Administrative Law Section Newsletter

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Beginnings: One Agency's Initial Foray Into Mediation[1]

by Robert D. Vandiver, General Counsel, Florida Public Service Commission and Diana W. Caldwell, Associate General Counsel, Florida Public Service Commission

I. Mediation as an Alternative

The Public Service Commission (PSC), like many state agencies, is constantly pressured to meet its mandate with fewer resources. One reason is public pressure to reduce government. The Legislature has cut staff across the board 5% in 1995 and 5% in 1996 for all agencies. Another is that in years past, the Commission's focus was to heavily regulate numerous industries. More recently, the focus has been toward deregulation — at least in the areas of telephones and gas, possibly in the area of electric in the near future. In anticipation of this deregulation, staff has been reduced. However, the task of implementing the deregulation has been left up to this agency, resulting in a workload that is as heavy as it ever was.

Economics is another consideration, both for state agencies and the industries. Politicians are trying to reduce the cost of government to the taxpayers while still providing services that are in the public interest. The industries in transition toward competition are looking to streamline themselves in order to be competitive. Lawyers are seeking alternatives to protracted litigation; otherwise, many find themselves stirring too many pots at once. Resources are dwindling and everyone must prioritize and work smarter.

Another important consideration for state agencies is turnover. Utilities are hiring experienced staff of the agencies to reinforce their position, leaving agencies to hire inexpe-

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From the Chair ...

by M. Catherine Lannon

This is an exciting time to be an administrative law practitioner. Within the last month alone, the First DCA held an oral argument in the *Tomoka* case dealing with the interpretation of the new 120.536, F.S.; it expanded the use of declaratory statements; and it held that rules can be applied retroactively.

Exciting as it all is, it is a little intimidating to try to keep up with everything and to test one's views of what is going on with the views of others who practice in the area. I hope that the Administrative Law Section can increase its availability and presence as a focal point for the discussions by practitioners about the direction of the APA. This Section has long had excellent newsletters, excellent CLEs, and excellent contributions to the Bar *Journal*. It is my hope as Chair of the Section to build on that history of excellence and to find ways to increase the opportunities for "currency" and dialogue.

While I realize that the need to be able to give predictability to clients is present for all lawyers, as a government lawyer, I am particularly aware of it. The reason for that is I have to be in a posture of not just helping my client figure out which side of an issue to be on, but trying to get my client to do what the law requires in situations where what the law requires is not all that clear. We struggle with issues such as whether a particular petition for declaratory statement states an issue that is answerable by declaratory statement.

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rienced staff. As the experience level of both attorneys and other professionals decrease at the agency, the agency must allocate its workload among remaining and new staff to accommodate the learning curve of new employees and to make sure expertise of remaining staff is used for the most complex cases. In the area of utility regulation, the learning curve is a minimum of 2 to 3 years to have competent staff. The loss of institutional knowledge can be harmful to the agency, the industry, and the public. The readjustment requires cooperation among all parties, not just within the agency.

Finally, with regard to the telecommunications industry, the Telecommunications Act of 1996 provides for negotiation as the first step in entering into agreements for local competition. This congressional intent to negotiate dovetails well with agency mediation prior to the institution of formal hearings under Sections 120.569 and 120.57, Florida Statutes.

II. Statutory Authority for Agency Mediation

Mediation in agencies was first introduced in 1996 by HB 2429. It was incorporated totally in SB 1066, the rewrite of the Administrative Procedure Act, in 1996. The house bill summary stated:

> This legislation requires agencies to advise parties whose substantial interests will be determined by agency action whether mediation of the administrative dispute is available without affecting the party's right to a formal hearing.
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> The proposed legislation resulted from ideas considered by the [house] committee's APA Task Force during meetings held from June through December 1993, and was formulated to address citizen complaints that the administrative hearing process was litigiously complex and financially burdensome to those who challenged the actions of governmental agencies. By offering an alternative streamlined hearing process, the bill should result in cost savings to both the private sector and governmental agencies.
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> Effect of Proposed Changes:
> To encourage the alternative resolution of administrative disputes, the legislation directs agencies to inform parties whose substantial interests will be determined by agency action whether mediation of the administrative dispute is available without affecting the party's right to a formal hearing. If the affected party and agency agree to mediate the dispute, the time limitations for exercising the right to a formal administrative hearing are tolled pending the outcome of mediation. If the dispute is resolved through mediation, the agency will enter a final order incorporating the agreement of the parties. If the mediation does not result in settlement, the agency must notify the party in writing that the formal administrative hearing process is still available for resolution of the dispute and state with particularity the procedure for electing that remedy.

III. Executive Agencies' Implementation of Mediation

In 1996, the Governor's Administrative Procedure Act Review Commission agreed that mediation had a valuable role in the administrative processes. Mediation, in the view of Commission members, had the potential to be less costly and to lead to more satisfactory results than standard administrative litigation. The APA Commission recognized the importance of having a "buy in" to the mediation both by the agency and those persons whose substantial interests were being determined by an agency. The Governor's Commission recommended a broad and flexible approach to mediation, particularly since the need for and use of such procedures would vary greatly from agency to agency. The Commission believed that a mandatory "one size fits all" approach would be inadvisable. Ultimately, the Commission's recommendations became part of the 1996 APA rewrite, specifically, Section 120.573, Florida Statutes. More recently, the Uniform Rules of Procedure have been adopted. Uniform rules on mediation can be found at 28-106.401-.405, Florida Administrative Code. The October 1997 Bar *Journal* has a convenient pullout of those rules.

Currently, a number of agencies are using mediation, or other varieties of alternative dispute resolution, in their administrative processes. Agencies are using mediation both in resolving disputes under the APA, as well as in formulating rules in complex or controversial agency rulemaking. It is hoped that agencies will expand their use of mediation as they become more familiar with these alternative processes, and as they become more comfortable with the outcomes. Governor Chiles has long been a proponent of mediation in the administrative processes, and will continue to encourage agencies to use mediation to the mutual benefit of the agency and the citizenry with which the agency deals. The recent DEP net ban forum was an example of this process.

IV. The Advantages of Mediation

At the PSC, or any other agency for that matter, mediation offers advantages for parties:

Mediation represents an opportunity for parties to control

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their own destiny. In the new telecommunications world, government agencies seem particularly unsuited for promulgating rules of conduct for competition. Rather, competitors know what the market realities are, and are best equipped to negotiate those terms. These competitors may need assistance from a government agency with technical knowledge to bring them to agreement among themselves.

Litigation is extremely costly. The case law surrounding the APA has taken on a life of its own and many who practice before state agencies, particularly those dealing with technical matters such as those before the PSC, know the issues are complicated and interrelated. The total cost of bringing an action at the PSC today is staggering.

Results of litigation are uncertain. It is a rare case where one party gets everything he wants. Most agency decisions are mixed bags for the parties. The litigation process lends itself to a middle ground solution. Often, competing interests are coming from two extremes on any one issue. One can adopt either extreme or try to chart some sort of middle ground. Most administrative agencies and administrative law judges will head to the middle as opposed to totally accepting one side or the other. However, before the Commission, results may be more predictable. On the other hand, results may be too certain, but not fitting the situation or facts of the case. By sitting down and talking with an agency in mediation, a totally different solution can be reached that was not contemplated as a solution by the regulators.

Mediation represents a viable alternative to litigation if one accepts the premise that *no one* ever gets 100% of the pie. Mediation, by definition, represents something each side can live with although neither side is totally satisfied. Through mediation, parties can get a similar compromised solution in considerably less time.

Mediation also offers advantages for agencies.

Mediation requires fewer resources from the agency. As stated earlier, the reality of state government is that resources are shrinking. As resources diminish, the agency is forced to seek less costly processes. A mediated solution is invariably cheaper than a litigated solution. Even an informal hearing under Section 120.57(2), Florida Statutes, would most likely be more costly than a mediated outcome.

In addition, it stands to reason that less appeals will be generated from cases subject to mediation. Again, parties by definition command and control the process, can live with the result so less appeals would be filed than at the present. Agencies can have confidence that the *parties'* needs are satisfied by the mediated outcome. A word of caution, however: some agencies such as the PSC, must assure that the public interest has been protected.

V. Applying Mediation in a Regulatory Setting

Mediation, it was thought, was a viable alternative to what has been and is being done at the Commission. How to get it started was the question.

Government always thinks it knows exactly what the people want. Actual experience has been that if left to its own devices, government would find a way to mess up a two-horse parade. Although the mediation process could save everyone time and money, Commission staff did not want to simply open a rule docket or even start the process without getting some input from the parties that would actually use the process. To this end, a staff task force was appointed to explore the feasibility of alternative dispute resolution. The task force held two workshops, conducted research, and made recommendations to the Commission.

The Workshop Process:

Two full-day workshops were held August 14 and September 11, 1996. Issues were identified and discussed in various forums such as breakout sessions by industry, as well as general discussion sessions. Similarities and differences in the resolution process were identified. A key theme recurring in the workshop was that the process be voluntary. The Conflict Resolution Consortium, a group associated with Florida State University, assisted in this process.

Approximately 20 individuals representing all industries regulated by the Commission participated. The usual benefits were identified such as saving time, money, and resources, and obtaining quicker and potentially better results. Parties wanted to have control over the process to settle either small or large issues, mediate issues on the side in larger cases; essentially enhancing the creativity of the solution. Control, tailoring, and creativity were the buzz words.

More specific issues unique to the Commission were also identified. Statutory restrictions, where the Commission is required to complete rate cases within a specified time, were of concern to staff. Confidentiality may not necessarily be a problem but it poses a definite chilling effect on the parties as to the number of cases that would be considered for mediation.

The main concern identified by the participants was the role of staff. In particular, parties did not want staff to learn information in the mediation that could later be use against them. While there is the benefit of staff's expertise, the other side of the coin is staff's role in regulation. At the Commission, staff's role is rather unique. Staff is not a party to a proceeding. Its job is to make sure all information is before the Commission for them to make a decision. However, at the agenda conference, staff takes a position based upon all the evidence and makes a recommendation that the Commission can accept or reject based upon the record. Parties did not want information learned in a mediation to be carried back to the office for later use.

Another concern was Public Counsel. Office of Public Counsel is also unique. The Commission's role is to make sure all rates are fair, just, reasonable, and in the public interest. It is the Public Counsel's role to represent the ratepayers in a given proceeding. In the past and currently, the Public Counsel negotiates settlements directly between the parties.

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However, there may be situations where the Public Counsel, for his own reasons, may elect not to participate in a proceeding. Without participation of Public Counsel in a mediation for a proceeding where Public Counsel is involved, settlement would be meaningless.

The task force reviewed these issues and offered their solutions in a final report to the Commission that was presented to the Commission at Internal Affairs. Staff recommended, and the Commission agreed, that no rule was needed at this time. Another recommendation was that parties should be notified when a docket is opened that mediation is available. Upon request, parties are given information which leads them through a decision process to determine whether to mediate. Sample requests and agreements to mediate are now available from the Commission. The task force also recommended that the Uniform Rules on mediation be followed. In the meantime, internal procedures are being written to guide in the selection of staff mediators and to define staff's role in a mediation.

VI. Prescriptive v. Open Process

As stated earlier, the Commission chose not to go forward with rulemaking. Of course, in our new world — the APA, rulemaking is *not* a matter of agency discretion. *See* Section 120.545, Florida Statutes. The decision whether to promulgate rules involved consideration of how the agency would structure mediation. The issue considered was whether to adopt detailed rules for implementing mediation or allow for a more free form process to fit the needs of the parties. The Commission opted for the bare bones approach, providing certain elements, such as the agreements, and allowing the parties to create a process which would meet their needs. In adopting this approach, it was the Commission's belief that to be overly prescriptive from the outset might discourage participation. The Commission wanted a process that would give parties maximum flexibility to arrive at a negotiated settlement. The Commission believed that because it had no actual experience, the process, as it developed, could be modified to incorporate successful processes once several mediations were completed.

In its process, the Commission envisions parties using staff as mediators or choosing an independent private mediator. Currently, the Commission has five Circuit Civil Certified mediations on staff. In addition, technical staff and managers have had mediation training. Parties will present mediated agreements for Commission approval via the same public process that is presently used to present stipulations. The parties will be present to answer the Commissioner's questions on the written agreement. Independent Commission staff will review and file a recommendation on the mediated agreement. The Commission will consider the matter at a public agenda conference where the Commissioners discuss and vote on the issue in public. The Commission either accepts or rejects with specificity the agreement. An appealable order approving or rejecting the agreement which contains the rationale would follow.

VII. The PSC Mediation Process Is Constructed

The Commission will follow the Uniform Rules on Mediation and Section 120.573, Florida Statutes. To that end, notice language is now inserted in all PSC Procedural Orders. As previously discussed, the PSC chose the least prescriptive approach to mediation. The notice does not guarantee an absolute right to mediate a particular issue. The Commission will decide on a case-by case basis whether to allow the mediation.

The following language is now included in all Proposed Agency Action orders:

> Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The independence of the mediator is an absolute in the PSC process. If a staff member participates in the mediation process as a mediator or co-mediator, that staff member is then precluded from advising the Commission about that matter. At agenda, any questions regarding the agreement would be answered by the parties, not the mediator.

VIII. Mediation Experience

Since enactment of the PSC policy, there has been only one request for mediation. The result of the mediation was an impasse so the most important aspect of the experience was development of the agreement to mediate. A provision that the mediator not participate in the agency process was included. Because the mediator was the General Counsel who is required to sign off on every appellate brief, language was included to allow the mediator to participate at the appellate level. This would not occur with other staff mediators.

Another important provision was that the entire process was public and no confidential information was involved. The PSC is unique in state government in that the confidentiality sections of Florida Statutes relating to utilities grant the Commission discretion to determine which materials are confidential. See Section 364.183, Florida Statutes; *Florida Society of Newspaper Editors, Inc. v. Florida Public Service Com'n.*, 543 So. 2d 1262 (Fla. 1st DCA 1989). The general rule is that absent an explicit exemption, the document is a public record.

IX. One Year Later

It has been at least a year since mediation has been offered with only one request. Interest has been expressed, but no further requests have been received. The following reasons

may affect a successful mediation program:

It may be lawyers' attitudes:

• Can a "Chinese wall" be "built" around staff?

• Are more satisfactory results attained by going directly to Commission?

• Will staff be prejudiced by information it learns at the mediation that would later "taint" other investigations?

• Or would staff learn the attorney's style and strategy to later sabotage the attorney?

It may be client attitudes:

• An unrealistic expectation that the client is going to get 100% of what they want.

The understanding of all participants should be: "if everyone goes away a little disappointed — mediation was successful."

Or it may be the uncertainty of the unknown.

X. Issues Relating to Public Agency Mediation

Confidentiality versus "government in the sunshine" is the conflict with public policy to disclose "public information" — to have government in the sunshine.

Present Law:

Pat Gleason of the Attorney General's Office takes the position that all public mediations must be exactly that — open to the public, absent a specific statutory exemption. This view is consistent with all the case law under Chapters 119 and 286, Florida Statutes, to date, and is also rooted in the public interest determination that must be made. If the deal is secret, how does the *public* know that the agency has in fact carried out the public interest? This of course is an accountability issue which Florida's unique open meetings/records law is designed to address.

Ms. Gleason correctly points that Chapter 44, Florida Statutes, applies only to *court-ordered* mediations and, therefore, provides no exemption from the sunshine laws. Given that no exemption exists to keep administrative mediations confidential, normal rules apply and all aspects of mediation should be done in the sunshine. This means there are no private caucuses in agency mediation.

Ms. Gleason reports that she has conducted a number of mediations successfully in the public context. Copies of the Attorney General's report on these public mediation processes are available from the Attorney General's Office.

In terms of the issues relating to public agency mediation of disputes, there are really more questions than answers. This is because there are two important policies working against each other. This is the tension between the open meetings and records requirements and the confidentiality provisions of Supreme Court mediation Rule 10.080 which provides:

> (a) Required. A mediator shall preserve and maintain the confidentiality of all mediation proceedings, except where required by law to disclose information.
>
> * * *
>
> (c) Records. A mediator shall maintain confidentiality in the storage and disposal of records and shall render anonymous all identifying information when materials are used for research, training or statistical compilations.

Several observations are appropriate at this time. Chapter 44, Florida Statutes, applies to records only, not to meetings. The law provides that an exemption from the public records law *does not* imply a public meeting exemption. See Subsection 119.07(6), Florida Statutes (1995). Bear in mind also that the phrase "where required by law to disclose information" would apply to public mediators and be governed by Chapter 119 and Chapter 286, Florida Statutes.

There is another perspective:

Another perspective is offered for consideration. It is rarely in a government attorney's or the agency's interest to ever disagree with the Attorney General. The strongest legal arguments do fall on the side of public mediation. However, lawyers can disagree about *anything* and argue the other side.

The opposite view already alluded to is that the Legislature is presumed to know the meaning of the terms it uses. The Legislature wants agencies to spend less money in resolving disputes — that's why the mediation option is in Chapter 120, Florida Statutes. Further, if the mediation is not successful, there would be the standard hearing process under Chapter 120, Florida Statutes.

If cheaper dispute resolution is the goal, allow that process to work. A central tenet of private mediation *is* confidentiality. Florida Statutes and Court rules echo this position for *private* mediations; the same should apply in the government sector as well.

The way mediation is structured at the Commission, staff would mediate and offer technical assistance. No final approval would be made by staff. Final approval would be by the Commission who deliberate at a public meeting. This is consistent is with an Attorney General's opinion that stated staff may negotiate so long as they do not have final authority.

Finally, Chapter 119, Florida Statutes, requires all documents to be public record unless exempt by statute. Parties should keep in mind that a mediator does not need any documents to mediate. However, one should be aware of the White Sox case: The city of St. Pete, by hiring a private firm to negotiate a deal to bring the White Sox to their stadium, was found to be in violation of the public meetings/records laws. See *Times Publishing v. City of St. Pete*, 558 So. 2d 467 (Fla. 2nd DCA 1990).

As a final note, mediation is in the public interest.

XI. The Future of Agency Mediation

In conclusion, the Legislature needs to make some decisions. The system of public mediation has had some significant successes. For instance, the Attorney General's office has publicly mediated a number of public records disputes.

Having stated that, to be successful on a larger scale, agencies will need to capture the synergies of mediation. What is meant here? That for mediation to work on a larger scale, the mediation process needs to take place. Authority to order mediation should be given to the ALJ or agency heads as done in the Judicial branch.

In addition, caucuses should take place in private in this process. An

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agency head need not be aware of the course of negotiations to decide whether a written agreement is in the public interest. In terms of PSC process, this would mean a public meeting for the Commission to deliberate in public and consider the public interest. At that time, Commissioners can delve into the details of the agreement. Citizens may attend the agenda conference and speak on the agreement. If the Commission believes the agreement comports with the public interest, then the agreement should be approved.

Mediation provides a viable solution for agencies and those it regulates to resolve issues that otherwise require great cost and time. It should be encouraged, reviewed and all obstacles should be removed that cause undue burden on the process.

XII. Mediation as Pro Bono Service for Government Lawyers

The mediation training which agency attorneys have taken also provided an excellent opportunity for pro bono service by government attorneys. The increasing specialization of the law has often resulted in many government attorneys forsaking pro bono work for fear that their lack of expertise as to specific areas such as family law could result in a disservice to the client.

The Neighborhood Justice Center (Center) located on Railroad Avenue in Tallahassee sponsors a pro bono mediation office in which volunteer mediators mediate disputes. The pro bono mediation is a positive and rewarding experience.

The Center personnel is extremely helpful in getting the process established. Mediations take place at the Center offices during business hours and afterhours. This type of pro bono service is one type of service that government attorneys could competently handle. It should be noted that volunteer mediators enjoy the immunity protection of Section 44.107, Florida Statutes (1997), while conducting the volunteer mediations at the Center. Government lawyers looking for opportunities to serve and gain valuable experience in mediation should call Martha Weinstein at 921-6980.

Special Thanks to ***Janet Brunson,*** *Florida Public Service Commission,* ***Pat Gleason,*** *Florida Attorney General's Office,* ***Booter Imhoff,*** *Florida House of representatives,* ***Dan Stengle,*** *Office of the Governor, and* ***Martha Weinstein,*** *Neighborhood Justice Center.*

Endnote:

[1] A similar continuing legal education (CLE) presentation was given on October 10, 1997.

FROM THE CHAIR
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This whole area has been complicated by the quandary agencies are put in when they have developed or need to develop "policies," but it is not clear that they have rulemaking authority so that those policies can be announced in a rule. So can those policies be announced in a declaratory statement? Well, to paraphrase the rental car commercials, "Not necessarily."

One of the things that I am doing is setting up a series of breakfast "discussions" of topics relating to changes in APA practice since the 1996 amendments. Each of these programs will be led by someone with particular experience with the topic, but the key part of the discussion will be a dialogue by those of us out in the field who are having to deal on a day-to-day basis with the changes and to advise our clients in a way that anticipates the direction the changes will be going in the future.

A series of three CLEs will be offered in Tallahassee (CLE credit has not been approved, but will be applied for). All of these will be held at 7:30 a.m. at the Florida Bar annex with the lure of free coffee and doughnuts. The first of these will be on **July 21** and the topic will be "declaratory statements." The leader for that discussion will be Allen Grossman, Assistant Attorney General, who has had to deal with some of the issues because of declaratory statement requests of the Board of Medicine, one of the agencies he represents. The second will be on **August 18** and the topic will be "variances and waivers." It will be led by Donna Blanton, an attorney with Steel Hector & Davis who has regularly monitored this topic for the Section. The third scheduled program will be on **September 15** on "exceptions to uniform rules." Bill Williams, an attorney for Huey Guilday & Tucker, will lead this program. Bill has been active in reviewing exception requests that have been filed with the Governor and Cabinet and will be able to get us updated on that topic. (All three are able leaders.)

I am hopeful that some of you who are not in Tallahassee will band together to help set up similar programs. They could serve the same purpose of providing special opportunities for other Section members (and friends who we hope will want to become members because we are so useful) to hear an update on the current state of the law in program areas of importance to your area. This would provide an opportunity for a dialogue among knowledgeable people in your area in order to help you think through applications of the changes in the law to the current problems you face in representing various clients.

This Section has a lot to offer, but its ability to make that offer is only as good as your willingness to help. We need people who will help set up discussion groups, who will contribute articles to the newsletter, who will volunteer to serve on committees, or who will agree to make CLE presentations. I really do urge all of you who are willing to become involved to get in touch with me or one of the other members of the Executive Council and let us know of your interest.

Case Notes, Cases Noted and Notable Cases

by Seann M. Frazier

Supreme Court of Florida

The Supremes chimed in to the sweet song of administrative law in *BellSouth Telecommunications, Inc. v. Johnson*, 23 Fla. L. Weekly S206 (Fla. 1998). A Florida statute capped "rates" for basic local telecommunication services. However, prior to the effective date of that law, BellSouth attempted to reclassify the "rate groupings" for certain areas in order to establish higher rates based on increased population concentrations. After the Public Service Commission entered an order denying the rate regrouping, BellSouth rang up the Florida Constitution for direct jurisdiction before the Supremes. Art. V, Sec. 3(b)(2), Fla. Const., Sec. 364.381, Fla. Stat. (1995).

Noting that the PSC's Order came clothed with a presumption of validity and that the PSC was entitled to great deference in its interpretation, the Court refused to overrule the Order unless it was clearly erroneous. *Florida Interexchange Carriers Ass'n v. Clark*, 678 So.2d 1267, 1270 (Fla. 1996); *Florida Cable Television Ass'n v. Deason*, 635 So.2d 14, 15 (Fla. 1994). In order to find a connection with the Supremes, BellSouth must have shown that the PSC departed from the essential requirements of law. Because the Supremes found the PSC's interpretation was not clearly erroneous and there was no such departure, it ruled that BellSouth was dialing the wrong number. They politely hung up.

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The Supremes also gave deference to the Public Service Commission in *Harris Corporation v. Julia L. Johnson*, 23 Fla. L. Weekly S290 (Fla. 1998). BellSouth installed hardwiring in facilities owned by Harris Corporation and began charging them a monthly fee for the wiring throughout the 1970s. Under BellSouth's interpretation of required accounting, BellSouth should continue to charge Harris for this wiring through the present time. Harris argued that the wiring should have been fully amortized by the end of 1988 based upon deregulation by the FCC. It brought an administrative proceeding before the PSC seeking a refund for overpayments made since that time.

In what the dissent would call Solomon-like justice, the PSC agreed with Harris that BellSouth was improperly accounting for its wiring and that Harris should no longer pay BellSouth for the wiring. However, the PSC refused to order a refund based upon the difficulty of determining when the facilities at issue were fully expensed, and therefore what the amount of the refund should be. A majority of the Supremes gave great deference to the Commission's orders which were presumptively valid and, in this case, not clearly erroneous. *AmeriSteel Corp. v. Clark*, 691 So.2d 473, 477 (Fla. 1997). Justices Grimes, Harding and Wells dissented from this "split-the-baby" sort of justice.

District Courts of Appeal

First District

A stipulation may behave like shifting sands if one relies upon it to establish standing. In *Grand Dunes, Ltd. v. Walton Co.*, 23 Fla.L.Weekly D1228 (Fla. 1st DCA 1998), the Edgewater Beach Owners Association sought review of a Walton County Commission Order which amended a development of regional impact. An ALJ recommended that FLWAC approve the development order and dismiss the Beach Owner's appeal. However, FLWAC upheld the Beach Owner's challenge and the developers therefore appealed to the First DCA.

The First DCA found that a Stipulation as to jurisdiction over subject matter is of no effect if jurisdiction does not truly exist. *Polk Co. v. Sofka*, 702 So.2d 1243, 1245 (Fla. 1997). It also noted that in the administrative context, standing has been equated with jurisdiction. *Askew v. Hold the Bulkhead — Save Our Bays, Inc.*, 269 So.2d 696, 698 (Fla. 2nd DCA 1972), overruled on other grounds, *Save Sand Key, Inc. v. United States Steel Corp.*, 281 So.2d 572, 577 (Fla. 2nd DCA 1973). Because the record contained no factual allegations which demonstrated that the Beach Owners were "owners, developers, or the State Land Planning Agency", the only parties recognized by Florida Statutes to have standing in such a proceeding (Section 380.07(2), Fla. Stat. (1995)), the First DCA could not conclude that standing/jurisdiction ever existed. Instead, the parties simply stipulated as to the Beach Owners' standing. That, it seems, was not enough. And, like sands through the hourglass, so are the cases where standing is established by stipulation only.

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The First DCA elected to clarify the purpose of administrative declaratory statements in *Chiles v. The Department of State, Division of Elections*, 23 Fla.L.Weekly D1225 (Fla. 1st DCA 1998). The Florida Election Campaign Financing Act provided matching funds for certain candidates. However, in 1992, a constitutional amendment abolished a trust fund which had previously been set aside for this purpose. Art. III, Sect. 19(f)(2), Fla. Const. A particular candidate filed a declaratory statement with the Division of Elections to determine whether an amendment to a Florida statute precluded certification of candidates for public campaign financing. Section 215.3206(2), Fla. Stat. (1997).

When the declaratory statement was challenged on appeal, the First DCA was offered an opportunity to

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explain when a declaratory statement permissibly "applies to the Petitioner in his or her particular set of circumstances", as opposed to being generally applicable. Section 120.565, Fla. Stat. "Generally applicable" statements of agency policy, of course, are better suited for rules. Sect. 120.52(15), Fla. Stat. The Court noted that the APA declaratory statement statutes once required that the opinion "*only*" apply to a particular petitioner. After the 1996 overhaul of the APA, the word "only" was lost in the shuffle. The Court reasoned that there was no longer a requirement that the issue would *only* apply to a single petitioner. However, the Court cautioned that a declaratory statement may not be used in place of a rule to require compliance with a general agency policy, upholding *Regal Kitchens, Inc. v. Florida Department of Revenue*, 641 So.2d 158 (Fla. 1st DCA 1994); and *Tampa Electric Company v. Florida Department of Community Affairs*, 654 So.2d 998 (Fla. 1st DCA 1995). If the issue presented by a petition for declaratory statement leads the agency to a generally applicable policy, the agency should dismiss the petition and initiate rulemaking. See *Agency for Health Care Administration v. Wingo*, 697 So.2d 1231 (Fla. 1st DCA 1997).

Nevertheless, a declaratory statement can be applicable to more than one person and may in fact "offer useful guidance to others who are likely to interact with the Agency in similar circumstances." Thus, declaratory statements now may provide guidance which instruct regulated parties as to the agency's rationale, or require an agency to explain why different applications are required. Holding that a statute related to the dissolution of a trust fund had nothing to do with the subject of elections or campaign financing, the Court impeached the Division of Elections' expertise in this instance and held that the Division's interpretation was clearly erroneous.

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In a decision rendered only a few days earlier, the First DCA held that a declaratory statement from the Department of Insurance was cracked in *Liberty Care Plan v. Department of Insurance,* 23 Fla. L. Weekly D1134 (Fla. 1st DCA 1998). The question presented by the declaratory statement was whether the sale of a particular home health care plan constituted the unauthorized sale of "insurance" and "health insurance" as defined by Florida Statutes. The home health plan would be free to offer its low cost health care services so long as it was not found to be indemnifying its members against loss, or offering insurance.

The Court found that the plan constituted "insurance" but that the Insurance Code deferred the regulation of "insurance" to more particular provisions of the Code which relate to the particular kind of insurance being offered. Because "health insurance" was defined and because the plan did not meet that definition, the court found that no law was being violated. Until the legislature more closely defined "insurance" which could be regulated, the plan would not have its bell rung by the DOI. The declaratory statement was reversed.

Noting that the "Level II" contract at issue sounded when the contingency of bodily disablement or injury was struck, Judge Benton suggested in a dissent that the declaratory statement should be upheld at least as to that section of the plan.

*** * ***

When petitions to initiate rulemaking are taken on appeal, they often may result in appellate declarations that they are moot, though this may be viewed as a victory. In *Kalway v. Singletary*, 23 Fla. L. Weekly D1116 (Fla. 1st DCA 1998), an inmate challenged a rule related to gain time which allegedly violated the ex post facto clause. Because the Department of Corrections had already initiated the requested rulemaking, the appeal was declared moot.

*** * ***

In *State Contracting and Engineering Corp. v. Department of Transportation*, 23 Fla. L. Weekly D942 (Fla. 1st DCA 1998), a disappointed bidder challenged the apparent low bidder by claiming the bid was nonresponsive. The challenger alleged that the successful bid's commitment to disadvantaged business enterprises was illusory. State Contracting alleged that the successful bidder's DBE forms failed to meet Agency requirements because the subcontracted disadvantaged business would itself sub-contract for the work it was assigned.

After travelling down the road of formal proceedings, an ALJ agreed with the disappointed bidder and suggested that the successful bid be rejected as nonresponsive. The road then took a sharp turn as the Final Order issued by DOT interpreted its rule in a manner which would accept the successful bidder's submission.

On appeal, the First DCA noted that deference must be given to an Agency's interpretation of statutes *and* its interpretation of longstanding rules. *Pan-American World Airways, Inc. v. Florida Public Service Commission,* 427 So.2d 716, 719 (Fla. 1983). *Humana, Inc. v. Department of Health and Rehabilitative Services*, 492 So.2d 388, 392 (Fla. 4th DCA 1986). After applying that due deference, the Court did not find DOT's interpretation clearly erroneous and the bid decision stood.

* * *

In a case described as one of first impression, the First DCA refused to consider the merits of an appeal regarding the suspension of a physician's license because the physician had unfortunately passed away during the pendency of the appeal. *Lund v. Department of Health*, 23 Fla. L. Weekly D887 (Fla. 1st DCA 1998). Though the good doctor's death would have made relief from suspension an ineffective remedy (*Montgomery v. Department of Health and Rehab Services*, 468 So.2d 1014 (Fla. 1st DCA 1985)), the representative of the deceased argued that an award of appellate attorney's fees under Section 120.595(5), Fla. Stat., merited further consideration of the appeal.

The Court refused to recognize this attorney's fees award as a "collateral legal consequence" affecting the rights of a party — one of the gen-

eral exceptions to a declaration of mootness. *Godwin v. State*, 593 So.2d 211, 212 (Fla. 1992). Because the doctor's estate suffered no collateral consequence, the Court would not consider the merits of the appeal. Apparently, the Court equated collateral consequence with new debt as opposed to an opportunity for reimbursement/windfall. A dispute over attorney's fees will not save a case from mootness when, due to a change in circumstances, an actual controversy no longer exists. *See Boca Raton Artificial Kidney Center, Inc. v. Department of Health and Rehab Service*, 514 So.2d 1114 (Fla. 1st DCA 1987).

* * *

After the Agency for Health Care Administration dismissed a petition for formal administrative hearing out of hand, the First DCA reversed that decision in *Halifax Medical Center v. Agency for Health Care Administration*, 706 So.2d 955 (Fla. 1st DCA 1998). Though the issue of reclassification of Halifax's license could properly be dismissed based on precedent addressing the same issue (*Agency for Health Care Admin. v. University Hospital*, 670 So.2d 1037 (Fla. 1st DCA 1996) and *Agency for Health Care Admin. v. Sebastion Hospital*, 670 So.2d 1040 (Fla. 1st DCA 1996)), the issue of Halifax's eligibility for Medicaid reimbursement raised disputable issues of fact and warranted a formal hearing.

****

In a case allegedly giving foundation to a "cottage industry" for APA lawyers, the First DCA found that an award of attorney's fees was "mandatory" as to that portion of a proceeding which proved that an Agency statement constituted an unpromulgated rule in violation of Section 120.54(1)(a), Fla. Stat. (1997). *Security Mutual Life Insurance Company of Lincoln, NE v. Department of Insurance and State Treasurer*, 707 So.2d 929 (Fla. 1st DCA 1998). Though another portion of the appeal was unsuccessful, the Court read Section 120.595, (Fla. Stat. 1997) to *mandatorily* award attorney's fees in every successful case demonstrating an unpromulgated rule is being implemented by an Agency unless the Agency demonstrates that the statement is required by the federal government in association with receipt of federal funds. Despite the Department of Insurance's protests that this automatic award of attorney's fees would create a cottage industry for APA lawyers, the Court ruled that APA revisions were clear and that any complaints should be taken up with the Legislature. Ladies and gentlemen, start your engines.

Second District

In a case strikingly similar to the *Liberty Bell* decision, *supra*, the Second DCA was faced with an administrative declaratory statement action which sought to declare whether a home health services contract constituted "insurance" or "health insurance" in *Sun Coast Home Care, Inc. v. State of Florida, Dep't of Insurance*, 23 Fla.L.Weekly D989 (Fla. 2nd DCA 1998). If it was, then the Insurance Code would be violated. DOI quickly declared that the contracts at issue constituted insurance. This time, the appellate court refused to address the issue because an abbreviated record did not contain enough facts to make a decision. Based on that limited record, DOI should have refused to

continued...

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rule on the petition (*Florida Optometric Ass'n v. Dep't of Prof. Reg., Bd. of Opticianry*, 567 So. 2d 928) rather than issue an adverse ruling. The Second DCA reversed and remanded to hear this issue on another day.

* * *

In *Beverly Enterprises — Florida, Inc. v. Agency for Health Care Administration*, 23 Fla. L. Weekly D984 (Fla 2nd DCA 1998), the court heard an appeal regarding whether a nursing home properly staffed its facility and what type of fine should be imposed if such a violation occurred. The facts appeared to be undisputed. The facility experienced shortfalls in its level of certified nursing assistants (CNAs), but always more than made up for such shortfalls with more highly trained and more highly paid nurses. Despite the finding of a technical violation after an administrative hearing and a prosecutorial effort by the Agency's staff which sought only a $700 fine, the Agency Director determined that eight violations occurred and that each merited a $500 fine, for a total of $4,000. His conclusion regarding the fine was based on a violation of law (Sect. 400.23(9)(c), Fla. Stat.) never mentioned in the proceedings below. The appellate court disagreed with his order.

Though an agency director retains great discretion to set penalties rather than accept the suggestions of an ALJ, *Criminal Justice Standards and Training Comm'n v. Bradley*, 596 So.2d 661, *Chase v. Pinellas County School Bd.*, 597 So. 2d 419 (Fla. 2nd DCA 1992), he or she is not free to amend an agency's complaint by adding violations and seeking a larger fine after a hearing has occurred. The court affirmed the technical violation but imposed the $700, rather than $4,000, fine.

Third District

The subject of proper penalties for licensure violations was addressed again in *Arias v. Dep't of Business and Professional Regulation*, 23 Fla.L.Weekly D1026 (Fla. 3rd DCA 1998). Ms. Arias was a realtor who, after locating a suitable renter, answered a question posed by a landlord regarding the potential renter's race. She informed the renters of the landlord's decision and his reasoning: an unlawful bias based on race. The realtor offered to help find other housing and suggested the renters hire a lawyer. A HUD ALJ imposed significant civil penalties on the landlord and found the realtor in violation of housing laws. The realtor should have refused to answer the landlord's unlawful question regarding race at the outset. The punishment for the realtor would be attendance at fair housing training and a $100 fine. Then, BPR filed a complaint against the realtor.

Following an informal hearing, BPR imposed a two year suspension, an additional one year probation, and a $1,000 fine. However, the statute authorizing penalties for the realtor's alleged violations required BPR to publish penalty guidelines. On appeal, the court found that a lack of guidelines for penalties left the licensee in a "predicament ripe for arbitrary and erratic enforcement." This represented somewhat of a retreat from the Supremes' edict in *Florida Real Estate Comm'n v. Webb*, 367 So. 2d 201 (Fla.1978), which had prohibited an appellate court from altering an imposed penalty unless findings of fact were in part reversed, a situation not present here. The 3rd DCA explained the departure by a statute more recent than the case which required rulemaking for penalty guidelines. Sec. 455.2273, Fla. Stat.

Though statutes may grant broad discretion to an agency allowing it to impose a wide array of penalties, such statutes must be tailored by rules which provide regulated professionals with guidelines for punishment. Compare *Morey's Lounge, Inc. v. Dep't of Bus. And Prof. Reg.*, 673 So. 2d 538, 540 (Fla. 4th DCA 1996). Deciding that remand would not be viable because application of a new penalty scheme would violate *ex post facto* laws (*Linkous v. Dep't of Prof. Reg.*, 417 So. 2d 802 (Fla. 5th DCA 1982)), the court reversed.

Fourth District

The 4th DCA stopped the music on an alcoholic beverage license dispute in *Silver Show, Inc. v. Department of Business and Professional Regulation*, 23 Fla. L. Weekly D488 (Fla. 4th DCA 1998). The proceeding sought a stay as of right against the denial of a liquor license application so that a licensee could continue operating under a temporary license pending appeal. As authority, the business cited Section 120.68(3), Fla. Stat. which grants "supersedeas . . . as a matter of right" if the decision on appeal "has the effect of suspending or revoking a license."

The court declared that the show could not go on. Citing a difference between *applications* for licenses from license *disciplinary proceedings*, the court found no existing interest in an ongoing license was held by an *applicant* for a new license. *Reid v. Florid Real Estate Comm'n*, 188 So. 2d 846 (Fla. 2nd DCA 1996); *Delk v. Dep't of Prof. Reg.*, 595 So. 2d 966, 967 (Fla. 5th DCA 1992). Thus, no stay as of right existed.

Fifth District

In a rare case considering newly discovered evidence after the close of administrative hearings, the 5th DCA remanded a decision of the Florida Real Estate Commission in *Mazurek v. Department of Business and Professional Regulation*, 23 Fla.L.Weekly D1202 (Fla. 5th DCA 1998). During the penalty phase of the proceedings, the Commission expressed some disbelief of the licensee's mitigation evidence. After the hearing, the licensee was able to secure an affidavit which supported her argument. The appellate court found that "justice required" the court to remand for a new penalty hearing so that all the evidence could be presented and considered, citing *Cluett v. Dep't of Prof. Reg.*, 530 So. 2d 351, 355 (Fla. 1st DCA 1988).

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DOR: The Rules Are Different Here?

by Vicki Weber

When the 1996 Legislature mandated a review of all agency rules for the purpose of determining whether the agencies possessed statutory authority for their stated positions, it soon became apparent to tax practitioners that this review would be a risky proposition for Florida taxpayers who rely upon the rules of the Florida Department of Revenue ("DOR"). As the Wall Street Journal reported in December of last year: "A 1996 law that was supposed to grant regulatory relief to businesses is instead threatening many with the loss of cherished tax breaks, and could also wipe out tax exemptions carved out over the years for all sorts of nonbusiness groups."[1]

Ultimately, the 1998 Legislature reenacted most of DOR's listed rules in six Rule Authorization Bills (SB 1686, SB 1688, SB 1690, SB 1692, SB 1694 and SB 1696). And, as explained below, the Legislature's process for assigning a fiscal impact to tax legislation, coupled with the number of tax issues presented to legislators all at once, effectively eliminated anything more than a legislative rubber-stamp of the existing DOR rules.

The DOR clearly took its rule review task seriously, creating a comprehensive review process involving numerous agency employees working over several months and ultimately producing a list of almost 100 rule provisions for which the agency claimed it lacked statutory authority.[2] As anticipated, many of these listed rules provided interpretations or details that were missing from the statutes, but that were viewed as helpful to taxpayers. For example, elaborate provisions in Rule 12A-1.051 explained how contractors should determine whether they are selling tangible personal property (and are responsible for collecting sales tax from their customers) or improving real property (and are responsible for paying sales tax on materials they buy), and how certain specialty contractors could use formulas for computing tax due in lieu of retaining detailed records. Not surprisingly—but to the dismay of many—much of this rule was listed for repeal.

When the DOR first presented its list of rules to the Senate Ways & Means Committee's Subcommittee on Finance & Taxation, Senator Charles Williams, a key sponsor of the 1996 APA revision, acknowledged that the rule review process was "a two-edged sword, as we have seen most directly with the DOR rules where some exemptions have been granted by rule and may lack statutory authority." Committee Chairman John Ostalkiewicz warned that "all of Florida should pay close attention to what DOR is doing here." He noted that some 78 exemptions were at risk and he criticized DOR for taking an overzealous approach to listing rules. DOR's Executive Director Larry Fuchs countered that the DOR was simply complying with the Legislature's directive and that the agency had no desire to repeal the listed tax exemptions but was instead seeking statutory authority for them.

The magnitude of the exemptions at issue is reflected in the staff analysis prepared by the House Finance & Tax Committee for PCB FT 98-05 (the House's proposed Rule Authorization Bill for DOR). A chart included in the analysis explains that if no action was taken by the Legislature on the rules listed by DOR, the state would have received $491.1 million in additional revenues in fiscal year 1998-99. This estimate was based on work of the Revenue Estimating Conference, the body tasked with assigning official revenue estimates to legislation.[3] The Estimating Conference meets regularly throughout the legislative session to evaluate proposed legislation. The Estimating Conference's baseline for determining whether a measure will increase or decrease taxes is the *DOR's current interpretation and application* of current law. This approach has been criticized by taxpayers (and some legislators) who complain that it makes it very difficult to legislatively correct DOR's interpretation of the tax laws without generating budget problems. And, this approach likewise affected the Legislature's review of DOR's listed rules.

As evidenced by Senator Ostalkiewicz' criticism of DOR, the Legislature was in no mood to "raise taxes" by allowing exemptions provided by agency rule to sunset on January 1, 1999. By the same token, legislators were not particularly interested in hearing a challenge to the agency's statutory authority to impose tax under an existing rule because altering the rule position would "have a negative fiscal impact." As a result, the 1998 Legislature essentially blessed the status quo by inserting the language of the DOR's listed rules straight into the Florida Statutes.

Endnotes

[1] "Regulatory Relief Comes With Strings," *The Wall Street Journal*, December 10, 1997, F1.

[2] Letter from Executive Director L. H. Fuchs to Mr. Carroll Webb, Executive Director of the Joint Administrative Procedures Committee, October 1, 1997.

[3] Sections 216.133-216.137, Florida Statutes (1997) describe the composition and responsibilities of the estimating conference.

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DOAH has grown!

...but not THAT much! An editing glitch resulted in backgrounds for ALL of the DOAH Administrative Law Judges appearing in the last newsletter issue, and not just one-third as the lead-in suggested. We apologize for the error.

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