Administrative Law Section Newsletter

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From the Chair

by Mary F. Smallwood

As I assume the position of Chair of the Administrative Law Section for the year 2000-2001, I do so with a bit of awe for the accomplishments of my predecessors in this position and the many people who have worked so hard for many years to make this Section successful. My particular thanks go out to Dan Stengle who has now achieved the laudable position of Immediate Past Chair. All of us owe Dan a heartfelt thank you for his great work this past year.

Having served on the Executive Council for a number of years, I have had the opportunity to watch the dedicated service of many, many people to the Section's programs. My fellow members of the Executive Council are as hard-working as any group I have been associated with. Certainly, they don't do it for the glory. Instead, there is a uniform feeling that service to the Section provides a way for us to contribute to the membership of the Bar as a whole and the Section's membership in particular.

In the coming year, I hope to encourage the "old-timers" to continue that service and to recruit more of you to become active in Section affairs. The opportunities are many, and the rewards will be great.

With Dan's leadership, I am lucky to step into the enviable situation of taking over a well-run organization. I hope to leave the position with the Section in as good a shape. There are, however, a number of areas in which the Section will need to provide leadership in the next year. My priorities are as follows.

Legislative Action on the APA

It should come as no surprise to anyone who has practiced in the administrative law area for any period of time to hear that the Legislature will likely be faced with a number of bills proposing to amend the APA during the 2001 session. While there was no significant modification of the Act last session, there were certainly many attempts. In the end, the Governor made it known that he did not favor modification during the 2000 session, and his desires prevailed.

However, another session is just around the corner. The Section has had in place for a number of years legislative positions which were adopted by the Executive Council and approved by the Board of Governors. Those positions are generic in form to allow needed flexibility in legislative issues as they arise. Typi-

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Son of Tomoka, Son-of-a-Gun!

by Robert G. Gough

Just as agencies thought it was safe to go back into rulemaking, a final order invalidating a rule in *Save the Manatee Club v. Southwest Florida Water Management District* (DOAH Case No. 99-3885RX, Dec. 9, 1999) (appeal pending) has muddied the waters once again regarding agency rulemaking authority and has provided a sequel to the pivotal case of *Consolidated-Tomoka Land Co. v. St. Johns River Water Management District*, 717 So.2d 72 (Fla. 1st DCA 1998), *review denied*, 727 So.2d 904 (Fla. 1999). The final outcome of *Save the Manatee*, together with *Tomoka*, will probably form the foundation of the law interpreting the rulemaking authority of agencies under section 120.52(8) of the Florida Statutes, as amended in 1996 and 1999.

As part of the 1996 legislative revisions to the Administrative Procedure Act, section 120.52(8) was amended to include the following language:

> A grant of legislative authority is necessary but not sufficient to al-

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cally, the Executive Council reviews and modifies its legislative positions annually. This year, a comprehensive review is planned as part of the Section's Retreat. Any input from members of the Section is welcome. It has always been our goal to adopt legislative positions that will have the broadest possible support of our members. Because the membership on the Executive Council cuts across the grain of administrative law practitioners, including agency attorneys, private practitioners, and public interest lawyers, we believe our legislative positions reflect the broad common goals of the Section as a whole. However, we strongly encourage anyone with an interest in these issues to participate in the ongoing attempts to refine these positions.

The Section's Legislation Committee is comprised of Bill Williams, Linda Rigot, and Curt Kiser. These people spend countless hours prior to and during the session analyzing each bill that has the potential to affect the state administrative process and, where necessary, appearing before the Legislature to inform its members about the Section's positions. Please take the opportunity to talk with me personally or any of the committee members if you wish to have input in this area.

In addition to the usual legislative work, the Executive Council will attempt to provide educational information to interested Legislators and staff members prior to this year's session so that proposed legislative initiatives can be considered with as much historical background as possible.

Section Educational Initiatives

The Executive Council prides itself on providing excellent educational opportunities to its members through its CLE programs, the Florida Administrative Practice Manual, the Section newsletter, and regular articles in The Florida Bar *Journal*. That will continue to be a priority for the coming year.

The Section has requested from the Bar *Journal* a "theme issue" to be published in January 2001. That Journal issue will include articles from a number of practitioners in the field of administrative law in anticipation of the upcoming legislative session. The articles will address a variety of topics in the field that have, over the years, been controversial or generated great interest. Hopefully, this Journal issue will provide us all with a historical perspective of how we got where we are today.

The Florida Administrative Practice Manual is also in the process of being updated and should be available this coming year. The Manual is a comprehensive treatise on Florida administrative law issues and a tremendous resource.

The Section is also undertaking a new initiative in the education arena this year. We hope to put together a basic level videotape presentation on administrative law that can be used as a training video for new state employees who may not have had extensive background in the APA.

As we work together during the upcoming year on these goals, I invite all of you to take a more active role with the Section. There are as many opportunities to contribute as there are talented members of the Section. Those of you who enjoy speaking should consider volunteering to participate in one of the Section CLE programs. Ralph DeMeo is the chair of the CLE Seminar Committee and would love to hear from you. If you enjoy writing, please let Elizabeth McArthur know if you would like to submit an article for the newsletter or contact Bobby Downie if you would prefer contributing a more extensive article for the Bar *Journal*. Last but not least, please feel free to contact me at any time if you have questions or want to be involved in Section activities. You can always reach me at *MFS@Ruden.com*.

Administrative Law Essay Competition Winners

1st Place — Leslie Bryson

"After the 1999 Amendments to Florida's Administrative Procedure Act, One Aspect of Consolidated-Tomoka May Still Survive, but Save the Manatee Suggests that the Amendment's Toll on Consolidated-Tomoka is Not Taken Lightly."

2nd Place — Katherine Flores

"The Effects of the Revisions to the Administrative Procedure Act"

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> low an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute.

Section 120.52(8), Fla. Stat. (1996 Supp.) (Ch. 96-159, Laws of Fla.).

Shortly thereafter, the St. Johns River Water Management District (SJRWMD) proposed to adopt and amend rules that would create a riparian habitat protection zone and special aquifer recharge, stormwater, and floodplain storage criteria for the Tomoka River basin. The proposed rules were challenged by Consolidated-Tomoka and were held invalid by an administrative law judge (ALJ) solely on the ground that the rules exceeded the limitations on rulemaking authority in section 120.52(8). The ALJ concluded that the Legislature, in enacting section 120.52(8), intended the term "particular powers and duties" to require the enabling statute to "detail" the powers and duties that may be the subject matter of an agency's rules. The SJRWMD appealed, and amicus curiae briefs were filed by the Governor's Legal Office, the Florida Attorney General, the Department of Environmental Protection, the South Florida Water Management District, the Southwest Florida Water Management District, the Department of Community Affairs, 1000 Friends of Florida, the Florida Wildlife Federation, and the Sierra Club in support of the SJRWMD, and by the Florida Legislature and fourteen industry associations in support of Consolidated-Tomoka. The First District Court of Appeal reversed the ALJ in *Tomoka*. The *Tomoka* court held that the term "particular," as used in section 120.52(8), did not require the enabling statute to provide a detailed description of the authorized powers and duties, but rather merely restricted an agency's rulemaking authority to subjects that are directly within the "class of powers and duties" identified in the enabling statute.

In response to the *Tomoka* decision, in 1999 the Legislature again revised section 120.52(8) to read in part as follows:

> An agency may adopt only rules *that implement or interpret the specific powers and duties* granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious *or is within the agency's class of powers and duties*, . . . Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting *the specific powers and duties conferred by the same statute.*

Sec. 120.52(8), Fla. Stat. (1999) (Ch. 99-379, Laws of Fla.) (emphasis added). In enacting this provision, the Legislature expressly stated that it did not intend to reverse the result of the *Tomoka* case — i.e., the upholding of the proposed rules as being authorized by the enabling statutes — but only to "clarify" agency rulemaking authority and to reject the "class of powers and duties" analysis used by the court in *Tomoka*.[1]

Ironically, even the legislative staff reports conceded that "[a]s in the case of the word 'particular' in the 1996 amendments, the word 'specific' [in the 1999 amendment] is not defined by the bill. As a result, in any administrative appeal, the courts will [have to] use principles of statutory construction to determine legislative intent for the word 'specific.'"[2] It wasn't long before the courts were faced with that task. On September 17, 1999, the Save the Manatee Club challenged a grandfather exemption in the environmental resource permitting (ERP) rules of the Southwest Florida Water Management District (SWFWMD), asserting that the rule was invalid under section 120.52(8) because there was no specific statutory power or duty authorizing the exemption. The ALJ agreed and invalidated the rule.[3] In so holding, the ALJ reasoned that (1) the statutes relied on by SWFWMD did not provide "enough detail" to provide specific authority for the particular exemption, (2) the provision in section 373.414(9) stating that "rules [adopted by the Department and water management districts] may establish exemptions . . . if such exemptions . . . do not allow significant adverse impacts to occur individually or cumulatively" was only a class of powers, and (3) because section 373.414 expressly provided for certain grandfather exemptions, other grandfather exemptions were not authorized by the provision in section 373.414(9) that the Department and water management districts "shall adopt rules to incorporate the provisions of [section 373.414] relying primarily on the existing rules of the department and the water management districts, into the rules governing the management and storage of surface waters." The SWFWMD appealed, and the Department of Environmental Protection and the St. Johns River Water Management District filed amicus curiae briefs in support of the SWFWMD. Indicative of the significance of this case, on August 7, 2000, the court *sua sponte* requested additional amicus curiae briefs from the Florida Chamber of Commerce and the Associated Industries of Florida.[4]

It is significant that the rule invalidated by the ALJ was an existing rule of the SWFWMD prior to the enactment of the provisions of section 373.414 noted above, and was brought forward into SWFWMD's ERP rules *verbatim*. While not requiring that all existing management and storage of surface water (MSSW) and dredge and fill rules be incorporated into the new ERP rules, section 373.414(9) specifically directed that the new ERP rules shall be based primarily on the then-existing MSSW and dredge and fill rules.

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Since the Legislature must be presumed to have been aware of the existing rules of the SWFWMD[5], including the rule at issue in this case, it is hard to imagine how the Legislature could have been more specific without either quoting or listing each and every rule it was authorizing as a basis for the ERP rules. Thus, the ALJ seems to have erred in holding that there was not sufficiently specific authority for the rule. Although some aspects of the opinion in *Save the Manatee* suggest that the holding may be limited to grandfather exemptions under section 373.414, the opinion as a whole has sweeping implications for agency rulemaking authority. If this holding is affirmed on appeal, a great many agency rules that are based on less specific statutory authority would be open to challenge and likely invalidation.

One particularly troubling aspect of the *Save the Manatee* opinion is the reasoning that the statutes relied on by the SWFWMD did not provide "enough detail" to provide a specific authority. A requirement that an authorizing statute be "detailed" was rejected by the Legislature in enacting CS/HB 107 in 1999.[6] This is clearly shown by the sequence of the initial version of CS/HB 107 and the subsequent amendments thereto. HB 107, as first introduced, provided in relevant part that

> An agency may adopt only rules that implement, interpret, or make more specific the detailed ~~particular~~ powers and duties granted by the enabling statute.[7]

However, the *final* version of the bill, CS/HB 107, as enacted by the Legislature deleted any mention of a "detail" based test and instead provided:

> An agency may adopt only rules that implement, or interpret the~~, or make~~ specific ~~the particular~~ powers and duties granted by the enabling statute.

Ch. 99-379, §§ 2 & 3 at 3788, 3790-91, Laws of Fla. (1999). It is clear from the history of CS/HB 107 that the Legislature rejected a rulemaking authority standard based on the level of detail in the enabling statute. In interpreting legislative intent, it is appropriate to consider such changes in a bill during the enactment process.[8]

The First District Court of Appeal in *Tomoka* also rejected an interpretation requiring that the enabling statute be "detailed," noting that a "rulemaking standard based on the level of detail . . . would be unworkable," and that "[a] standard based on the precision and detail of an enabling statute would produce endless litigation regarding the sufficiency of the delegated power." *Tomoka*, 717 So.2d at 79, 80. Significantly, the Florida Supreme Court, citing this reasoning in *Tomoka*, has noted that rulemaking authority under section 120.52(8) is not restricted to those situations in which the enabling statute details the precise subject of a proposed rule.[9]

In addition, a standard for rulemaking authority based on a requirement for detail or too much specificity could create an unconstitutional infringement on the executive branch's duty to implement the law. In *Tomoka*, the court noted that a test based on "detail" would be problematic:

> [A]n administrative agency might find itself caught between conflicting demands in the Administrative Procedure Act. If the lack of detail in the enabling statute could be said to prohibit an agency from adopting rules under section 120.52(8), *the agency might not be able to carry out the very task the Legislature assigned to it.* At the same time, the agency would be directed by section 120.54 to adopt rules to codify its policies. Hence, the Legislature could not have meant to condition rulemaking authority on the existence of a statute describing in detail the subject of each potential rule.

Tomoka, 717 So.2d at 80 (emphasis added). When a substantive statute imposes a duty on an executive agency, a construction of chapter 120 requiring the agency to implement that duty by rule while simultaneously prohibiting rulemaking because the substantive statute lacks a sufficiently "detailed" power or duty, would result in an unconstitutional interference with the executive branch's duty to execute the law. Sections 120.52(8) need not be read so narrowly, and it is axiomatic that statutes should not be read in a manner that reaches an unconstitutional result.[10]

By the express terms of section 120.52(8), an agency may adopt rules to implement or interpret the specific powers and duties granted by the enabling statute. Certainly the power to interpret an enabling statute by rule authorizes the rule to add *some* substantive language to clarify and flesh out the meaning of the statute. To "interpret" means "to set forth the meaning of; explain; explicate; elucidate." *See The Random House Dictionary of the English Language, Unabridged* (1979); *see also Webster's Third New International Dictionary of the English Language, Unabridged* (1993) ("interpret" means "to explain or tell

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the meaning of"). As recently as 1998 — after the 1996 amendments to section 120.52(8) which the 1999 amendments merely "clarified" — the Florida Supreme Court recognized the continued viability of the principle that rules may clarify and flesh out the details of an enabling statute. Thus, the Court wrote:

> [The Department of Environmental Protection] utilizes its expertise and special knowledge to flesh out the Legislature's stated intent to prevent pollution by creating rules, regulations and permit conditions necessary to effectuate the Legislature's overall policy of preventing and controlling pollution in the infinite variety of situations that may occur in which Florida's natural environment may be threatened. The Legislature itself is hardly suited to anticipate the endless variety of situations that may occur or to rigidly prescribe the conditions or solutions to the often fact-specific situations that arise.

Avatar Development Corporation v. State, 723 So.2d 199, 204 (Fla. 1998). By authorizing rules to interpret enabling statutes, section 120.52(8) left intact this well-settled principle of administrative law.

Moreover, the very term defined in section 120.52(8) "invalid exercise of *delegated legislative authority*" (emphasis added) clearly shows that the Legislature intended that agencies would have *some* delegated legislative authority to develop in rules the details for regulation that statutes, as a practical matter, often must lack. This is also reflected in the definition of a rule in section 120.52(15) as "each agency statement of general applicability *that implements, interprets, or prescribes law or policy* or that . . . imposes any requirement . . . *not specifically required by statute*." § 120.52(15), Fla. Stat. (1999) (emphasis added). These provisions show that when an agency has a grant of rulemaking authority, the rules may add more specificity than that provided by the enabling statute and may specify or more narrowly identify the power or duty granted by the statute.

The definition of "rule" noted above appears in subsection (15) of section 120.52, the same section that provides the standard for rulemaking authority in subsection (8). They must be read together in harmony. The fact that in the 1996 and 1999 amendments, the Legislature chose not to amend the definition of a rule noted above further shows that in "clarifying" the standard for rulemaking authority in both the 1996 and 1999 acts, the Legislature meant to continue the core concept of administrative law that enabling statutes must identify the powers delegated, but those powers need not be detailed to provide sufficiently specific guidance for rulemaking.

Furthermore, an agency's authority under section 120.52(8) to interpret an enabling statute by rule must allow for more than just restating the statute. Section 120.74 requires an agency to repeal a rule that merely "reiterates or paraphrases statutory material."

As the Senate staff report for the 1999 amendments conceded, the legislation provided no real guidance for determining whether a statute authorizes a particular rule by a "specific power or duty," and "the court[s] will [have to] use principles of statutory construction to determine the legislative intent for the word "specific."[12] How then, should the agencies and courts be guided? As noted above, when an agency has rulemaking authority, it must have authority to clarify and flesh out the details of the enabling statutes. Whereas the enabling statute creates the gridwork for regulation, a rule may fill in the interstices — but must not go beyond the gridwork. Within the limits of the non-delegation doctrine, the Legislature is free to choose between broad or narrow terms in identifying a specific — i.e., an identified or identifiable — power or duty to be implemented by rule.[13] The Legislature could choose to use very narrow words or terms in identifying a specific power or duty, in which case the authorized range of rules to implement the provision would be correspondingly narrow. Alternatively, the Legislature could choose to employ broad words or terms in identifying a specific power or duty, in which case the range of authorized rules would be correspondingly broad. Therefore, in determining whether a particular rule provision is only implementing or interpreting an identified or identifiable specific power or duty, the proper test is whether the rule provision is within the range of reasonable, possible meanings for the words and terms the Legislature chose to use in identifying the specific power or duty. *See generally Johnston v. Presbyterian Homes of Synod*, 239 So.2d 256, 262 (Fla. 1970) (a fair and reasonable interpretation must be made with due regard for the ordinary meaning of the terms employed and the objective of the statute). In this context, it is notable that in *Tomoka*, the court held that

> the proper test to determine whether a rule is a valid exercise of delegated authority is a *functional test based on the nature of the power or duty at issue* and not the level of detail in the language of the applicable statute. The question is whether the rule falls within the *range of powers* the Legislature has granted to the agency for the purpose of enforcing or implementing the statutes within its jurisdiction.

717 So.2d at 80 (emphasis added). Although the Legislature rejected the "class of powers" test, it did not reject the above holding. The provision in section 373.414(9) that the Department and the District may adopt rules to "establish exemptions and general permits" is a broadly identified specific power. The provision that such exemptions and general permits must not "allow significant adverse impacts to occur individually or cumulatively" narrowly establishes the range within which rules are authorized to implement the specific power. Therefore, section 373.414(9) not only identifies a specific power to be implemented by rule, it also narrowly identifies the range of rules that may implement the identified specific power. Accordingly, the ALJ erred in holding that this provision was only a "class of powers" and did not authorize rulemaking.

The agencies and courts are not wholly without guidance in determining whether a statute contains a sufficiently specific power and duty to authorize a particular rule. Because in enacting the 1999 amendments the Legislature expressly

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stated that it did not intend to overrule the result in the *Tomoka* case, a comparison of section 373.413 with the types of rules adopted thereunder and left intact by the Legislature in 1999 provides some guidance into how specific an enabling statute must be. Furthermore, since the 1999 amendments expressly only "clarified" the standard for rulemaking authority under section 120.52(8), a comparison of statutes enacted in 1996 and thereafter that mandate rulemaking also provides guidance into how specific an enabling statute must be in order to authorize rulemaking. As stated by the St. Johns River Water Management District brief of amicus curiae, these statutes provide "template[s] by which to judge the nature of enabling powers and duties the Legislature itself deemed sufficient to warrant and authorize rulemaking under the original 1996 standard."[14]

Endnotes:

[1] Ch. 99-379, § 1 at 3789, Laws of Fla. (1999).
[2] Senate Staff Analysis and Economic Impact Statement, CS/CS/SB 206, Fiscal Policy Committee, Governmental Oversight and Productivity Committee, April 21, 1999, at 12. Available on the official Internet site of the Florida Legislature at http://www.leg.state.fl.us/session/1999/Senate/bills/analysis/pdf/SB0206.go.pdf.
[3] The only issues at the hearing were the standing of Save the Manatee Club and whether the rule was authorized under section 120.52(8).
[4] Oral argument has been scheduled for October 17, 2000, before Judges Padovano, Ervin, and Lawrence.
[5] It is, of course, a longstanding principle that the Legislature is presumed to know of the existing statutes and rules when it enacts new laws. *Holmes County School Board v. Duffell*, 651 So.2d 1176 (Fla. 1995).
[6] CS/HB 107 became Ch. 99-379, Laws of Fla. (1999).
[7] Available on the official Internet site of the Florida Legislature at http:/www.leg.state.fl.us/session/1999/House/bills/billtext/pdf/h0197.pdf.
[8] *McDonald v. Roland*, 65 So.2d 12 (Fla. 1953).
[9] *Florida Department of Business and Professional Regulation v. Investment Corporation of Palm Beach*, 747 So.2d 374 (Fla. 1999).
[10] *State v. Hoyt*, 609 So.2d 744, 747 (Fla. 1st DCA 1992).
[11] *Woodgate Development Corp. v. Hamilton Investment Trust*, 351 So. 2d 14 (Fla. 1977).
[12] See note 2, *supra*.
[13] *See generally Avatar Development Corporation v. State*, 723 So.2d 199 (Fla. 1998).
[14] Brief of Amicus Curiae, St. Johns River Water Management District, at 24.

Editor's Note: *As described in the biographical note, the author of this article represents the Department of Environmental Protection as amicus curiae in the pending appeal, in support of the appellant's position. In accordance with the policy of the Executive Council of the Administrative Law Section, counsel for the appellee, Steve Medina, was advised of the submission of this article and offered the opportunity to submit a counterpoint article. Mr. Medina declined that offer, and simply noted that Save the Manatees Club agrees with the Administrative Law Judge's Order.*

Robert G. Gough *is Administrative Law Counsel for the Florida Department of Environmental Protection, where he has served for eleven years. He participated in the preparation of the Department of Environmental Protection's briefs of amicus curiae in both the* Tomoka *and* Save the Manatee *cases.*

APPELLATE CASE NOTES

by Mary F. Smallwood

Licensing

Masteller v. Department of Health, 25 Fla. L. Weekly 1241 (Fla. 3rd DCA 2000)

Masteller appealed a final order of the Department of Health denying his request for a continuance of the final hearing and revoking his nursing license. The Department issued an administrative complaint alleging that Masteller's license had been suspended in Pennsylvania. He originally appeared *pro se* and requested a formal hearing. Counsel for the Department suggested in writing that it might be more appropriate to have an informal hearing, and Masteller agreed. When he received the Department's materials prior to the scheduled hearing, however, he sought to retain counsel. When three different attorneys suggested he needed representation with expertise in administrative law and that he should request a formal hearing, he requested a continuance. At the final hearing, the Board denied his request, noting that it had been eight months since the administrative complaint had been issued. The Board then took evidence on the merits of the case, including the details of the offense in Pennsylvania that had led to that state's disciplinary action. Masteller sought to demonstrate that his behavior had been rehabilitated. Despite the fact that the Board's guidelines called for the penalty to be consistent with that in the other state, the Board entered an order revoking the Florida license.

On appeal, the court reversed and remanded. It held that the Board should have granted the requested continuance. While it noted that the Board was entitled to take into consideration such factors as the eight-month time frame, it concluded that the totality of circumstances did not justify the denial of the continuance. In particular, the court noted that the continuance was timely requested, that Masteller was not presently employed as a nurse, and that there were no "exigent" circumstances. There was no discussion, however, of the standard under which the court should review the decision of the Board.

Hamilton v. Department of Business and Professional Regulation, 25 Fla. L. Weekly 1689 (Fla. lst DCA 2000)

The Department filed a Notice of Intent to Revoke License alleging that Hamilton, a licensed yacht broker, had violated certain statutory provisions, justifying revocation of his license. The Notice referenced Section 326.006(2)(f)l., Fla. Stat., which allows the Department to suspend or revoke a broker's license if

he procures the license by fraud or misrepresentation. The Department also alleged that Hamilton had been found guilty of a crime involving moral turpitude, which is a separate basis for revocation or suspension. The final order concluded that Hamilton had violated Section 326.006(2)(f)1.

On appeal, the court vacated that portion of the order. After a review of the transcript, the court held that the Department had merely referenced that provision of the statute in the Notice, but had failed to make any specific allegations of acts that constituted fraud or misrepresentation. In addition, all of the evidence presented by the Department addressed the issue of conviction of a crime involving moral turpitude. The case was remanded to the Department to initiate "a new disciplinary action."

Quevedo v. South Florida Water Management District, 25 Fla. L. Weekly 1381 (Fla. 4th DCA 2000)

Quevedo obtained a right-of-way permit from South Florida Water Management District allowing him to use property owned by the District located between his home and the C-51 canal. The original permit allowed him to construct a boat dock and landscape the right-of-way. Subsequently, Quevedo received a permit modification that allowed him to install a fence along the right-of-way extending from his property to the seawall on the canal. Quevedo argued that the fence was necessary for safety reasons. He used the fence to limit public access to the area, even though the property was part of a public park and had historically been used by local fishermen. Similar permits had been issued for other properties in the area.

After Quevedo had one member of the public arrested for trespassing, the District reevaluated whether the permit was appropriate in light of the limitations on public access to the right-of-way. After two public hearings, the Governing Board revoked the right-of-way permit, finding that it was contrary to the District's policies of allowing public access to publicly owned land. The administrative law judge issued a recommended order concluding that the District had the right to revoke the permit at will if it determined that it was not consistent with the statutory and regulatory criteria. He noted that the standard conditions of the permit put the permittee on notice that the permit could be revoked at will and that the permittee would bear all costs of such revocation.

On appeal, Quevedo argued that the revocation was arbitrary and capricious. The court rejected that argument and upheld the permit revocation. The court held that the District was not arbitrary in changing its mind about the validity of the "public safety" reasons for the initial issuance of the permit. Moreover, it rejected Quevedo's argument that he had been treated discriminatorily because other permits in the area were not revoked. The court agreed with the District that the right-of-way adjacent to Quevedo's property was unique because of its history as a snook fishing area and because it was within a public park, unlike the other properties. Finally, the court concluded that the District had given due consideration to Quevedo's detrimental reliance on issuance of the permit.

Adjudicatory Proceedings

Teachers Educators Association, Inc. v. Duval County School District, 25 Fla. L. Weekly 1659 (Fla. 1st DCA 2000)

The TEA filed a petition for hearing pursuant to Section 120.569, Fla. Stat., seeking a hearing on the School District's refusal to recognize the association as an entity authorized to provide training and staff development. The School District failed to take any action on the petition, and TEA appealed, seeking a writ of mandamus. The District Court entered an order to show cause requiring the District to explain its failure to act. The response identified a number of objections to the petition. The court, while recognizing that some or all of the District's reasons might justify either denial of the petition or rejection of the TEA's qualifications, held that the response to the show cause order did not provide a basis for failure to act on the petition. Accordingly, the matter was remanded to the District with directions to act on the petition within 15 days.

Agency Authority

Tampa Electric Co. v. Garcia, 25 Fla. L. Weekly 294 (Fla. 2000)

The Florida Supreme Court heard argument in three consolidated cases involving the authority of the Public Service Commission to make a determination of need under the Florida Electrical Power Plant Siting Act (PPSA) and the Florida Energy Efficiency and Conservation Act (FEECA) for the proposed construction of an electrical generating plant in Volusia County. A joint application was filed by Duke Energy and the City of New Smyrna Beach to construct a 514 megawatt capacity facility. Thirty megawatts of the total capacity was to be committed to the city, which operated a municipal electric utility. The remaining capacity was uncommitted. The plant was intended to generate power to be sold in a competitive wholesale market to other utilities.

In a divided decision, the PSC determined that Duke Energy was a "regulated utility" sufficient to allow it to apply to the PSC for a determination of need under the PPSA. Section 403.503(4), Fla. Stat., defines "applicant" to include any "electric utility." The latter term is further defined to include "regulated electric companies." §403.503(13), Fla. Stat. The minority opinion concluded that only Florida retail utilities were proper applicants. There was no dispute that the City was a proper ap-

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plicant. However, since only 30 megawatts of the proposed facility's capacity was pledged to the City and the remaining capacity was to be sold on the wholesale market, the minority concluded that Duke was not an "entity... which provides electricity ... at retail to the public" as required by Section 403.519, Fla. Stat.

On appeal, the Court reversed the order of the PSC, holding that the PSC lacked the statutory authority to make a determination under the PPSA for wholesale power providers. The court noted that Section 403.519 (the codification of FEECA) limited the definition of "utility" to entities providing power at retail to the public. In 1990, Section 403.519 was amended to change the term "utility" to "applicant." The Court construed this statutory language to limit the determination of need process to power plants providing power to retail customers. "The projected need of unspecified utilities throughout peninsular Florida is not among the authorized statutory criteria for determining whether to grant a determination of need pursuant to Section 403.519, Florida Statutes."

St. Petersburg Kennel Club v. Department of Business and Professional Regulation, 25 Fla. L. Weekly 1093 (Fla. 2d DCA 2000)

The Department of Business and Professional Regulation issued an order denying a request by the Kennel Club for authorization to play three card games in its licensed cardroom facility. The denial was based on Rule 61D-11.002(2)(a), Fla. Admin. Code, which provides that those card games identified in Hoyle's Modem Encyclopedia of Card Games are approved by the Department. The rule further provides that other games may be approved by the Department if they meet the criteria contained in the applicable statutory provisions. A previous request by the Kennel Club had been denied on the basis of Rule 61D-11.026, which contained a definition of poker. However, the Second District had overturned that decision, holding that Rule 61D-11.026 was an invalid exercise of delegated legislative authority. On appeal in this case, the Kennel Club argued that the Department had merely adopted the same findings of fact and conclusions of law that had previously been rejected by the court in *St. Petersburg Kennel Club v. Department of Business and Professional Regulation,* 719 So. 2d 1210 (Fla. 2d DCA 1998).

The court rejected appellant's argument that the law of the case doctrine required the Department's order to be overturned. The first case involved the validity of Rule 61D-11.026. The court concluded that the determination of the Department in this case did not require reliance on the invalid rule. Accordingly, the law of the case doctrine did not apply.

Confidentiality of Department of Revenue Records

Florida Department of Revenue v. WHI Limited Partnership, 25 Fla. L. Weekly 998 (Fla. 1st DCA 2000)

Section 213.053(8), Fla. Stat., provides that confidential taxpayer records may be disclosed in response to "an order of a judge of a court of competent jurisdiction." When WHI sought disclosure of records related to another taxpayer, the Department sought a protective order from the Division of Administrative Hearings administrative law judge. The judge denied the request, and the Department appealed. On appeal, the Department argued that an administrative law judge is not a "judge" within the meaning of Section 213.053. The First District agreed, noting that administrative law judges are only quasi-judicial officers. The matter was remanded with instructions to the administrative law judge to enter a protective order as requested.

Attorney's Fees

Department of Insurance v. Florida Bankers Association, 25 Fla. L. Weekly 1219 (Fla. 1st DCA 2000)

The Florida Bankers Association and others challenged a proposed rule of the Department of Insurance that was intended to establish parity between insurance companies affiliated with financial institutions and unaffiliated companies. The administrative law judge held the rules to be invalid, and the Department did not appeal that decision. The prevailing parties then sought attorney's fees and costs pursuant to Section 120.595(2), Fla. Stat., which provides that the administrative law judge shall award costs and fees to the successful challenger "unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust." The administrative law judge entered an order awarding attorney's fees to the counsel for the prevailing companies but denying fees to a qualified representative for one of the parties. The final order included findings of fact of a conclusory nature to the effect that the Department's action was not substantially justified, that there was no basis in fact or law for the proposed rules, and that no special circumstances existed which would make the award unjust.

The court reversed and remanded for entry of a revised order including specific findings of fact with respect to the appropriateness of the award of fees. It held that the administrative law judge's "findings" were, in fact, conclusions of law. In reaching this result, the court quoted extensively from *Helmy v. Department of Business and Professional Regulation,* 707 So. 2d 366 (Fla. 1st DCA 1998), which involved Section 57.111, Fla. Stat., a provision the court characterized as a "similar agency fee statute." Apparently, the court relied on this case for the proposition that the agency has the burden of proving that an award of fees is not appropriate. With respect to the administrative law judge's denial of fees to the non-attorney representative, the final order was upheld. The court held that there is no statute or rule authorizing an award of attorney's fees to a non-attorney.

Mary F. Smallwood *is a partner with the firm of Ruden, McClosky, Smith, Schuster & Russell, P.A. in its Tallahassee office. She is the Chair of the Administrative Law Section of The Florida Bar and a Past Chair of the Environmental and Land Use Law Section. She practices in the areas of environmental, land use, and administrative law. Comments and questions may be submitted to MFS@Ruden.com.*

A Short History of the Rules in Florida
(The unofficial but true story)

by Donna Erlich

Many experienced Board members have been advised by their attorney regarding the requirement for specific legislative authority to adopt a rule. As new members, professional and consumer, are appointed by the Governor; however, they wonder why their Board cannot simply pass the rules that are needed to resolve a problem or situation at hand. This Short History was inspired by a "why" question from a recently appointed Board member. The views expressed are solely those of the author.

Once upon a more innocent time in the State of Florida, people had not yet figured out the connection between detergent, paper mills, pig farms, and pollution; water use and Everglades; wetlands and species; or flooding and stormwater runoff. In those olden times, Florida's government had a two-fold Mission: to Kill Mosquitoes and Drain the Swamps. The State was soon covered with roads and cement.

As government grew, the members of the Legislature discovered that, with regard to competing interest groups, it was better if those who journeyed to visit left with a smile. All were happier when the laws were somewhat vague. Thus, the agencies were born to carry out the laws and fill in all the details.

People regulated by the government gradually became concerned because they did not know what the rules were or if an agency was applying the rules fairly to one and to all. Grumbling could be heard about "phantom government" and hidden policies stashed in the desk drawers of bureaucrats.

To shine a light on secret government, the 1974 Legislature revised the Administrative Procedure Act (APA). In 1977, the 1st District Court in the *McDonald* case (*McDonald v. Department of Banking and Finance*) explained that, from now on, policy statements for everyone (those of general applicability) had to be adopted as rules "to close the gap between what the agency and its staff know about the agency's law and policy and what an outsider can know." The Court also recognized "incipient policy," which means that sometimes an agency is not ready to adopt a rule and must consider cases one at a time.

Fast forward about 20 years. Many volumes were now filled with hard-to-read rules and regulations. Some agencies passed new rules without bothering to discard the old. The Department of Community Affairs administered the Growth Management Act and had the nerve to pass lots of rules that slow or even stop developers from building on their property. The Department of Community Affairs was nick-named the "Agency-out-of-Control." Bumper stickers suggested that the government should make it as tough to get welfare as a building permit. The Florida Governor's own cook shack in the woods was found to be built contrary to the rules. The agencies were told to repeal half of their rules. This was just the beginning.

In 1996, the Legislature rewrote the APA. Before 1996, an agency could make rules if the Legislature said that the agency could make rules. This was called a general grant of rulemaking authority. After 1996, the agency had to have specific authority to pass each rule. The 1996 amendment was not applied only to the agency that had angered the developers (the Department of Community Affairs), but to all of the agencies. The Legislature made no exceptions for non-controversial rules (except recently with regard to district school boards).

The 1996 law said that an agency may adopt only rules that implement, interpret or make specific the particular powers and duties granted by the enabling statute. In 1998, the 1st District Court in the *Tomoka* case (*St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*), said that particular means "identified," not described in detail. After all, if the law includes every possible detail, you don't need a rule!

In 1999, the Legislature again amended the APA. The APA currently states that an agency may adopt only rules that implement or interpret the "specific" powers and duties granted by the enabling statute. At this time *Tomoka* may still be good law, and no one knows how specific or detailed is "specific," or when or even if a Court will consider this issue.

Sometimes an agency is informed by the Joint Legislative Procedure Committee (JAPC) staff (the rule police) that the Legislature has not provided the agency with sufficient specific authority to adopt certain rules. The agency may then plan to go to the Legislature in an attempt to gain additional and hopefully more specific legislative authority. In the meantime, the agency must carry out its assigned functions. Even after the reprimand by JAPC staff for having tried to adopt rules so that the agency's policy choices could be communicated to the affected people, the agency continues to make decisions. Sadly, this state of affairs does not equal happily-ever-after.

And still – it may be hoped that one day Florida's elected officials will be wise enough to understand that they cannot be experts with regard to every subject matter and that day-to-day realities are different from the distorted perceptions way up in the castle tower on Monroe Street in Tallahassee. They may come to understand the pitfalls of micro-management as well as the common sense reasons for delegating the details to those hired or appointed because they develop a special interest and knowledge in specific areas.

***Donna Erlich** is an Assistant Attorney General in the Administrative Law Section in Tallahassee, Florida, and represents various regulatory boards. She previously worked for the Legislature for six years in the position of Chief Attorney for the House Committee on Community Affairs.*

Section 2000-2001 Budget

REVENUES:	
Dues	$20,500
Dues Retained by Bar	10,250
Affiliate Dues	500
Affiliate Dues Retained by Bar	400
TOTAL DUES	**$10,350**
OTHER REVENUE:	
CLE Courses	$1,100
Audiotape Sales	2,000
Interest	7,352
Course Material Sales	150
Section Service Programs	5,000
TOTAL REVENUE	**$25,952**
EXPENSES:	
Staff Travel	$631
Postage	500
Printing	300
Newsletter	2,500
Photocopying	275
Meeting Travel	500
Committees	500
Council Meetings	500
Bar Annual Meeting	1,500
Awards	500
Council of Sections	300
Section Service Programs	5,000
Retreat	750
Writing Contest	2,400
Officer Expense	500
Membership	500
Officer Travel	2,500
CLE Speaker Expense	100
Operating Reserve	2,026
Public Utilities	500
TOTAL EXPENSES	**$22,282**
BEGINNING FUND BALANCE	**$105,023**
PLUS REVENUES	**25,952**
LESS EXPENSES	**22,282**
ENDING FUND BALANCE	**$108,693**

SECTION REIMBURSEMENT POLICIES:

General: All travel and office expense payments in accordance with Standing Board Policy 5.61. Travel expenses for other than members of Bar staff may be made if in accordance with SBP 5.61(e)(5) (a)-(i) 5.61(e)(6) which is available from Bar headquarters upon request.

Share your newsletter and this application with a non-attorney colleague.

Affiliate membership in the Administrative Law Section is open to members of administrative boards, agency staff, law students, legal assistants, members of the legislature and legislative staff, and other administrative personnel. This membership will help keep you up to date in administrative law and processes.

To be considered for affiliate membership, please complete the application below, enclose a resume of your professional experience and your check for $20 or $25 made payable to The Florida Bar.

THE FLORIDA BAR
APPLICATION FOR AFFILIATE MEMBERSHIP
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NAME: _____

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OFFICE ADDRESS: _____

CITY/STATE: _____ ZIP CODE: _____

OFFICE PHONE: (____) _____

PROFESSIONAL SPECIALTY(IES): _____

_____

WHAT AGENCIES DO YOU PRIMARILY WORK WITH? _____

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WHAT LEGAL AREAS ARE YOU MOST INTERESTED IN? _____

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FROM THE STANDPOINT OF YOUR PROFESSION, WHAT ISSUES INVOLVED IN ADMINISTRATIVE LAW AND PROCEDURE AND STATE AGENCY PRACTICE ARE MOST IMPORTANT?

_____

I understand that all privileges accorded to members of the section are accorded affiliates, except that affiliates may not advertise their status in any way, nor vote, or hold office in the Section or participate in the selection of Executive Council members or officers.

SIGNATURE: _____ DATE: _____

Note: Membership dues are $25.00 (Law Students - $20.00). Membership in the section will expire June 30. The Florida Bar dues structure does not provide for prorated dues. Your application, resume and check should be mailed to Jackie Werndli, Section Administrator, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300.

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Administrative Law Essay Competition

DON'T WRITE OFF the Pat Dore Administrative Law Essay Competition. Packets of information have been provided to all of the Florida law schools, inviting their students to submit articles on the subject of Florida administrative law. We are hoping to have a good sampling of articles for this first competition. To assure that we do, you can be of enormous help.

Many of you stay in contact with your law school and many of you have developed a relationship with law professors who teach administrative law courses. Please mention to them that you would appreciate anything they could do to enhance interest in the writing competition. Perhaps you could pass on issues of merit that would prompt a student to write or encourage professors to suggest interesting issues to their students to encourage participation. The prizes are substantial: $1400 for first place and $500 and $300 for second place and honorable mention, respectively.

In this era of the push for professionalism, law schools are looking for ways to better interact with the practicing legal community. Here is one way for you to introduce administrative law professors to our Section's programs.

Share your newsletter and this application with a non-attorney colleague.

Affiliate membership in the Administrative Law Section is open to members of administrative boards, agency staff, law students, legal assistants, members of the legislature and legislative staff, and other administrative personnel. This membership will help keep you up to date in administrative law and processes.

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Administrative Law Section Members:

We Want To Hear From You!!

What can your section do for you that it is not now doing?
How can we improve? What would you like to see in your newsletter that you do not see now?

This is YOUR section — we need YOUR input.

Listed below is the information you need to contact your section officers or your newsletter editor.
Please let us hear from you!

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Attorney General's Ofc.
400 S. Monroe St.
Tallahassee, Florida 32399-6526
(850) 414-3752
Cathy_lannon@oag.state.fl.us

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The Capitol / Governors Ofc.
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Katz Kutter Haigler Et Al
P.O. Box 1877
Tallahassee, Florida 32302-1877
(850) 224-9634
emcarthur@katzlaw.com

ADMINISTRATIVE LAW SECTION MEMBERSHIP APPLICATION

This is a special invitation for you to become a member of the Administrative Law Section of The Florida Bar. Membership in this section will provide you with interesting and informative ideas. It will help keep you informed on new developments in the field of Administrative Law. As a section member you will meet with lawyers sharing similar interests and problems and work with them in forwarding the public and professional needs of the Bar.

To join, make your check payable to "THE FLORIDA BAR" and return your check in the amount of $20 and this completed application card to ADMINISTRATIVE LAW SECTION, THE FLORIDA BAR, 650 APALACHEE PARKWAY, TALLAHASSEE, FL 32399-2300.

NAME _____ ATTORNEY NO. _____

OFFICE ADDRESS _____

CITY _____ STATE _____ ZIP _____

Note: The Florida Bar dues structure does not provide for prorated dues. Your Section dues covers the period from July 1 to June 30.