the appellate court. The court rejected the appellant's argument that the deadline for filing the appeal should have been extended to December 28th if either the agency clerk's office or the appellate court clerk's office was closed on December 24th. Instead, it held that since the original filing was with the agency clerk, it was not significant that the court's office was closed. The court considered the possibility that the filing of the duplicate copy of the notice of appeal with the district court should be considered sufficient to vest jurisdiction in the court. However, it held that since the duplicate notice was not received until December 29th, it could not be considered timely in any event.

Public Records

Coventry First, LLC v. Office of Insurance Regulation, 30 So. 3d 552 (Fla. 1st DCA 2010) (Opinion filed February 12, 2010)

Coventry First, LLC ("Coventry"), a provider of viatical settlements, provided thousands of pages of documents to the Office of Insurance Regulation ("OIR") in the course of an investigation by OIR. Because the documents are required to be provided on a very short timeframe, Coventry had no opportunity to review the documents prior to providing them to OIR to determine whether they might contain trade secrets or confidential information. After the documents were produced, Coventry determined that certain of the documents contained trade secrets and confidential information, including, but not limited to, personal information about insureds and brokers, insurance policy numbers and negotiated prices. OIR received public records requests seeking disclosure of the documents provided by Coventry.

In an action filed by Coventry seeking injunctive relief and a declaratory judgment, the circuit court issued several temporary injunctions. It concluded that certain of the documents sought pursuant to the Public Records Act constituted trade secrets. However, after a final hearing in the matter, the court held that a 2007 amendment to section 624.319, Fla. Stat., eliminated a previously existing exemption for such documents from the Public Records Act. Prior to that final hearing, OIR had issued a show-cause order which actually set out the contents of the documents at issue.

Chapter 2007-249, Laws of Florida, placed a time limit on the public records exemption for documents held by OIR before, on, or after the effective date of the statute. It further provided that the exemption applied only until the filing of an examination report or the completion of an investigation.

Before the circuit court, Coventry had argued that the exempt records constituted vested property rights and that the elimination of the exemption violated its constitutional rights. The trial court further held that Coventry lacked standing to raise issues related to the 2007 amendment.

On appeal, the district court held that the retrospective application of the statute to documents held by OIR before the effective date of the amendment unconstitutionally deprived Coventry of vested property rights in the continuing privacy of its trade secrets. While the district court agreed with the trial court's determination that the Legislature intended the statute to be applied retroactively, it found that the trial court had failed to adjudicate the second prong of the legal analysis of whether a statute may be applied retroactively – its constitutionality. The court found that the information compiled by Coventry, with an expectation that it would continue to be confidential, constituted a property right. The court noted that section 119.15(7), Fla. Stat., requires that the Legislature, in repealing or curtailing an exemption from the Public Records Act, consider the damage or loss to those who were previously protected by the exemption. The court held that the Legislature failed to conduct that analysis in adopting the 2007 amendment. It rejected the argument by OIR that Coventry should have been on notice of the potential removal of the exemption simply because the act exemption was subject to a sunset provision if not re-enacted.

The district court also reversed the lower court's finding that the trade secret issue was mooted by the disclosure of the documents under OIR's show cause order. It concluded, that, mootness did not preclude the courts consideration of the trade secrets issue since it was one that was likely to recur. Moreover, the court noted that OIR had issued the show cause order while it was still under the terms of a temporary injunction precluding disclosure of the documents.

Florida Power & Light Co. v. Florida Public Service Commission, 31 So. 3d 860 (Fla. 1st DCA 2010) (Opinion filed March 3, 2010)

Florida Power & Light and Progress Energy Florida, Inc. (the "utilities") filed requests with the Public Service Commission ("PSC") for rate increases. During discovery, the PSC sought information regarding the salary, bonuses, stock options and other compensation information for all employees of the utilities who earned over $165,000 per year. The utilities provided some of the requested information but filed motions seeking to have other information protected as confidential on the grounds that it was competitive business information and that disclosure would violate the employee's constitutional right to privacy.

The PSC entered orders holding that it lacked authority to consider the constitutional arguments presented and concluding that the information sought was not exempt from the Public Records Act under section 366.093(3)(f), Fla. Stat.

On appeal, the District Court determined that it had jurisdiction to review the non-final orders of the PSC as they were not an ultimate determination of the utilities' rates or services and thus subject to the Florida Supreme Court's exclusive jurisdiction.

The court held that the utilities would be subject to irreparable harm if required to appeal the confidentiality of the information sought as part of the final order of the PSC as, under its own rules, it could release the information to the public after the time for filing an appeal expired.

Section 366.093(3) provides for certain information to be exempt from the Public Records Act. The statute specifies the type of information to be treated as confidential business information as including trade secrets, internal auditing information, security information, certain bidding or contractual data, information related to competitive interests and "employee personnel information unrelated to compensation, duties, qualifications or responsibilities." Relying on the specific exclusion for certain employee information, the PSC concluded that compensation information was not covered by the statute.

The court determined that the specific language of section 366.093(3)(f) relating to employee information was only one factor to be considered. It noted that the statute specifically stated that confidential information included but was not limited to the enumerated factors. The utilities argued that basis for confidentiality was section 366.093(3)(e), which exempted information related to competitive interests. The utility presented evidence to the PSC that disclosure of employee compensation could result in competing companies stealing their employees and that it could lead to loss of morale among employees.

Since the court found a statutory basis for determining that the compensation information was exempt from the Public Records Act, it declined to address the constitutional arguments.

Poole v. City of Port Orange, 33 So. 3d 739 (Fla. 5th DCA 2010) (Opinion filed April 1, 2010)

Poole sought to obtain copies of two appraisals of land the City of Port Orange was purchasing from a private entity. Upon the City's failure to provide Poole with copies, he filed suit. The trial court dismissed the complaint. On appeal, the court held that count two of the complaint adequately alleged the elements of mandamus (a clear legal right to performance of an indisputable ministerial duty by a person in an official capacity). Poole alleged that the records requested were required to be produced upon request under the Public Records Act. The court further held that even if mandamus was not appropriate, for example, where the records custodian has a legal objection to producing the documents, Poole would have had an adequate remedy under the Public Records Act.

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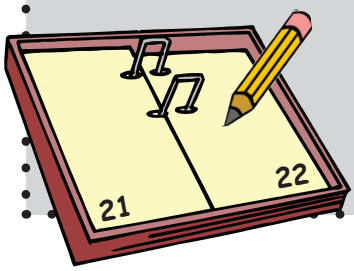

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Agency Snapshot

Florida Commission on Human Relations

by Toni A. Egan

Background:

In 1969, the Florida Legislature created the Florida Commission on Human Relations ("FCHR" or the "Commission") to promote and encourage fair treatment and equal opportunity for all persons regardless of race, color, religion, sex, national origin, age, handicap, or marital status; to promote mutual understanding and respect among members of all economic, social, racial, religious, and ethnic groups; and to endeavor to eliminate discrimination against, and antagonism between religious, racial and ethnic groups and their members.

The Commission is comprised of 12 members appointed to four-year terms by the Governor, subject to confirmation by the Senate. Members must be broadly representative of various racial, religious, ethnic, social, economic, political, and professional groups within the state, and at least one member must be 60 years of age or older. FCHR's basic statutory responsibilities are set forth in Chapter 760, Florida Statutes. Though assigned to the Department of Management Service ("DMS"), the Commission, in performance of its duties pursuant to the Florida Civil Rights Act of 1992, is not subject to the control, supervision, or direction of DMS.

FCHR's stated mission is "to prevent unlawful discrimination by ensuring people are treated fairly and given access to opportunities in employment, housing and certain public accommodations; and to promote mutual respect among groups through education and partnerships." To this end, the Commission is responsible for investigating complaints of employment, housing, and public accommodations discrimination, as well as state employee whistle-blower retaliation. In addition, FCHR's Community Outreach Service Unit strives to educate individuals, employers, housing providers and schools regarding their rights and responsibilities.

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Executive Director: Derick Daniel

The Executive Director acts as the Commission's chief administrative officer and is responsible for the implementation of FCHR's policies and procedures, as well as the day-to-day operations and activities of the Commission. The Executive Director also oversees the budgetary and human resource decisions of the Commission. The FCHR currently employs 55½ full-time equivalent positions, including five attorneys, as well as one full-time and three part-time mediators.

Agency Clerk:

Denise Crawford
2009 Apalachee Parkway, Suite 200
Tallahassee, FL 32301
(850) 488-7082
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Monday–Friday 8:00 AM to 5:00 PM

General Counsel: Lawrence Kranert

Mr. Kranert received his J.D. and B.A. in History, Government, and Spanish from the University of Miami. He was admitted to the Florida Bar in 1974. Prior to becoming General Counsel of FCHR in 2008, Mr. Kranert held various positions in state government, including serving as District Counsel for the Department of Children and Families in Broward County and acting as General Counsel for Florida State Hospital.

Types of Cases:

The Commission is responsible for investigating complaints brought under the Florida Civil Rights Act of 1992 (sections 760.01-760.11 and 509.092, Florida Statutes) and under the Fair Housing Act (sections 760.20-760.37, Florida Statutes). The Commission also investigates complaints brought by state employees alleging violations of the Whistle-blower's Act (sections 112.3187-112.31895, Florida Statutes). In addition to 15,000 telephonic inquiries, approximately 1,900 complaints are filed with the FCHR annually. The Commission handles around 1,400 of these complaints, with the remainder being referred to other agencies.

Florida Civil Rights Act ("FCRA") Complaints

Complaints brought under the FCRA must be filed within 365 days of the date the alleged act of discrimination took place. Once the complaint is processed, the FCHR notifies the

complainant of his or her rights, provides a copy of the complaint to the person who allegedly committed the violation, allows the person who allegedly committed the violation 25 days to file a response, and provides the parties with the option to attempt to settle the dispute through mediation. If the parties decline mediation or if mediation is not successful, the Commission will conduct a full investigation into the allegations in the complaint. Within 180 days of receiving the complaint, the Commission must issue a determination as to whether there is reasonable cause to believe that a discriminatory practice has occurred in violation of the FCRA and must promptly notify the parties of the determination and the options going forward. If the Commission determines that there is reasonable cause to believe that a violation of the FCRA has occurred, the complainant may bring a civil action against the person named in the complaint within 365 days of the determination or may request an administrative hearing under sections 120.569 and 120.57, Florida Statutes, within 35 days of the determination. If the Commission determines there is not reasonable cause to believe that a violation of the FCRA has occurred, the complainant may request an administrative hearing under sections 120.569 and 120.57, Florida Statutes, within 35 days of the determination. If the Commission fails to conciliate or issue a determination within 180 of the filing of the complaint, the complainant may proceed as if the Commission determined that there was reasonable cause.

Fair Housing Act ("FHA") Complaints

Complaints brought under the FHA must be filed with the Commission within 365 days of the date the alleged discriminatory housing practice occurred. Once the complaint is processed, the FCHR notifies the complainant of his or her rights, provides a copy of the complaint to the person who allegedly committed the violation, and provides the person who allegedly committed the violation an opportunity to file an answer. The Commission works with the United States Department of Housing to ensure that the complaint is thoroughly investigated. Within 100 days of receiving the complaint, the Commission must complete its investigation and give notice to the complainant of whether it intends to resolve the complaint. If the Commission decides to resolve the complaint, it shall try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation and persuasion. If within 180 days after a complaint is filed the Commission is unable to obtain voluntary compliance with the FHA, the complainant may commence a civil action (within 2 years of the alleged discriminatory act) or petition for an administrative hearing under Chapter 120, Florida Statutes, (within 30 days of receiving notice that the Commission has concluded its investigation). If the Commission determines that there is reasonable cause to believe that a discriminatory housing practice has occurred, the complainant may request that the Attorney General bring an action in the name of the state on behalf of the complainant to enforce the provisions of the FHA. The Commission may also institute a civil action or an administrative proceeding if it is unable to obtain voluntary compliance with the FHA.

State Employee Whistle-blower Retaliation

Any person applying for work or working for a state agency who has been retaliated against for disclosing protected information may file a complaint with the FCHR, no later than 60 days after the adverse employment action. The Commission conducts an informal fact finding investigation to determine whether there are reasonable grounds to believe that a violation of the Whistle-blower's Act has occurred. Within 90 days after receiving the complaint, the Commission must provide the agency head and the complainant with a fact-finding report that may include recommendations to the parties or a proposed resolution of the complaint. If within 60 days after issuing the fact-finding report the Commission is unable to conciliate the complaint, the Commission shall terminate the investigation and notify the complainant and the agency head of the termination of the investigation, providing a summary of relevant facts found during the investigation. If the Commission determines that reasonable grounds exist to believe that a prohibited action has occurred, is occurring, or will be taken, the Commission must report the determination together with any findings or recommendations to the agency head. If after 20 days, the agency does not implement the recommended action, the Commission shall terminate the investigation and notify the complainant of his or her rights to appeal. If the Commission finds that there are not reasonable grounds to believe that a prohibited personnel action has occurred, is occurring, or is to be taken, the Commission shall terminate the investigation. Within 60 days of receiving a notice of termination of the FCHR investigation, the complainant may file a complaint with the Public Employee Relations Commission against the employer-agency regarding the alleged prohibited personnel action.

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DECISIONMAKING
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pursuant to section 120.54(4), Florida Statutes.[6] On March 13, 2009, after holding a public hearing, Florida Housing adopted rule 67ER09-3, Florida Administrative Code, which established the order of how funds already preliminarily awarded to affordable housing developers would be "deobligated" in order to pay the $190 million back to the state treasury. On April 24, 2009, in accordance with the emergency rule, Florida Housing's Board of Directors accepted staff recommendations to deobligate funding for a number of projects, including funding for many developers previously awarded money through the Community Workforce Housing Innovation Pilot Program ("CWHIP").[7] All told, 47 proposed affordable housing developments lost funding, including 16 CWHIP projects.[8]

In response, seven developers of CWHIP projects filed petitions challenging the deobligation of the funds, two of which dropped out of the litigation before the final hearing. Each of the developers had been selected for potential funding by the Florida Housing Board on November 12, 2008, and had received preliminary commitment letters from Florida Housing.[9] Florida Housing forwarded the petitions to DOAH, and the cases were consolidated for hearing before ALJ John G. Van Laningham.

Petitioners asked for a Recommended Order directing that the projects be funded or, alternatively, that Florida Housing reconsider whether to deprive the CWHIP program of funds that were preliminarily committed to it.[10] The ALJ concluded that "such a remedy is not available under the Florida Administrative Procedure Act" ("APA") and that DOAH therefore lacks subject matter jurisdiction to hear the case.[11] The petitions were thus dismissed. The analysis employed by the ALJ to reach the conclusion that DOAH had no jurisdiction is interesting. He found that Florida Housing's decision to deobligate the funds, and thereby revoke preliminary awards to the developers, does not constitute an "order," a "rule," or even "agency action." Rather, the decision constitutes something else entirely that apparently comes with no APA remedy, an action the ALJ called "an exempt decision."[12]

First, Judge Van Laningham noted that the phrase "agency action" is defined in section 120.52(2), Florida Statutes, as "the whole or part of a rule or order, or the equivalent [thereof]." He then noted that the phrase "final order," as defined in section 120.52(7), means "a written final decision . . . which is not a rule, and which is not excepted from the definition of a rule . . . ."[13] Finally, he noted that the definition of rule in section 120.52(16) specifically excludes the preparation or modification of agency budgets.[14] He then found as follows:

> Thus, a rule is not an order, and neither is a decision that falls within an exception to the definition of a rule. A decision that is categorically excluded from the definition of a rule is, for that very reason, neither a rule nor an order and thus is not an agency action under the APA (unlike a rule, which is).
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> Under the plain language of this statute [120.52(16)], a decision respecting the preparation or modification of an agency's budget falls within a categorical exception to the definition of the term 'rule.' Such a decision is therefore an exempt decision.
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> Because an exempt decision never ripens into a final order, there is no administrative remedy to be had under the APA by a person who claims that the exempt decision determines his or her substantial interests.[15]

Essentially, the ALJ found that because Florida Housing's decision involved a modification to the agency's budget, no administrative remedy was available of any kind. He relied on *Palm Beach County Classroom Teachers Association v. School Board of Palm Beach County*, 406 So. 2d 1208 (Fla. 4th DCA 1981), a case involving an excess of state funds that was appropriated to county school boards pursuant to a supplemental appropriation. The supplemental appropriation language instructed that priority in spending the funds be given to increasing teachers' salaries. When the School Board of Palm Beach County decided not to bargain with the local teachers' union to increase salaries, the union requested an administrative hearing pursuant to section 120.57, Florida Statutes. The School Board denied the hearing request, and the appellate court affirmed, reasoning:

> [W]e hold that the allocation and disbursement of the funds received through the SAA involves the modification of the agency's budget which entails neither rule making nor an order within the meaning of those terms as set forth in Section 120.52, Florida Statutes (1980). There was, therefore, no necessity for the Board to provide [the union] with a hearing required by Section 120.57.[16]

A difference between *Classroom Teachers* and the *CWHIP* case is that the School Board did not take away funds from teachers that had been previously promised, preliminarily or otherwise. Thus, it is questionable whether the substantial interests of teachers were affected by the supplemental appropriation, which only suggested that the school boards give priority to increasing teacher salaries when deciding how to spend the money. Judge Van Laningham described the *Classroom Teachers* opinion as the "mirror image" of the CWHIP case.[17]

Petitioners, in their exceptions to the Florida Housing Board of Directors, argued that they were not challenging Florida Housing's decision to modify its budget. Rather, they argued that they were challenging the decision to prevent the developers from completing the credit underwriting process, to which they had been invited, and which is an essential final step in receiving funding.[18] Noting that Florida Housing had adopted an emergency rule relating to the deobligation process and applied that rule to the Petitioners, the Petitioners argued that "the April 24, 2009, memorandum was the application of a rule by an agency, which constitutes quasi-judicial adjudicatory agency action for which Petitioners are entitled to a Chapter 120 hearing."[19]

Florida Housing did not respond to Petitioners' exceptions, and staff simply recommended that the Findings of Fact and Conclusions of Law in the Recommended Order be adopted by the Board as a Final Order. The Board complied on April 30, 2010.

In addition to determining that the

APA provides no remedy for Florida Housing's decisions to deobligate CWHIP funding, Judge Van Laningham also said the agency had no discretion to provide an opportunity for a hearing on its deobligation decisions, even if it was not legally required to do so. The Legislature has only authorized agencies to conduct section 120.57 proceedings when they act in a quasi-judicial capacity, he wrote. Because the budget decision was a quasi-legislative action, Florida Housing had no authority to provide the opportunity for an administrative hearing: "Lacking such quasi-judicial authority over this particular subject, an agency cannot voluntarily accede to administrative litigation, however laudable its intentions, where the dispute stems from the preparation or modification of its budget."[20]

One "factual wrinkle" in Judge Van Laningham's analysis (as he described it) is that the Legislature authorized Florida Housing to adopt an emergency rule to determine how the funds would be deobligated.[21] Florida Housing acted pursuant to that rule in making its decisions about which developments would not receive previously awarded funds. Judge Van Laningham suggested that the Legislature did not need to give Florida Housing emergency rulemaking authority: "The legislative directive to make emergency rules had the effect of requiring FHFC to adopt in rule form decisions respecting the modifications of its budget that otherwise would not have been the proper subject of a rule," he wrote. "Thus, the Emergency Rules, which involved or governed the preparation or modification of an agency's budget, were not 'excepted' from the definition of a rule only because of the specific enactment authorizing and requiring their adoption; the Emergency Rules were *within* the definition of a rule, however, only as far as they went."[22]

The ALJ found that by creating this "singular exception to the exception for budgetary decisions that otherwise would have excluded FHFC's budgetary decisions from the definition of a rule, the Legislature – perhaps as an unintended consequence – gave persons substantially affected by the emergency rules an administrative remedy, namely a rule challenge."[23] However, the emergency rule only had a lifespan of 180 days, from March 13, 2009 until September 9, 2009. And although the CWHIP developers did challenge the emergency rule, they filed their challenges after the emergency rule expired or was about to expire. Thus, the rule challenges were dismissed at DOAH. An appeal of that dismissal is pending at the First District Court of Appeal.[24]

The unique and unusual nature of the CWHIP case was discussed both by the parties in their Proposed Recommended Orders and by Judge Van Laningham. Whether the new category of "exempt decisions" under the APA will have precedential value or be accepted on appeal (if any party appeals the Final Order) remains to be seen. Perhaps the case is just an aberration resulting from the unprecedented revenue shortfalls and budgetary problems Florida has faced in the past two years. As Judge Van Laningham stated:

> Faced with an unforeseen change in material circumstances, which was beyond its control, FHFC did the best it could both to comply with the legislature's directives and to adapt to the new fiscal reality of a depleted budget. . . . While the deobligation no doubt has caused Petitioners economic hardship, they join the swelling ranks of those whom the state, due to the declining balance in the fisc, can no longer afford to pay as before.[25]

Donna E. Blanton *is a shareholder with Radey Thomas Yon & Clark in Tallahassee.*

Endnotes

[1] *See e.g., State Dep't of General Servs. v. Willis*, 344 So. 2d 580, 584-85 (Fla. 1st DCA 1977) ("Whatever its present state, the Department's action is or upon challenge will mature into a rule or order concerning which the Act assures respondents an opportunity to be heard according to 120.57(1) or (2) procedures . . ."); *McDonald v. Dep't of Banking & Finance*, 346 So. 2d 569, 577 (Fla. 1st DCA 1977) ("We recently held that every agency action is 'a recognizable rule or an order' under the APA or is 'incipiently a rule or order.'") (quoting *Willis)*; *Mitchell v. Leon County School Bd.*, 591 So. 2d 1032 (Fla. 1st DCA 1991) ("Except in formal rulemaking or declaratory statement proceedings, an agency decision which determines the substantial interests of a party must be made through the provisions of section 120.57, Florida Statutes, and culminate in a final order.").

[2] *Pasco CWHIP Partners, LLC v. Florida Housing Finance Corp.*, DOAH Case No. 09-3330, Recommended Order at ¶ 29, p. 18. (The Board of the Florida Housing Finance Corporation adopted the Findings of Fact and Conclusions of Law of the ALJ in its Final Order on April 30, 2010.)

[3] *Id.* at ¶ 32, p. 20.

[4] *See* Ch. 2009-01, Laws of Florida, § 47; *see also* Florida Housing Finance Corporation Board of Directors Agenda Packet, April 30, 2010 (discussing the Recommended Order in *Pasco CWHIP Partners*).

[5] *Pasco CWHIP Partners,* Recommended Order at ¶ 18, p. 14.

[6] Ch. 2009-02, Laws of Florida, § 12.

[7] CWHIP is a program created by the Legislature in 2006 to subsidize the cost of housing for workers performing "essential services." § 420.5095, Fla. Stat. Pursuant to the program, Florida Housing may lend up to $5 million to a developer for the construction or rehabilitation of housing in an eligible area for essential services personnel, such as firefighters, police officers, teachers, and others. The income restrictions for essential services personnel are not as stringent as for other low income housing programs. § 420.5095(3)(a), Fla. Stat. Because the cost of developing a project exceeds $5 million, the developers must also obtain funds from other sources. *Pasco CWHIP Partners,* Recommended Order at ¶ 3, p. 7.

[8] *Id.* at ¶ 25, p. 16.

[9] Importantly, when Florida Housing awards funds to developers through its competitive programs, those developers receive only preliminary commitment letters and still must go through a lengthy credit underwriting process. Rule 67-48.0072, Fla. Admin. Code. Thus, Florida Housing characterizes the initial awards as "preliminary," although developers rely on those preliminary decisions to begin certain aspects of their projects, and it is rare that any developer receiving a preliminary commitment will not be approved after credit underwriting. *Id.* at ¶ 12, p. 10. The ALJ determined that "upon receiving their respective preliminary commitment letters, Petitioners could reasonably anticipate, based on FHFC's past performance, that their projects, in the end, would receive CWHIP financing, notwithstanding the contingencies that remained to be satisfied." *Id*. at pp. 10-11.

[10] *Id.* at ¶ 26, p. 17.

[11] *Id*.

[12] *Id.* at ¶ 29, p. 18.

[13] *Id*.

[14] *Id.* at ¶ 30, p. 18.

[15] *Id.* at ¶ 29, p. 18; ¶ 30, p. 19; ¶ 31, p. 20.

[16] *Palm Beach County Classroom Teachers Assoc. v. Sch. Bd. of Palm Beach County,* 406 So. 2d 1208, 1210 (Fla. 4th DCA 1981).

[17] *Pasco CWHIP Partners,* Recommended Order at ¶ 35, p. 22.

[18] *Pasco CWHIP Partners,* Petitioners' Exceptions to Recommended Order at p. 6.

[19] The ALJ, by contrast found that Florida Housing was authorized to act in a quasi-legislative capacity when it makes decisions concerning its budget. *Pasco CWHIP Partners*, Recommended Order at ¶ 39, p. 25. Such decisions have immediate finality and are not judicially reviewable pursuant to section 120.68, he stated. *Id*.

[20] *Id.* at ¶ 40, p. 26.

[21] *Id.* at ¶ 44, p. 29.

[22] *Id.* at ¶ 45, p. 45.

[23] *Id.* at ¶ 46, p. 29.

[24] *Id*. at n. 11.

[25] *Id.* at ¶ 65, p. 38.

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CHAIR'S MESSAGE
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into the Section's past, connections to its current leadership and projects, and links to information of interest to administrative law practitioners.

One of the best chronicles of the growth of the Section's efforts and the evolution of Florida's Administrative Procedure Act is this Newsletter. Members of the Section work diligently to provide case summaries, updates on legislative changes and articles discussing application of the law. The re-designed site now includes links to not only the current Newsletter, but also links to every Newsletter published by the Section since 1997. Browsing through the links provides a shorthand view of the progression of the APA since the major revisions that took place in 1996.

Links are also provided to defining characteristics of the Section, such as its governing By-Laws, the work being done by its committees and even to current members of the Executive Council of the Section. With two clicks, you can directly e-mail the person assigned to whatever committee or project that might be of interest. You can also keep tabs on the work of the Section through links to its agendas and meeting minutes.

The revised site also provides a useful portal for research commonly conducted by our members. Links include connections to the Florida Administrative Weekly's web site, JAPC's excellent F.A.L.C.O.N. site, portals for Florida Statutes and important links to the Florida Bar and individual government agencies.

The website also includes a calendar of upcoming CLE programs sponsored by the Section. For those programs that have already occurred, the site includes direct links that will allow you to order CDs or DVDs of those past presentations.

We hope that the new website will provide some benefit to you and may serve as a clearinghouse for research projects and updates about the section. I encourage you to visit the site at your next opportunity. The website is available at: http://www.flaadminlaw.org growth of the Section's efforts and the evolution of Florida's Administrative Procedure Act is this Newsletter. Members of the Section work diligently to provide case summaries, updates on legislative changes and articles discussing application of the law. The re-designed site now includes links to not only the current Newsletter, but also links to every Newsletter published by the Section since 1997. Browsing through the links provides a shorthand view of the progression of the APA since the major revisions that took place in 1996.

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