Administrative Law Section Newsletter

Vol. XXXII, No. 4 **Amy W. Schrader, Editor** **June 2011**

HB 7253 & HB 993: The Legislature's Policy of Economic Review and the 2011 Amendments to the APA[1]

by Eric H. Miller

Late in the 2011 session the Legislature passed two bills significantly affecting practice under the Administrative Procedure Act ("APA").[2] HB 7253[3] ratified proposed rules adopted by the Administration Commission to modify the comprehensive plans for three different local jurisdictions in the Florida Keys. HB 993[4] made technical amendments pertaining to the ratification process adopted in 2010, exempted specific types of rulemaking from ratification, clarified the burden of ultimate persuasion in certain administrative proceedings, implemented a limited-term process to review the economic impact of existing rules, and provided limited protections for members of the public responding to a legislative survey on rules. Both bills represent refinements in legislative oversight of agency rulemaking.

HB 7253: The Ratification Process

The adoption of HB 7253 proves the adage "timing is everything." Contemporaneous with passage of the bill, Larry Sellers published his

See "HB 7253 & HB 993" page 12

Chair's Column

by Cathy M. Sellers

The Administrative Law Section has had another active and successful year, thanks to the hard work of the Section's Executive Council and committee members. As my year as Section Chair comes to a close, I want to summarize our Section's accomplishments and to recognize individuals who went "above and beyond."

This was a very successful year for our Section's CLE. The CLE Committee, chaired by Bruce Lamb, once again did an admirable job in providing one of our Section's most vital member services. In October, the Section offered the "Pat Dore Administrative Law Conference," our Section's biennial showcase seminar. The Conference's theme was "In Search of Camelot," featuring as keynote speaker former Florida Supreme Court Justice, Arthur England, and also featuring several Administrative Law Judges and many of the best known administrative practitioners in the state speaking on a range of timely Florida administrative law topics. Special thanks to Scott Boyd, our Section's Secretary, who took on extra duty in chairing the program steering committee, and to the steering committee members, Judge Elizabeth McArthur, Judge Lisa Nelson, Larry Sellers, and Jowanna Oates, for your creativity and hard work in putting together a very successful and enjoyable program. Also, my sincere

See "Chair's Column," next page

INSIDE:

CHAIR'S COLUMN
from page 1

gratitude to Francine Ffolkes, Bruce Lamb and Kelly Fernandez for their efforts in ensuring a successful State and Federal Government and Administrative Practice Certification Review program, and to Cindy Miller and Michael Cooke, who co-chair the Section's Public Utilities Law committee and who organized and oversaw the "Practice Before The PSC" seminar offered in the fall.

I am so proud of our Section's publications! So much has happened with respect to the Florida APA in the past year, and our Newsletter and Bar Journal articles have kept us all well-informed through excellent, timely articles. I cannot begin to express how grateful I am for Amy Schrader. Amy does double duty as our Newsletter editor and our Section Treasurer. She is talented, hard-working, and infinitely patient. Through her leadership, we continue to provide a Newsletter for our members that I believe is unparalleled in its quality and timeliness. Special thanks to Larry Sellers, who continues to be one of our Section's most prolific members. This year alone, Larry contributed three Newsletter articles and a Florida Bar *Journal* article addressing recent amendments to the APA and the outfall from these changes. Thanks also to Donna Blanton, Scott Boyd, Patti Nelson, and Eric Miller for contributing articles on timely, substantive topics; to long-standing contributor Mary Smallwood for her Appellate Case Notes column; to Agency Snapshots contributors Daniel Nordby, Francine Ffolkes, Toni Egan, and Seann Frazier; and to Agency Snapshots column coordinator Mary Ellen Clark. Thanks also to Judge Bram Canter for starting off our Florida Bar Journal publications year with an article addressing practice before the Division of Administrative Hearings, and to Paul Amundsen for his continued service as the Section's Bar Journal column liaison.

Once again the Section is working with the Bar to update the Administrative Practice continuing legal education manual. This effort is being headed by Judges Lisa Nelson, Elizabeth McArthur, and Linda Rigot. I am most grateful for their work in "herding the administrative law cats" and editing to ensure that the Manual continues to be the most timely, useful compilation of Chapter 120 "black letter law" available.

One of my goals this year was to revive our Law School Outreach program. To this end, the Section hosted two law school outreach events this year to introduce students to Florida administrative law. The events were hosted in connection with the Florida Administrative Law course offered at the University of Florida College of Law in Fall 2010 and the Florida State University College of Law in Spring 2011. Special thanks to Judges Charles Stampelos, Bram Canter, and John VanLaningham, and to Agency for Health Care Administration Clerk Richard Shoop for their participation in these events. More to follow next year as the Section explores creating a law student mentoring program.

The Section's showcase project this year entailed drafting amendments to the Uniform Rules of Procedure to address recent legislation, and to clarify and amend outdated rule provisions. Judge Linda Rigot chaired the Uniform Rules committee, which consisted of Larry Sellers, Judges Elizabeth McArthur and Lisa Nelson, Andy Bertron, Lynne Quimby-Pennock, Shaw Stiller, Wellington Meffert, and Paul Amundsen. This committee met numerous times and produced a thoroughly analyzed, workable, and comprehensive package of amendments. This package has been provided to the Administration Commission for consideration and adoption through the rulemaking process, and the Section will continue to provide support, as requested, through that process. On behalf of our Section's 1100+ members, special thanks to Judge Rigot and the committee for your tremendous effort and excellent work product.

I owe three people a tremendous debt of gratitude for their support in my year as Section Chair. In addition to her "formal" efforts in chairing the Section's main project this year, Judge Linda Rigot served as my mentor all year; without her sage advice and guidance, I am certain my year would not have gone nearly as smoothly. More than just a prolific author and the best Board of Governors Section Liaison, Larry Sellers, was my proverbial right arm this year, always there with brilliant suggestions, tactfully delivered and forever appreciated. Last, but certainly not least, our Section Administrator, Jackie Werndli, once again kept us in the middle of the road – organized, on track, and on time. Jackie is always there with an answer for any question and a suggestion on how to handle any situation. Quite literally, I could not have done my job this year without Jackie's support. I am so grateful to you all.

Thank you for the honor of serving as your Section Chair.

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

APPELLATE CASE NOTES

by Mary F. Smallwood

Adjudicatory Proceedings

Banks v. Florida Engineers Management Corp., 53 So. 3d 1151 (Fla. 1st DCA 2011) (Opinion filed February 7, 2011)

Banks, a professional engineer, had been disciplined by the Board of Professional Engineers ("Board") in 2007. The resolution of the disciplinary action required Banks to submit a list of projects to the Board for peer review. After the first list submitted resulted in findings of certain deficiencies, he subsequently informed the Board that he had not engaged in any engineering work.

In 2009, the Florida Engineers Management Corporation ("FEMC") served a complaint on Banks alleging that he had engaged in the negligent practice of engineering and that he had falsely stated that he had not performed engineering services. The complaint included a certificate of service dated October 14th and a notice of rights giving Banks 21 days to file a petition challenging the complaint. He sent a letter to the Board which it received on November 16th specifically disputing certain material allegations in the complaint. The letter, however, did not specifically request a formal hearing. FEMC filed a motion with the Board asserting that the November 16th letter was not a timely request for a formal hearing. The Board granted that motion and held an informal hearing. It entered an order suspending Banks' license.

Banks appealed. On appeal, the court reversed and remanded. It found that Banks had not received the complaint until October 27th. His letter challenging the allegations in the complaint was received by the Board within 21 days of his receipt. In addition, the court held that the contents of the letter disputing the allegations of the complaint should have been treated as a request for a formal administrative hearing. Even if the letter was insufficient for that purpose, Banks should have been allowed the opportunity to amend the petition. The case was remanded for proceedings pursuant to section 120.57(1), Fla. Stat.

Ft. Myers Real Estate Holdings, LLC v. Department of Business and Professional Regulation, 53 So. 3d 1158 (Fla. 1st DCA 2011) (Opinion filed February 7, 2011)

Ft. Myers Real Estate Holdings ("Ft. Myers") applied for a permit to conduct quarter horse racing on property located in Miami-Dade County. The Division of Pari-Mutuel Wagering ("Division") gave notice of its intent to deny the permit with a notice of rights to request a hearing. The grounds for denial were that the applicant had not demonstrated that the property was available for quarter horse racing or that it had the ability to commence construction within one year of receiving a permit. Ft. Myers filed a request for a formal hearing which the Division dismissed without prejudice. Ft. Myers then filed an amended petition alleging that it met all the permitting criteria and that it had demonstrated that the land could be rezoned for racing soon enough to allow for construction to proceed within one year. The amended petition also asserted that the Division had relied on unadopted rules in denying the permit application. The Division dismissed the amended petition with prejudice. It recognized that the applicant would be injured by denial of the permit but held that the injury was speculative because of the contingencies involved with the necessary land use approvals.

On appeal, the court reversed and remanded for a formal hearing. It held that it is self-evident that a permit applicant has standing to challenge an agency decision denying it a permit. Because a permit applicant is a "party" to the permitting proceeding, it is not required to establish its standing to challenge a denial under the *Agrico* test.

The Division had argued that the case should be moot in light of a 2010 statutory amendment that prohibited new racing facilities located within 100 miles of an existing pari-mutuel facility. The court held that the record was insufficient to determine the validity of the Division's argument, however, as it was not clear from the record whether the new law should be applied to Ft. Myers' application.

Wade v. Department of Children and Families, 57 So. 3d 869 (Fla. 1st DCA 2011) (Opinion filed February 7, 2011)

Wade requested a formal hearing challenging the determination of the Department of Children and Families to revoke her scholarship under the Road-to-Independence ("RTI") Program for failure to attend school or make adequate progress. A hearing officer appointed by the Department held an evidentiary hearing and entered an order revoking the scholarship. The order, which was characterized as final, gave Wade notice of her right to appeal the order to the District Court of Appeal. Wade filed an appeal, and neither party suggested that the court lacked jurisdiction to hear the appeal.

The court dismissed the appeal for lack of jurisdiction, concluding that the order was not a final order under the Administrative Procedure Act. The court noted that section 409.1451(5), Fla. Stat., required the Department to adopt procedural rules for recipients of services from the Department to challenge agency decisions. Further, the statute required that the procedures provide for an appeal to the Secretary of the agency. However, the rules adopted by the Department provide that the hearing officer's decision is final. The rules provide for use of a federal "fair hearings" process which is applied to other federal public assistance programs.

continued, next page

CASE NOTES
from page 3

In response to the court's order to show cause, the Department asserted that the RTI program was subject to the fair hearings process, not Chapter 120, Fla. Stat. While the court agreed that there was nothing subjecting the RTI challenge to Chapter 120, it held that the statutory provisions governing RTI challenges expressly required that an appeal to the Secretary of the hearing officer's decision be provided. The appeal was dismissed without prejudice to Wade to appeal a final order of the Secretary.

St. Johns Riverkeeper, Inc v. St. Johns River Water Management, 54 So. 3d 1051 (Fla. 5th DCA 2011) (Opinion filed February 18, 2011)

St. Johns Riverkeeper challenged a consumptive use permit which the District proposed to issue to Seminole County for withdrawal of 5.5 million gallons of water from the river. It alleged that its members were affected by the proposal as they used it for various purposes, including boating, and that the proposed withdrawal would cause an increase in nutrient loads resulting in algal bloom that would interfere with such use. The administrative law judge concluded that Riverkeepers had not established that issuance of the consumptive use permit would "affect their use or enjoyment of air, water or natural resources of the River." The District adopted the recommended order.

On appeal, the court reversed on the issue of standing. It held that the administrative law judge and the District had incorrectly mixed the issue of standing with the ultimate determination on the merits. The determination that the permit should be issued did not deprive the petitioners of standing where they demonstrated that the group's mission was the protection of the river, that the proposed withdrawal of water would increase nutrient loading and that algal blooms can inhibit boating on the river.

Hasselback v. Department of Environmental Protection, 54 So. 3d 637 (Fla. 1st DCA 2011) (Opinion filed February 28, 2011)

Hasselback filed a petition for hearing challenging the Department of Environmental Protection's issuance of a coastal construction control line permit to an adjacent land owner. The Department issued a final order dismissing the petition as untimely. It based that decision on the fact that notice had been provided to Rick Barnett, another adjacent property owner allegedly acting as an agent for Hasselback, and to the law firm of Oertel, Fernandez, Cole & Bryant, which had previously represented Hasselback. Despite having characterized its order as final, the Department forwarded the matter to the Division of Administrative Hearings for a determination of the timeliness of the petition. The administrative law judge concluded that notice should have been imputed to Hasselback through Barnett and the law firm.

On appeal, the court reversed. The court accepted Hasselback's testimony that his relationship with the law firm ended a year before notice of the permit was given. Further, it held that there was no evidence to support a conclusion that Barnett was acting as an agent for Hasselback.

Riverwood Nursing Center, LLC v. Agency for Health Care Administration, 58 So. 3d 907 (Fla. 1st DCA 2011) (Opinion filed March 10, 2011)

In February 2010, Riverwood Nursing Center received two statements of deficiencies from the Agency for Health Care Administration (AHCA) citing it for noncompliance with state and federal law requirements. At the same time, the U.S. Department of Health and Human Services, Center for Medicare and Medicaid Services (CMS) issued a Notice of Immediate Jeopardy. The CMS notice provided that Riverwood could appeal the notice within 60 days. A timely appeal was filed by Riverwood which stated that it was both disputing several of the federal deficiencies and the state law deficiencies. A copy of the appeal was provided to an AHCA field office but was not filed with the agency clerk.

In May 2010, AHCA filed an administrative complaint against Riverwood seeking revocation of its nursing home license. The complaint included an election of rights form that required Riverwood to respond within 21 days. Riverwood failed to timely file the election of rights form; however, on the 22nd day it contacted AHCA's counsel and sought an extension of time to file the form. AHCA's counsel agreed that Riverwood could file a late election of rights form.

After receipt of the form, however, AHCA dismissed the request with prejudice. On appeal, Riverwood argued that its request should be considered timely because: (1) the time for filing it was equitably tolled by AHCA's agreement to allow late filing; and (2) the appeal of the CMS notice was sufficient to put AHCA on notice that Riverwood disputed the state deficiencies.

With respect to its equitable tolling argument, Riverwood relied on

Foley v. Department of Health, 839 So. 2d 828 (Fla. 4th DCA 2003), where the Fourth District reversed a dismissal of a late filed election of rights form because an agency attorney had stated that the late filing would be accepted. AHCA relied on *Watson v. Brevard County Clerk of the Circuit Court*, 937 So. 2d 1264 (Fla. 5th DCA 2006), where the Fifth District found a petition filed one day late untimely even though a member of the commission had told Watson she could file the petition late.

The court found the *Watson* case more persuasive and concluded that equitable tolling did not apply where Riverwood admittedly was aware of the filing deadline and the attorney's representation that a late filing would be accepted occurred after the deadline to file had already passed.

The court also rejected Riverwood's argument that its election of rights form was timely because it related back to the appeal of the CMS notice or modified that request. The court noted that the election of rights form did not refer to the previously filed appeal. Moreover, Riverwood made no attempt to determine whether AHCA intended to treat a copy of the appeal as a request for hearing under Chapter 120, Florida Statutes. Finally, the court noted Rule 28-106.104, Fla. Admin. Code, requires that petitions be filed with the agency clerk.

Gonzalez v. Department of Financial Services, 60 So. 3d 469 (Fla. 3d DCA 2011) (Opinion filed April 13, 2011)

Gonzalez appealed a summary order of the Department of Financial Services revoking his license to transact insurance. The petition for hearing was submitted two days late. On appeal, Gonzalez argued that the late filed petition should be accepted based on the doctrine of equitable tolling.

The court affirmed the order revoking the license. It noted that Gonzalez did not assert that he was misled or lulled into inaction. Instead, he argued that a number of physical and mental maladies caused him to tell his attorney that he received the administrative complaint on August 27th instead of August 23rd. The court held that even if his mistake constituted excusable neglect, it was not sufficient to meet the requirements of the Administrative Procedure Act.

Licensing

Arteaga v. Department of Business and Professional Regulation, 54 So. 3d 599 (Fla. 3d DCA 2011) (Opinion filed February 16, 2011)

The Department of Business and Professional Regulation filed an administrative complaint against Arteaga, a licensed community association manager on July 24, 2009. When the Department did not receive an election of rights form from Arteaga, it entered a final order holding he had waived his right to challenge the complaint and revoking his license. The final order did not contain any factual findings of a prior disciplinary history or aggravating circumstances as required by rule for license revocation.

Arteaga filed a motion to set aside the final order, alleging that he had faxed the election of rights form to the Department on July 30, 2009. He provided a notarized form with that date but indicated he had no fax confirmation sheet as his fax machine malfunctioned. Before the motion was ruled on, Arteaga appealed the final order and he and the Department negotiated a settlement under which the final order would have been vacated. Despite the fact the settlement had not been finally approved by the agency head, Arteaga dismissed his appeal. Subsequently, the agency head issued an order denying the motion to vacate and rejecting the recommended settlement, although allowing Arteaga to refile the appeal.

On appeal, the court reversed and remanded. The court instructed the Department to either accept the draft settlement within 20 days or hold an evidentiary hearing on both the issue of timeliness and the merits of the original complaint. The court noted that Arteaga would be subject to prosecution for perjury if he lied about the fax transmission and the notary would be subject to criminal penalties for backdating the form. In light of Arteaga's property rights in the license, the court concluded that he was entitled to an evidentiary hearing on the timeliness of the election of rights form.

Griffis v. Florida Fish & Wildlife Conservation Commission, 57 So. 3d 929 (Fla. 1st DCA 2011) (Opinion filed March 28, 2011)

Griffis, a commercial fisherman, pled no contest to one count of an amended information in Brevard County alleging a generic theft of personal property. In return, the assistant state attorney agreed not to prosecute three other counts which alleged the specific actions of molesting of blue crab traps and unlawful removal of trap contents.

Subsequently, the Florida Fish and Wildlife Conservation Commission ("Commission") took administrative action to revoke Griffis' commercial saltwater fishing privileges on the basis of section 379.366(4)(b), Fla. Stat., which provides that a harvester receiving a judicial disposition other than dismissal or acquittal on accusations of theft of or from a trap shall permanently lose all saltwater fishing privileges.

On appeal, the court reversed. It held that revocation under the statute could not be based on the generic theft plea as the statute specifically referenced theft of a trap or trap contents. The court noted that penalty provisions must always be strictly construed in favor of the one against whom the penalty is being imposed. Finally, the court concluded that the resolution of the criminal case was driven by the State Attorney and Griffis to avoid a revocation of his fishing privileges. The court held that the Commission could not undermine the action of the State Attorney's office since it was the entity with the constitutional responsibility for charging and prosecuting the offenses identified in section 379.336, Fla. Stat.

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Governor's Rules Freeze Draws Legal Challenge: Governor Asserts "Supreme Executive Power"

by Lawrence E. Sellers, Jr.

Shortly after his inauguration, Governor Rick Scott issued an executive order that freezes all rulemaking by agencies under the direction of the Governor. The executive order has drawn a legal challenge from Rosalie Whiley, a blind woman, who asks the Florida Supreme Court to order the Governor to demonstrate the authority to issue such an order and, if the Court finds there is no authority, she seeks to have the order revoked. In response, the Governor asserts that, as the chief administrative officer, he has the "supreme executive power" to direct those agency heads who serve at his pleasure.

Executive Order No. 11-01

On January 4th, Governor Scott issued Executive Order No. 11-01.[1] The executive order freezes all new rules and establishes the Office of Fiscal Accountability and Regulatory Reform (OFARR), which is to review all rules prior to promulgation. The order immediately suspends rulemaking for all agencies under the direction of the Governor and prohibits agencies from promulgating rules unless they obtain prior approval from OFARR. The order also prohibits the Secretary of State from publishing notices of rulemaking except at the direction of OFARR.

The Whiley Petition for Writ of Quo Warranto

On March 28th, Ms. Whiley filed a petition for writ of quo warranto in the Florida Supreme Court.[2] She asks the court to order the Governor to demonstrate the authority for Executive Order No. 11-01, and, if the Court finds there is no authority, she seeks to have the order revoked. She argues that Florida's Administrative Procedure Act (APA) assigns certain rulemaking authority directly to the "agency heads," and that just because the Legislature allows the Governor to appoint agency heads does not mean that the Governor has the power to control their rulemaking by fiat. She argues that the Governor does not have the constitutional authority to replace legislative mandates with procedures that are inconsistent with the APA. She argues that the executive order violates the separation of powers because: (1) it violates the APA's express prohibition on delegation of the agency head's authority to propose rules or to file proposed rules for adoption; (2) it violates the APA's express time limits for adopting or withdrawing proposed rules; and (3) it violates the APA's express mandate for the Secretary of State to publish notices of rulemaking.

Executive Order 11-72.

On April 8th, and after the filing of Ms. Whiley's petition, the Governor issued Executive Order 11-72.[3] It expressly supersedes Executive Order No 11-01 and chronicles the rulemaking reviews conducted by OFARR pursuant to that order in the intervening three months. It notes that OFARR has reviewed over 11,000 existing rules and helped agencies identify 1,035 unnecessary rules for repeal. The new order contains many of the same requirements as the initial order. It no longer prohibits the Secretary of State from publishing notices; however, it provides that no agency may submit a notice of rulemaking for publication without OFARR approval. Unlike the initial order, Executive Order 11-72 begins by reciting that the Florida Constitution vests the "supreme executive power" in the Governor.

The Governor's Response to the Whiley Petition

On May 12th, the Governor filed a lengthy response to the petition. He argues that the two Executive Orders are fully consistent with the Governor's constitutional powers and the APA. The Governor says the OFARR approval process does not violate the Florida Constitution because the Governor has the power to inform agency heads who serve at his pleasure of the considerations that will govern their retention and removal, and that as the chief administrative officer and the supreme executive, the Governor may direct those agency heads who serve at his pleasure. The Governor also argues that the orders do not violate the APA because they do not require agency heads to improperly delegate or transfer rulemaking responsibilities and OFARR does not require agencies to contravene APA time limits. In addition, the Governor contends that the Court lacks jurisdiction to issue a writ of quo warranto, in part because the petition constitutes a standard APA challenge that should be brought at DOAH.

The Whiley Reply

In a reply filed on June 2nd, Ms. Whiley argues that neither the "supreme executive power" nor the Governor's role as the chief administrative officer allow the Governor to ignore or displace statutes that govern rulemaking. She also argues that both executive orders violate the rulemaking authority that the Legislature gives exclusively to agency heads and rulemaking time limits mandated by the APA. She summarizes the narrow question presented as: Whether the Governor's authority under the separation of powers authorizes him to contravene the legislative mandate in the APA by giving rulemaking power to OFARR that should, by law, lie with agency heads?

HB 993.

Meanwhile, the Florida Legislature

enacted HB 993 during the recently-concluded 2011 Regular Session.[4] HB 993 specifically refers to Executive Order No. 11-01 (but not to No. 11-72). The bill establishes an enhanced biennial review and compliance economic review process for rules in effect on November 16, 2010.[5] However, the measure provides that an agency is exempt from these reviews "if it has cooperated or cooperates with OFARR in a review of the agency's rules in a manner consistent with Executive Order No. 11-01, or any alternative review directed by OFARR."[6] It is unclear whether this legislation was intended to provide any authorization for the executive orders.

Ms. Whiley's case presents interesting questions for administrative lawyers. She has asked for expedited argument, asserting that "this suspension of rulemaking raises issues of great importance to determining a critical separation of powers issue affecting the Administrative Procedure Act, a law that affects the lives of thousands of Floridians everyday." On June 17, 2011, the Court granted the request and set oral argument for June 29th. Stay tuned.

Endnotes:

[1] Executive Order No. 11-01 (issued Jan. 4, 2011) is available at: http://www.flgov.com/wp-content/uploads/2011/01/scott.eo_.one_.pdf.

[2] *Whiley v. Scott*, Case No. SC11-592 (petition filed Mar. 28, 2011). The petition and other pleadings are available at: http://www.floridasupremecourt.org/pub_info/summaries/briefs/11/11-592/index.html.

[3] Executive Order No. 11-72 (issued Apr. 8, 2011) is available at: http://www.flgov.com/wp-content/uploads/orders/2011/11-72-fiscal.pdf.

[4] As of June 5, 2011, HB 993 had not yet been presented to the Governor and was therefore not yet effective.

[5] For a summary of the new reviews required by HB 993, *see* Eric Miller, HB 7253 & HB 993: The Legislature's Policy of Economic Review and the 2011 Amendments to the APA, Administrative Law Section Newsletter, Vol. XXXII, No. 4 (June 2011).

[6] HB 993, s. 5, to be codified as s. 120.745(9)(a), F.S.

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Agency Snapshot

Florida Department of Juvenile Justice

by Allen R. Grossman

The Department of Juvenile Justice (DJJ) was carved out of the former HRS in 1994. In 1997 and 2000 significant changes were made in statute and DJJ now finds its duties and responsibilities set forth in chapters 984 and 985, F.S. The legislative changes have created a shift away from the social services model and toward a punitive criminal justice approach while maintaining the juvenile justice system in a manner that continues to be operationally and philosophically distinct from the adult criminal justice system. DJJ and its staff are responsible for handling juvenile delinquency cases and addressing the issues of children and families in need of services. As a result of the 2000 "Tough Love" plan implemented by the Florida Legislature, DJJ shifted away from the HRS service district structure to a structure that conformed to the boundaries of the 20 judicial circuits. DJJ is organized in five program offices: Administrative Services; Prevention and Victim Services; Detention Services; Probation and Community Intervention; and Residential Services. The Department operates 25 juvenile detention centers in 24 counties with a total of 2,007 beds. The detention centers provide custody, supervision, education and mental health/substance abuse services to juveniles statewide. Juvenile Detention Officers receive specialized training and certification. Approximately 13,000 youth are committed to the Department by the local judiciary and placed in mandatory day treatment or residential commitment programs.

Head of the Agency:
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The Clerk's Office does accept electronic and facsimile filing during operating hours.

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The General Counsel, Brian Berkowitz, is a graduate of the University of Florida (B.A. '77) and the Florida State University College of Law (J.D. '82). Previously in his legal career, Brian served first as Staff Counsel for various Committees and then as General Counsel for the Florida House of Representatives. From 1993-1995, he also served as the Director of the Task Force for the Review of the Criminal Justice and Corrections Systems established within the Office of the Attorney General of Florida. In 1999, Brian came to the DJJ General Counsel's Office and was earlier this year appointed as General Counsel to the Department.

Number of Lawyers on Staff:
16 attorneys located in Tallahassee and four regional offices.

Kinds of Cases:
Attorneys representing DJJ routinely find themselves participating in Circuit Court in matters as diverse as civil rights cases, tort claims, contract disputes, the prosecution of cases involving Children In Need of Services (CINS) and Families In Need of Services (FINS) and of course at the request of any concerned Circuit Judge in custodial and other matters related to juvenile defendants in their courts. In addition, approximately 20% of the work performed by the General Counsel's Office deals with APA matters including bid disputes, rulemaking and rule challenges, and administrative challenges to reconciliations as to County Cost Share determinations. In fact, one attorney within the General Counsel's Office is assigned full-time to handle the rulemaking process for DJJ.

Practice Tips:
Exhibiting common professional courtesies will go a long way in facilitating resolutions when working with the General Counsel's Office and it is always best to remember that the ultimate goal of the Department of Juvenile Justice is to increase public safety by reducing juvenile delinquency through effective prevention, intervention, and treatment services that strengthen families and turn around the lives of troubled youth. Tailoring your request to meet these goals and keeping in mind the realities of statutory and fiscal limitations on the authority of DJJ is also always a good idea.

Professional Ethics of The Florida Bar

OPINION 09-1
December 10, 2010

A lawyer may not communicate with officers, directors, or managers of State Agency, or State Agency employees who are directly involved in the matter, and other State Agency employees whose acts or omissions in connection with the matter can be imputed to State Agency about the subject matter of a specific controversy or matter on which a lawyer knows or has reason to know that a governmental lawyer is providing representation unless the agency's lawyer first consents to the communication. A lawyer may communicate with other agency employees who do not fall within the above categories, and may communicate with employees who are considered represented by State Agency's lawyer on subjects unrelated to those matters in which the agency lawyer is known to be providing representation. The lawyer may be required to identify himself or herself as a lawyer who is representing a party in making those contacts. Lawyers communicating with agency personnel are cautioned not to either purposefully or inadvertently circumvent the constraints imposed by Rule 4-4.2 and Rule 4-4.3 in their communications with government employees and officials. If a lawyer does not know or is in doubt as to whether State Agency is represented on a particular matter or whether particular State Agency's employees or officials are represented for purposes of the rule, the lawyer should ask State Agency's lawyer if the person is represented in the matter before making the communication.

[Note: This opinion was approved as revised by the Board of Governors at its December 10, 2010 meeting.]

RPC: 4-4.2, 4-4.3
Opinions: 78-4, 87-2

A member of The Florida Bar has requested an advisory ethics opinion. The operative facts as presented in the Inquiring Lawyer's letter are as follows.

Inquirer's firm represents financial institutions in applying for charter approvals and other necessary approvals with State Agency and federal regulatory agencies, and also in regulatory issues that may arise with such agencies. Occasionally, Inquirer's firm may represent clients in administrative or judicial proceedings in which State Agency is the opposing party.

Inquirer's firm currently is representing four clients in administrative or judicial proceedings involving State Agency which handles state regulatory matters involving the licensing, examination, and supervision of financial institutions. Legal counsel for State Agency has advised Inquirer's firm that all communications to any employee of State Agency from any lawyer in the firm pertaining to any of the firm's clients must go through the legal department of State Agency, even when such client matters are not connected in any way to the four litigation cases. The Inquirer asks whether Inquirer's firm is prohibited by Rule 4-4.2 from directly communicating with all employees of State Agency, when such communications do not pertain to any adversarial proceeding between the firm's clients and State Agency.

Rule 4-4.2 of the Rules of Professional Conduct of The Florida Bar is the governing ethical standard:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any court rule, statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by the court rule, statute or contract, and a copy shall be provided to the adverse party's attorney.

The Comment to the rule states, in relevant part:

> This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter…and the uncounseled disclosure of information relating to the representation.
>
> This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between 2 organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make, provided the client is not used to indirectly violate the Rules of Professional Conduct. Also, a lawyer having independent justification for communicating with the other party is permitted to do so. Permitted communications include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.
>
> In the case of a represented organization, this rule prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concern-

continued, next page

PROFESSIONAL ETHICS
from page 9

> ing the matter or has authority to obligate the organization with respect to the matter, or whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability...
>
> The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

Several issues must be considered in responding to the requested advisory opinion. The first is whether all persons within an organization are deemed to be represented by the organization's counsel for the purposes of this rule. As indicated in the comments to Rule 4-4.2 quoted above, a lawyer would be ethically precluded from communicating with employees of governmental entities or agencies who are considered represented by the government's lawyer for purposes of this rule with regard to matters on which the agency is known to be represented by a lawyer unless the entity's lawyer consents to the communication.

Florida Ethics Opinion 78-4 addresses this sometimes difficult question of who within an organizational structure is considered to be a "party" within the meaning of the rule. (Opinion 78-4 was decided under the old Code of Professional Responsibility, which prohibited ex parte contacts with a "party" represented by counsel. While the current rule refers to a "person" represented by counsel, the rationale of the opinion nevertheless remains applicable here.) Attempting to balance one party's need to conduct pre-suit investigation by interviewing certain members of the opponent corporation against the organization's interest in preventing the unadvised disclosure of particular information, the Committee declined to adopt a rule that would prohibit all contacts with organizational employees no matter how removed from the conduct in question. Instead, the Committee found ex parte communications improper only with regard to employees who are "officers, directors or managing agents" but not other employees "unless they have been directly involved in the incident or matter giving rise to the investigation or litigation." In Florida Ethics Opinion 87-2, the Committee extended the rationale of Opinion 78-4 to government entities and noted that the Comment to Rule 4-4.2, in addition to precluding direct contact with an agency's management, also would preclude unauthorized communications with persons whose acts or omissions in connection with the matter could be imputed to the organization.

Thus, regarding a matter in which State Agency is represented, Inquirer and the firm must obtain the consent of State Agency's lawyer before communicating with State Agency's officers, directors or managers, or employees who are directly involved in the matter, or with public officials or employees whose acts or omissions in connection with the matter can be imputed to State Agency.

The second issue that must be addressed is when the prohibition arises. Rule 4-4.2 is not limited to matters in litigation and may extend to matters on which litigation has not yet commenced, as well as to specific transactional or non-litigation matters on which the agency's lawyer is providing representation. Pursuant to the language of the Comment, however, direct communications with represented persons, including protected employees, on matters other than specific matters for which the agency lawyer is providing representation are permissible. See Florida Ethics Opinion 94-4. Moreover, the Comments limit the scope of the Rule to those circumstances where "the lawyer knows that the person [agency] is in fact represented in the matter to be discussed." Thus, an agency lawyer need not enter a formal appearance in order to "in fact" represent his or her agency on a particular matter, nor must the agency lawyer give other lawyers formal notice of such representation. However, as suggested by the Comment, there must be actual knowledge by the non-agency lawyer of representation by the agency lawyer on the matter being discussed in order for Rule 4-4.2 to apply; but such actual knowledge may be inferred from the circumstances. As a consequence, Inquirer and the firm are not precluded from communicating with employees or any other employee of State Agency regarding subjects unrelated to those specific matters on which the representation of the State Agency's lawyer is known to Inquirer and the firm. In this instance, however, the Inquirer or members of the firm may be required to identify himself or herself as a lawyer representing a client to comply with Rule 4-4.3 Dealing with Unrepresented Persons.

The final question that must be resolved is whether, because State Agency has a general counsel, the general counsel is effectively representing the agency on all matters, merely by virtue of being in the continuous employ of the agency, thus preventing all communications with the State Agency's public officials and employees on all subjects. The Comments described above suggest that this is not the intent of the Rule. In addition, the Comments to the Rule expressly recognize that lawyers with an "independent justification" may communicate with a represented party.

Florida Ethics Opinion 78-4 also addresses this issue:. The Professional Ethics Committee addressed two questions:

> (1) When is a party sufficiently "represented by a lawyer" to require application of DR 7-104(A)(1) so as to prohibit communication with the party and, in specific, must litigation have commenced for the DR to apply? (2) Where a potential suit or pending suit involves a corporation, who in the corporate structure is considered to be a "party" within the meaning of the (Rule)?
>
> The Committee's unanimous answer to the first question is that representation of a party commences whenever an attorney-client relationship has been established with regard to the matter in question, regardless of whether

> or not litigation has commenced. In the opinion of the majority of the Committee, in the case of even an individual or corporation that has general counsel representing the individual or corporation in all legal matters, the DR would require communication on the matter to be with the party's attorney.

Florida Ethics Opinion 87-2 extended the rationale of Opinion 78-4 to government agencies, as discussed above, and made no exception for contacts with personnel of government agencies.

In view of the Comments' clarification that there must be knowledge that the other party is represented in a particular matter and that the bar on communications does not apply to matters outside the representation, Rule 4-4.2 should not be read to bar all communications with government officials and employees merely because the government entity retains a general counsel or other continuously employed lawyers. Conversely, the rule cannot be read to allow lawyers representing a client to approach represented public officials and employees to make inquiry about a matter, the status of a matter, or obtain statements about a matter without affording such officials and employees an opportunity to discuss with government counsel the advisability of entertaining the communication. If the lawyer representing a client knows that the public official or employee is represented in the matter, the lawyer must obtain the prior consent of the government lawyer. If the lawyer representing a client does not know that the public official or employee is represented in a matter, the lawyer should inquire whether the person is represented in the matter. In all instances, to comply with other provisions of the Rules, the lawyer must identify himself or herself to the public official or employee as a lawyer who is representing a client. Rule 4-4.3 and Florida Ethics Opinion 78-4.

In conclusion, Rule 4-4.2, as clarified by its Comments, prohibits communications with officers, directors, or managers of State Agency, or State Agency employees who are directly involved in the matter, and other State Agency employees whose acts or omissions in connection with the matter can be imputed to State Agency about the subject matter of a specific controversy or matter on which a lawyer knows or has reason to know that a governmental lawyer is providing representation unless the agency's lawyer first consents to the communication. The Rule does not prohibit a lawyer from communicating with other agency employees who do not fall within the above categories, nor does it prohibit a lawyer from communicating with employees who are considered represented by State Agency's lawyer for purposes of this rule on subjects unrelated to those matters in which the agency lawyer is actually known to be providing representation. The lawyer may be required to identify himself or herself as a lawyer who is representing a party. Rule 4-4.3 and Florida Ethics Opinion 78-4.

Lawyers communicating with agency personnel must be cautioned not to either purposefully or inadvertently circumvent the constraints imposed by Rule 4-4.2 and Rule 4-4.3 in their communications with government employees and officials. The right to communicate directly with agency personnel about matters unrelated to those on which the agency lawyers are providing specific legal representation must not be used as a vehicle for engaging in communications that are barred by the rule. If the Inquirer does not know or is in doubt as to whether State Agency is represented on a particular matter or whether particular State Agency's employees or officials are represented for purposes of the rule, Inquirer should ask State Agency's lawyer if the person is represented in the matter before making the communication. In all instances, the Inquirer may be required to identify himself or herself as a lawyer who is representing a client.

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Editorial

Ethics Opinion 09-1 provides guidance on when and whether Rule 4-4.2 prohibits direct contact by counsel with non-lawyer government agency employees. Often, there are situations when permission or involvement of government counsel is obviously required by Rule 4-4.2, such as communications related to matters involving litigation with an agency. On other occasions, it can be just as clear that involvement or permission by government counsel is unnecessary. Yet, a large gray area exists between those clear and easy situations. Anyone who has practiced very long at or before state agencies has probably seen attorney conduct that arguably, albeit unintentionally, may have violated Rule 4-4.2.

Ethics Opinion 09-1 is an attempt to narrow the gray area between the clear-cut situations. If, after a reading of Ethics Opinion 09-1, private counsel remains in doubt about whether government counsel must be contacted in lieu of agency staff, the existence of doubt ought to be dispositive and government counsel must be contacted.

Importantly, the Opinion cautions against circumventing Rule 4-4.2 by discussing matters that should be handled through counsel during the course of a contact not requiring counsel. Likewise, although not expressly addressed in the Opinion, the commentary accompanying Rule 4-4.2 prohibits a lawyer from making a communication prohibited by Rule 4-4.2 through the acts of another. It follows that a law firm's non-lawyer "government consultant," acting on behalf of the law firm or one of its clients, should not make a communication that an attorney would be prohibited from making by Rule 4-4.2 and Ethics Opinion 09-1.

Finally, and I think most important, an improper communication under Ethics Opinion 09-1, by its nature, happens without the knowledge or consent of agency counsel. While we as lawyers are charged with knowing the rules that govern our profession, non-lawyer agency management and personnel are not. For these reasons, I suggest that government counsel should advise the agency's key non-lawyer personnel, and other personnel most likely to be contacted by attorneys, of the essentials of Ethics Opinion 09-1 and the kinds of particular matters and situations that should normally be handled through counsel.

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The views and opinions expressed in this editorial are those of the author and do not necessarily reflect the views and opinions of Ruden McClosky P.A.

HB 7253 & HB 993
from page 1

article[5] on the changes wrought in 2010 by HB 1565[6] and noted three issues stemming from the requirement for legislative ratification. The process leading to the adoption of HB 7253 is instructive on those issues.

1. The Rule Must be Filed for Adoption.

The language used in §120.541(3), Florida Statutes, shows rules may be submitted for legislative ratification only after completing the rulemaking process and being filed for adoption. The APA distinguishes between a rule being "adopted" and becoming enforceable or "effective." A rule must be filed for adoption before going into effect and cannot be filed for adoption until completion of the rulemaking process.[7] Rules meeting one of the statutory "million dollar" thresholds[8] must be submitted to the President of the Senate and the Speaker of the House of Representatives no later than 30 days prior to the next general legislative session and may not go into effect until ratified by the Legislature.[9] As a rule becomes effective if ratified by the Legislature, a rule must be filed for adoption before being submitted for legislative ratification. In HB 7253, the rules submitted for ratification[10] were filed for adoption on April 11, 2011.[11]

2. Legislative Consideration.

The process to consider these ratification requests began with notification from the agency on February 4, 2011, 30 days before the start of session. Although the rules were not yet adopted, the Department of Community Affairs ("DCA") anticipated completing rulemaking during the session and advised it may submit the rules for ratification. As applied, the 30 day notice requirement is a courtesy giving the Legislature sufficient time to consider the submission. The Legislature is not prohibited from taking up and acting on any ratification submission after that time. In fact, the Legislature received twenty-two submissions by February 4th but only two involved rules which had been filed for adoption; none of those were ratified.

Once DCA submitted the adopted rules on April 12, 2011, the Speaker authorized preparation of a single proposed committee bill by the Rules & Calendar Committee. PCB RCC 11-09 was presented by Rep. Christopher Dorworth[12] to the Committee on April 21, 2011 and was approved by unanimous vote. Filed as HB 7253, the bill was placed on the House Special Order Calendar, read a second time on April 29, 2011, and passed by the House on May 2, 2011. The bill was then sent to the Senate and approved on May 6, 2011.

3. Rules Ratified under §120.541(3) Remain Subject to the Full APA.

The Legislature moved from unformed submissions to unanimous ratification in 24 days. Such prompt action was made possible by staff's prior preparation of standard bill language for ratification submissions, which model was used for the various rule ratification bills filed during the session.[13] The language used in the bill addresses the third and most important question posed in Larry Sellers' article: Whether rules ratified in accordance with §120.541(3), Florida Statutes, remain subject to the legal challenges provided under the APA. Specific language in the bill clearly limits its scope solely to whether the submitted rules go into effect under the APA and expressly states:

> This act does not alter rulemaking authority delegated by prior law, does not constitute legislative preemption of or exception to any provision of law governing adoption or enforcement of the rules cited, and is intended to preserve the status of any cited rule as a rule under chapter 120. This act does not cure any rulemaking defect or preempt any challenge based on a lack of authority or a violation of the legal requirements governing the adoption of any rule cited.

Previous examples of legislative "ratification" produced substantive law only where the Legislature altered or adopted the substance of rules proposed by an agency.[14] In HB 7253, the Legislature expressly rejects this effect, clearly intending that the rules so ratified do not become general law. The action is better described as satisfaction of a statutory condition subsequent rather than legislative enactment of the rules. As the Legislature did not enact the substance of these rules, they remain within the statutory definition and thus subject to the APA.[15]

HB 993: Amendments to the APA

HB 993 amends the APA to resolve technical issues arising from the passage of HB 1565 in 2010; creates certain exemptions to the requirements for preparing a statement of estimated regulatory costs ("SERC") and legislative ratification; clarifies the burden of persuasion in certain proceedings; and modifies the biennial review and reporting process under §120.74, Florida Statutes. The bill creates §120.745, establishing a comprehensive review and reporting process for agencies to analyze the economic impact of those rules in effect on November 16, 2010. Finally, new §120.7455 describes the Legislature's prospective public survey requesting information on burdensome rules or regulations and provides limited use immunity and protection from retaliation for those responding to the survey.

1. Technical Revisions to the Rulemaking Process

The bill makes technical revisions to the rulemaking process. An agency's notice of proposed rulemaking under §120.54(3)(a)1., Florida Statutes, will be required to include a statement, based on the statement of the estimated regulatory costs, as to whether the proposed rule is expected to require legislative ratification. Legislative ratification is expressly added to §120.54(3)(e)6 as one of the contingencies for a rule to become effective.

Larry Sellers noted HB 1565 actually created some conflicts by changing certain time periods, and HB 993 reversed those changes to resolve the timing issues. Instead of allowing 45 days, the bill reverts to 21 days the time required for submission of a revised SERC before the rule is filed for adoption. Consistent with this change, the bill reverts to 20 days the time for challenging a proposed rule after the agency provides a SERC or a revised SERC.

2. Revised Authority of Agencies to Modify or Withdraw Rules After Filing for Adoption

As adopted in HB 1565, the requirement for legislative ratification created potential conflicts within the existing rulemaking procedures of the APA. Because of the delay between filing a rule for adoption and the time it takes effect, current law allows an agency to modify or withdraw the rule from further consideration only if the Joint Administrative Procedures Committee ("JAPC") files an objection, or to modify the rule to extend the effective date for no more than 60 days if JAPC gives notice of considering an objection.[16] A rule in effect cannot be withdrawn but only repealed through the standard rulemaking process.[17] Requiring legislative ratification creates the possibility that some rules will be adopted but never ratified, therefore not in effect, thus leaving an agency with no authority to withdraw the rule.[18]

If a rule takes effect without being submitted for legislative ratification, but is later found by final adjudication or administrative order to be invalid because its actual economic effect showed that ratification was required at the time of adoption, a question arises as to whether the rule was lawfully in effect. Because the rule met the statutory criteria mandating submission for ratification at the time it was adopted, but was never ratified, arguably it never went into effect and the agency could not rely on it. In essence, the agency adopted a rule that cannot be modified because JAPC did not object and cannot be repealed because it was not in effect.

HB 993 retains the agency's ability to modify or withdraw adopted rules in response to JAPC objections but also expands this authority. Agencies will be authorized to withdraw or modify a rule in response to a final order, not subject to further appeal, entered in a rule challenge brought after adoption but before the rule takes effect. Agencies will be allowed to withdraw, but not modify, a rule requiring legislative ratification if more than 90 days have passed since the rule was filed for adoption without the Legislature ratifying the rule. The 90-day period provides enough time for legislative consideration without burdening an agency with an adopted but unratified rule pending for an indefinite period.

3. Exemptions

Not surprisingly, the Legislature has received and considered a number of proposals to exempt specific rulemaking from the newly-enacted ratification requirement. HB 1565 created §120.541(4), which exempted emergency rulemaking and rulemaking to adopt federal standards from the economic analysis required under newly-created §120.541(2)(a). The 2010 exemption did not expressly exclude these rulemaking procedures from legislative ratification. Concerning the SERC requirement, the 2010 changes created inconsistencies between existing practices and whether the requirement would apply at least as to rules adopting federal standards.[19]

The final form of HB 993 clarifies the intent of HB 1565 and creates specifically-tailored exemptions within the APA. Section 120.541(4), Florida Statutes, is amended to exempt emergency rulemaking under §120.54(4), and rulemaking under §120.54(6) to adopt federal standards, from the requirements for preparation of a SERC and legislative ratification. Section 120.80(16) is amended by adding paragraph (d) to exempt amendments and triennial updates of the Florida Building Code only from legislative ratification. Similarly, §120.80(17) is created to exempt amendments and triennial updates of the Florida Fire Protection Code only from legislative ratification. Section 120.80(18) is created to exempt the adjustment of certain tolls by DOT from the requirements for preparation of a SERC and legislative ratification. Finally, §120.81(1) is amended by adding paragraph (l) to exempt rulemaking required under Ch. 2011-01, Laws of Florida, the Student Success Act, from both preparation of a SERC and legislative ratification.[20] Exemptions from time to time may appear in substantive chapters; however, HB 993 signals that the House Rulemaking & Regulation Subcommittee desires to codify exemptions to Chapter 120 rulemaking requirements in the APA as much as possible.

4. Burden of Ultimate Persuasion in Licensing Proceedings under Chapters 373, 378 and 403, Florida Statutes

A Senate amendment to HB 993 added a provision creating §120.569(2)(p), applicable to third party challenges to permit applications under Chapters 373, 378, and 403, Florida Statutes. Under this amendment, the applicant must first present a *prima facie* case establishing its entitlement to issuance of the license, permit, or conceptual approval. The applicable agency then makes its direct presentation, after which the non-applicant petitioner is required to prove its challenge to the application through submission of competent and substantial evidence. The non-applicant petitioner expressly has the burden of ultimate persuasion on its challenge. The applicant and agency on rebuttal may demonstrate the application meets the statutory criteria. It should be noted that the bill expressly extends these standards to hearings under §§120.569 and 120.57 and to summary hearings under §120.574, Florida Statutes.

5. Economic Review of Existing Rules

Under the changes wrought by HB 1565, a SERC is now required if the proposed rule will have an adverse impact on small business[21] or will directly or indirectly increase regulatory costs by more than $200,000 in the aggregate within its first year of operation.[22] Future rules meeting the "million dollar threshold"[23] will be submitted for legislative ratification but this requirement does not apply to rules in effect on November 16, 2010. Patterned after the review and reporting process required after the 1996 substantive changes to rulemaking authority, Section 5 of HB 993 creates §120.745, a program for comprehensive review and economic analysis of existing rules to ensure compliance with the policies established by HB 1565.

This review program is framed by two existing review processes. First, is the statutory requirement for each agency biennially to review and report on its rules to the Legislature, making indicated amend-

continued, next page

HB 7253 & HB 993
from page 13

ments or repeals.[24] In practice, the reports filed under this requirement are summaries of rule reviews and do not provide information useful for fiscal oversight. Second, is the review program adopted upon the inauguration of Governor Rick Scott and operated through the Office of Fiscal Accountability and Regulatory Reform ("OFARR").[25] While these reviews of existing rules are more thorough than the biennial statutory reviews, they only apply to agencies under the Governor's authority.

Section 120.74, Florida Statutes, is amended by adding two new subsections. Subsection 120.74(3) will require each agency by July 1st of each year to submit to the President of the Senate, the Speaker, and JAPC a regulatory plan identifying rulemaking the agency expects to pursue in the next fiscal year, excluding emergency rules. Subsection 120.74(4) adjusts some of the reporting requirements and deadlines under the statute to coordinate with the reporting requirements under new §120.745.

Section 120.745 establishes the program for reviewing and reporting the economic impact of existing rules under the standards set by HB 1565. The review and reporting process begins in 2011 and ends in 2013. All agencies will be required to review and categorize their rules and provide a comprehensive report to the Speaker, President of the Senate, and JAPC by December 1, 2011. For rules in effect on or before November 16, 2010, which the agency wants to retain without amendment, and which have or are projected to have one of the $1 million fiscal impacts delineated in §120.541(2)(a), Florida Statutes, agencies are required to divide such rules into two reporting groups. One group is to be analyzed and reported by December 1, 2012 (Group 1), and the other by December 1, 2013 (Group 2). For each rule in these Groups, the agency shall prepare a "compliance economic review" (defined in the new statute) incorporating specific information.

The bill provides for periods of public comment on the rules listed in Group 1 and Group 2 and on the resulting economic reviews, including opportunities to suggest lower cost regulatory alternatives to the existing rule. Final reports of these economic reviews will be made to the Speaker, President of the Senate, and JAPC. Rules identified for repeal or amendment will not require the economic reviews created under the bill because either action requires compliance with the current economic analysis procedures in the APA.[26]

The APA definition of "agency" encompasses most state governmental entities, including constitutionally-created bodies such as the Fish and Wildlife Conservation Commission and regional bodies such as water management districts. Most local governments are exempt but some may be included by special law.[27] Section 120.745(1)(a) will exclude local governments with jurisdiction in only one county or less[28] from the comprehensive review process. This recognizes the disparity in resources available to local governments as opposed to entities which receive state funding and enact rules having a regional or statewide impact. It also recognizes the direct accountability of local governments to local voters, whereas all other agencies are accountable to the people through the oversight of the Legislature. Further, the mandatory review includes only those rules required to be published in the Florida Administrative Code.[29]

In addition to the review and identification of rules by December 1, 2011 based on economic effects, agencies must identify those rules defined as having an impact on state revenues. Agencies must also identify and support defined "data collection rules" which they intend to retain. A number of agency rules require non-governmental entities such as service providers or regulated enterprises to report certain data to the agency. Because of the economic burden on Florida businesses of such requirements, the bill requires each agency to report all rules mandating such data reporting. The December 1, 2011 report will include the statutes authorizing the data collection, how the data is used by the agency, and the policies supporting continuation of the program.

Agencies will provide public notice of completing reports, listing of rules in Group 1 or Group 2, completing compliance economic reviews, and resolving public objections. Proposed §120.745(7) provides exclusive publication requirements, relying primarily on electronic postings on the websites of the agencies. Required publication will be deemed complete as of the date the required notice, determination or report is published on the agency's website. Agencies must post the full text of required documents using links on their respective websites. Once a week each agency will provide the Department of State with copies of all notices published in the previous week on the agency's website for publication in the Florida Administrative Weekly.

To enforce the review and reporting requirements, §120.745(8) requires each agency head to file with JAPC written certifications of completing specific activities. Agencies which fail to timely file these written certifications will have all rulemaking authority suspended until they are in proper compliance.

The bill provides agencies with an alternative to the detailed review and economic analysis process. No later than October 1, 2011, any agency may choose to cooperate with the review process conducted through OFARR. The agency head must certify this choice to JAPC. The agency's data collection and revenue rules still must be identified by December 1, 2011, but

the final report of economic analyses for rules having a significant regulatory cost or economic impact, as identified by OFARR, will not be due until December 1, 2013. This alternative should eliminate any duplication of work already undertaken by OFARR.

The review proceeds through the 2014 regular session of the Legislature to provide sufficient time for the agencies to conduct this comprehensive review and for public participation, legislative consideration of the reports, and any action the Legislature chooses to take. The bill excludes agency proceedings to repeal rules identified under §120.745 from the requirement to prepare a statement of estimated regulatory costs under §§120.54 and 120.541, Florida Statutes.[30]

By its terms §120.745 is repealed as of July 1, 2014. The legal status of any rule previously determined to be invalid remains unchanged, preventing an agency from using the process of review and submission to the Legislature to override a legal decision invalidating a rule.

6. Legislative Survey and Limited Immunity.

Concurrent with the economic review and reporting under §120.745, the Legislature intends to conduct a survey requesting public information on rules, statutes, and other regulations which impose significant burdens on business and employment development in Florida. Types of information requested under new §120.745 may include: the name of the business as registered in Florida; the number and identification of the agencies regulating the respondent's lawful activities; the number of permits, licenses, or registrations required for the respondent to engage in a lawful activity; and laws, rules, ordinances, or regulations the respondent alleges to be unreasonably burdensome. To encourage participation and candor in any such survey, the bill provides limited use immunity from prosecution based on either the act of responding or the information provided. The bill also protects survey respondents from retaliatory acts of an agency based on providing or withholding information in the survey by allowing evidence of retaliatory conduct in mitigation of any proposed sanction and authorizing the presiding judge to award the minimum sanctions authorized by the Legislature. While the protections created in this section only apply to a survey conducted between July 1, 2011 and July 1, 2014, to preserve the protections afforded, this section does not expire on July 1, 2014.

Conclusion

The consideration and passage of HB 7253 provides significant guidance about the Legislature's approach to rule ratification under § 120.541(3), Florida Statutes. The technical amendments, policy revisions, and reporting requirements of HB 993 show the requirement for legislative ratification established in 2010 was not mere rhetoric but signals a change in the Legislature's oversight of delegated rulemaking authority.

Endnotes:

[1] As of May 25, 2011, both HB 7253 and HB 993 were not yet presented to the Governor.
[2] Ch. 120, Fla. Stat. (2010).
[3] HB 7253 was passed on 5/2/11 by unanimous vote in the House (116-0) and on 5/6/11 by the Senate (37-0).
[4] CS/CS/CS/HB 993, as amended by the Senate: A 163806 & A 163738, making technical changes, and A 116030, creating paragraph §120.569(2)(p), Florida Statutes.
[5] Lawrence E. Sellers, Jr., *The 2010 Amendments to the APA: Legislature Overrides Veto of Law to Require Legislative Ratification of Million Dollar Rules,* 85 Fla. B. J. 37 (May, 2011).
[6] On November 16, 2010, the Legislature adopted HB 1565 by overriding the Governor's veto. The bill thus became Ch. 2010-279, Laws of Florida.
[7] §§120.54(3)(b)6, 120.54(4)(d), 120.54(6)(b), Fla. Stat. (2010).
[8] §120.541(2)(a), Fla. Stat. (2010).
[9] §120.541(3), Fla. Stat. (2010).
[10] Rules 28-18.100, 28-18.400, 28-19.310, & 28-20.140, Fla. Admin. Code.
[11] Notice of Filing Rules 28-18.100 & 28-18.400 for Adoption at: http://japc.state.fl.us/results_detail.cfm?cn=R148789&ruleNo=28-18.100; Notice of Filing Rule 28-19.310 for Adoption at: http://japc.state.fl.us/results_detail.cfm?cn=R148793&ruleNo=28-19.310; and Notice of Filing Rule 28-20.140 for Adoption at: http://japc.state.fl.us/results_detail.cfm?cn=R148795&ruleNo=28-20.140 (all by Dept. of Community Affairs on behalf of the Administrative Commission, filed with Dept. of State on April 11, 2011).
[12] The House sponsor of HB 1565 in 2010 and Chair of the House Rulemaking and Regulation Subcommittee.
[13] In addition to HB 7253, two ratification bills were filed in the Senate: SB 7030 (submitted as a proposed bill and then filed as Committee Bill 1990) and SB 7232 (submitted as a proposed bill and then filed as Committee Bill 2168). Neither Senate bill was passed by the Legislature.
[14] *Occidental Chemical Agricultural Products, Inc. v. Dep't. of Environmental Protection,* 501 So. 2d 674 (Fla. 1st DCA 1987); *Dep't. of Banking and Finance v. Evans,* 540 So. 2d 884, 886-887 (Fla. 1st DCA 1989). *See also Town of Gulfport v. Mendels,* 174 So. 8, 127 Fla. 730 (1937) (where legislative ratification which expressly recognized and validated a prior municipal assessment was interpreted as curing any defects in the earlier adoption).
[15] §120.52(16), Fla. Stat. (2010).
[16] §120.54(3)(d)3., Fla. Stat. (2010).
[17] §120.54(3)(d)5., Fla. Stat. (2010).
[18] §120.54(3)(d)3., Fla. Stat. (2010).
[19] This issue was raised in a meeting on February 18, 2011, between Subcommittee staff and a number of representatives from agency general counsels' offices and other entities. This was followed with "The Adoption of Federal Standards as it Relates to Preparation of a Statement of Estimated Regulatory Costs and Legislative Ratification," a Memorandum from the Department of Health to staff of the Rulemaking & Regulation Subcommittee (March 3, 2011). Credit where credit is due: Lucy Schneider, Assistant General Counsel with DOH, should be commended for her thorough, cogent, and timely analysis leading to the proposed improvement in the bill.
[20] Special thanks to F. Scott Boyd, Executive Director and General Counsel of JAPC, for his well-considered suggestions on placement of the exemptions.
[21] §120.54(3)(b)1.a., Fla. Stat. (2010).
[22] §120.54(3)(b)1.b., Fla. Stat. (2010).
[23] §120.541(2)(a), Fla. Stat. (2010).
[24] §120.74, Fla. Stat. (2010).
[25] Executive Order 11-01, replaced by EO 11-72.
[26] §120.54(3)(d)5., Fla. Stat. (2010).
[27] §120.52(1), Fla. Stat. (2010).
[28] §120.52(1)(c), Fla. Stat. (2010). The statute excludes from the APA, officers and governmental entities with jurisdiction over one county or less unless the officer or entity is expressly made subject to the APA by general law, special law, or existing judicial decision. The full definition of "agency" also excludes a number of specific entities, principally municipalities.
[29] §120.55(1), Fla. Stat. (2010).
[30] Under §120.54(3)(d)5., Florida Statutes, agencies must use the same procedure to repeal rules as to adopt them, including the potential for mandatory preparation of a statement of estimated regulatory costs under §§120.54 and 120.541, Florida Statutes.

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The views expressed here are solely those of the author and are not intended to reflect the views of the Subcommittee or the Florida Legislature.

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