Administrative Law Section Newsletter

Vol. XXIX, No. 1 **Donna E. Blanton, Editor** **September 2007**

Wanted: Due Process from the Florida Fish and Wildlife Conservation Commission

by Bob L. Harris, E. Gary Early, and Michael Dutko, Jr.

In 2001, the Florida Fish and Wildlife Conservation Commission (the "FWCC") published a proposed rule that banned feeding marine life in Florida waters.[1] The proposed rule applied solely to snorkelers and scuba divers, and it was in response to the request of three commercial spear fishermen who wanted to stop the practice of divers "feeding sharks" in Florida waters.[2] The proposed rule was issued by the FWCC under its "constitutional authority" in Article IV, Section 9 of the Florida Constitution.[3]

Before publication of the proposed rule, the FWCC held a number of meetings and workshops at which they sought the views of the various supporters and opponents of shark feeding. At one meeting in Orlando, more than a hundred citizens and experts, including, by videotape, noted marine biologist Jean-Michel Cousteau and author Peter Benchley, addressed the FWCC staff and commission members about the relative merits of shark feeding in Florida.

During the FWCC workshop process, the opinions of more than a dozen shark and shark feeding experts from around the world, and literally thousands of documents, were submitted to FWCC staff by persons who believed that marine life feeding, and in particular shark feeding, did not have adverse effects on the behavior of the animals or on the resource in general. The opponents of marine life feeding provided the opinion of a single expert in the subject of "reef fishes" whose most recent publication was a coloring book featuring reef fish.

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From the Chair

by Andy Bertron

It must be written somewhere in the Administrative Law Section bylaws that the incoming chair of the Executive Council must write a plea for greater member involvement in his or her first newsletter column. Ten years ago, incoming Chair Robert Rhodes wrote that the Executive Council's first priority was to increase member participation in section activities and recruit the next generation of section leaders. With some consistency, subsequent new chairs used their first columns to deliver the same message. With no greater imagination, but with equal resolve, I repeat the plea – your section needs you.

The section has many opportunities for member involvement. Most of the section's work is done by its committees, and all of the new committee chairs are looking for help:

Continuing Legal Education Committee – This committee produces the section's quality CLE programs. On August 16-17, the section co-sponsored the State and Federal Government and Administrative Practice Certification Review Course. This fall, we anticipate providing another Practice Before DOAH program with a mock administrative hearing. The committee always needs assistance with the Pat Dore Administra-

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tive Law Conference, next scheduled for the fall of 2008. Want to help with these programs or have your own idea for a CLE? Contact Scott Boyd, CLE Committee Chair (850-488-9110; boyd.scott@leg.state.fl.us).

Publications Committee – Working with the Publications Committee is an easy way to instantly get involved with the section. Elizabeth McArthur, Publications Committee Chair, would love to hear from you. She and her editors are always looking for new writers for newsletter articles, Bar Journal articles and agency snapshots. Contact Elizabeth (850-425-6654; emcarthur@radeylaw.com) or one of her editors: Donna Blanton, Newsletter Editor (850-425-6654; dblanton@radeylaw.com); Debby Kearney, Bar Journal Column Editor (850-245-0442; deborah.kearney@fldoe.org); or Amy Schrader, Agency Reporters Editor (850-577-9090; aschrader@gray-robinson.com).

Webpage Committee – Daniel Nordby, Chair, and committee members Cathy Lannon and Kent Wetherell have greatly improved the section's webpage. (Check it out at www.flaadminlaw.org.) At the webpage, you can access past newsletters, locate section members, review section legislative positions, and more. Daniel has also developed a listserv to send section announcements to the members. By the publication date of this newsletter, you should have already received your first message from the listserv. If you have not, please contact Jackie Werndli at jwerndli@flabar.org. Daniel plans further improvements and would welcome your ideas and help. Contact him at 850-425-5478 or dnordby@ausley.com.

Public Utilities – Michael Cooke (850-413-6189; mcooke@psc.state.fl.us) is the new Chair of the Public Utilities Committee. As General Counsel of the Public Service Commission, Mike brings substantial knowledge and expertise to the committee, but would welcome your involvement.

Membership – Administrative Law Judge Kent Wetherell, Membership Committee Chair, is always on the hunt for new members, both for the section and for his committee. Contact Kent at 850-488-9675 or kent_wetherell@doah.state.fl.us.

Legislation Committee – Bill Williams, Administrative Law Judge Linda Rigot, and Wellington Meffert monitor APA legislation and make recommendations to the Executive Council on the section's legislative positions. Contact Bill at 850-577-9090 or wwilliams@gray-robinson.com to help out.

Law School Outreach Committee – This committee presents a great opportunity for young lawyers and "down state" lawyers. The section has phased out its law school student writing competition in favor of more direct interaction with law students, beginning last fall with a panel discussion and reception at the FSU College of Law organized by Cathy Sellers. Administrative lawyers from private practice, agencies, the legislature and DOAH shared their experiences with students. The Executive Council plans to continue this effort at other law schools and particularly needs the help of members outside of Tallahassee. Want to organize an administrative law panel and reception at your alma matter? Contact Committee Chair Bruce Lamb (813-222-6605; bruce.lamb@ruden.com).

Another way to get involved is to attend the Executive Council meetings. The Council meets at least three times a year, once in Orlando or Boca Raton during the Florida Bar annual meeting and the rest of the time in Tallahassee. The meetings are a great way to meet council and section members and learn more about section activities.

Thomas Edison once said that "opportunity is missed by most people because it is dressed in overalls and looks like work." Overalls or not, helping with the Administrative Law Section rarely feels like work, but still provides some great opportunities. Section involvement has helped me become a better lawyer, meet people in public and private practice around the state, and make new friends. Whether you are a young lawyer looking to make new contacts and learn more about administrative law, or a seasoned practitioner who wants to give back to the profession, the section welcomes (and needs!) your involvement.

If you are still unsure how to get involved or what you want to do, call me. (850-907-2507; andy.bertron@sablaw.com). I would be happy to talk to you about the section and how you can become a more active member.

Governor Vetoes APA Bill

On June 27, 2007, Governor Charlie Crist vetoed HB 7183, which made a number of changes to the Florida Administrative Procedure Act. The June issue of this Newsletter included an article by Lawrence E. Sellers, Jr. about the bill, noting that it had not yet been presented to the Governor. Here is the Governor's veto message:

CHARLIE CRIST
GOVERNOR

June 27, 2007

Mr. Kurt S. Browning
Secretary of State
R.A. Gray Building
500 South Bronough Street
Tallahassee, Florida 32399-0250

Dear Secretary Browning:

By the authority vested in me as Governor of the State of Florida, under the provisions of Article III, Section 8, of the Constitution of Florida, I do hereby withhold my approval of and transmit to you my objections to, House Bill 7183, enacted during the 109th Session of the Legislature of Florida, since statehood in 1845, during the Regular Session of 2007 and entitled:

An act relating to administrative procedures . . .

This bill amends the Administrative Procedures Act, dramatically changing current Florida law.

I am concerned that the bill substantially rewrites this Act, potentially creating a number of unintended consequences detrimental to the efficient operation of our State government. For example, the bill disallows reliance upon an agency statement during the pendency of a challenge. Such a provision amounts to an injunction against the agency in the absence of any allegation of harm by the challenger and halts enforcement or implementation of laws.

Because I understand and respect the need for government accountability, I encourage the Legislature and the Joint Administrative Procedures Committee, in the spirit of cooperation, to undertake a full, fair, and open dialogue with agencies subject to this Act. To this end, I hereby direct my office and state agencies to work with the Legislature to address any concerns, recommend changes to streamline government, simplify procedures, and better serve the people of Florida.

For the reasons stated above, I withhold my approval of House Bill 7183, and do hereby veto the same.

Sincerely,

Charlie Crist

CC/dmm

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APPELLATE CASE NOTES

by Mary F. Smallwood

Adjudicatory Proceedings

Wills v. Florida Elections Commission, 32 Fla. L. Weekly 878 (Fla. 1st DCA 2007) (Opinion filed April 4, 2007)

Wills, a Palm Beach County police officer, was charged by the Florida Elections Commission with violation of the election laws for allegedly using his authority to coerce employees into attending a political rally for a sheriff's candidate and threatening a subordinate for supporting another candidate. The administrative law judge entered a recommended order finding that Wills did not use his authority to influence anyone's attendance at a rally and was appropriately disciplining the subordinate for misbehavior. The order recommended dismissal of the charges. The Commission rejected the findings of fact and concluded that Wills had violated election laws; however, the Commission concluded it was required to dismiss the charges on a technicality.

Wills appealed the order, alleging that the Commission's substituted findings that he violated the law placed his moral character and professional reputation in question. The Commission argued that Wills had no standing to appeal the final order. The court concluded that Wills could be subjected to a future disciplinary action by the Criminal Justice Standards and Training Commission based on the findings in the final order. Under section 943.1395, Florida Statutes, the employing agency must conduct an investigation if it has reason to suspect that an officer has not maintained good moral character. Accordingly, the court held that Wills had standing to appeal the final order. With respect to the Commission's rejection of the findings in the recommended order, the court concluded that all of the findings were supported by competent substantial evidence. The order was reversed.

Orthopaedic Medical Group of Tampa Bay v. Agency for Health Care Administration, 32 Fla. L. Weekly 912 (Fla. 1st DCA 2007) (Opinion filed April 9, 2007)

The Agency for Health Care Administration rejected a number of findings of fact in a recommended order based on its determination that the appellant's expert witness in the hearing was not competent to express an opinion of Medicare coding. On appeal, the court reversed. It held that a determination of a witness's qualifications is within the discretion of the administrative law judge and may not be rejected unless it constitutes clear error.

Board of Commissioners of Jupiter Inlet District v. Thibadeau, 32 Fla. L. Weekly 1270 (Fla. 4th DCA 2007) (Opinion filed May 16, 2007)

Thibadeau sought a Noticed General Permit ("NGP") to construct a private single-family dock in the Loxahatchee River. The Department proposed to issue the NGP and consent to use sovereign submerged lands. That action was challenged by the Jupiter Inlet District (the "District"), an independent special district created by the Legislature for purposes of deepening and maintaining the river. The District had also contracted with the Board of Trustees of the Internal Improvement Trust Fund to undertake certain activities in the Loxahatchee River, including enhancing recreational uses and natural resources in the river.

The administrative law judge found that the District had standing to bring the challenge but concluded that Thibadeau had met all the requirements to receive the NGP and consent of use. The District filed exceptions with the Department including one that challenged the determination of the administrative law judge that the dock complied with the riparian setback line requirements. The Department rejected the exceptions and expressed the opinion that it was unclear whether the District had standing to challenge the compliance with the setback requirement since it did not own adjacent riparian lands.

The District appealed. The court affirmed the final order. It held that the District's substantial interests were affected by the Department's proposed action, as it had responsibility for managing natural resources in the river area. However, the court held that the District did not meet the standing test for appealing the determination that the dock would comply with riparian setback requirements. Because those requirements are meant to protect property owners' access to and use of water adjacent to their upland property, and because the District did not own property adjacent to the applicant, the District was not adversely affected by the determination.

Gonzalez v. Department of Business and Professional Regulation, 32 Fla. L. Weekly 1393 (Fla. 3rd DCA 2007) (Opinion filed May 30, 2007)

The Department of Business and Professional Regulation filed an administrative complaint against Gonzalez, a licensed air conditioning contractor, seeking revocation of his license. The complaint alleged that Gonzalez had failed to satisfy a judgment entered against him within ninety days as required by statute. Gonzalez requested a formal administrative hearing, and the Department denied that request. It found that there were no disputed issues of material fact. After an informal hearing, the Department entered a final order revoking Gonzalez's license.

On appeal, the court affirmed. It held that Gonzalez was not entitled to a formal hearing because he did not dispute the existence of a judgment against him or that it had not timely been satisfied.

Nicks v. Department of Business and Professional Regulation, 32 Fla. L. Weekly 1183 (Fla. 5th DCA 2007) (Opinion filed May 4, 2007)

Nicks appealed from a final order of the Construction Industry Licensing Board finding that Nicks had waived his right to a hearing challenging an administrative complaint. Nicks was initially notified that a complaint had been filed with the agency against him, asserting that he had performed substandard roofing work and then refused to correct that work unless the client paid him more money. Nicks provided information to the agency investigator, which he asserted established that there was simply a dispute as to the scope of work required by the contract. The agency found probable cause to take disciplinary action and served Nicks with an administrative complaint, including an election of rights form. The election of rights form stated that failure to respond "may be deemed a waiver of the rights" to seek a hearing. Nicks did not return the election of rights form within the 21-day period specified therein. He alleged on appeal, however, that he had telephoned the agency and asked if the information he had previously provided would be sufficient to contest the charges in the complaint. He further asserted that he was told that he did not have to return the election of rights form but could, instead, rely on the initial information.

On appeal, the court reversed and remanded. It held that the allegations that Nicks had been misled by an agency employee and the unclear language in the election of rights form stating that his rights "may" be waived could constitute equitable tolling. The matter was remanded to the agency for a hearing on the factual basis for the equitable tolling argument. Alternatively, the court stated that the agency could simply accept the allegations and forward the matter to the Division of Administrative Hearings for a hearing on the merits.

Lassor v. Agency for Persons With Disabilities, 32 Fla. L. Weekly 1190 (Fla. 2d DCA 2007) (Opinion filed May 4, 2007)

Lassor sought an administrative hearing to challenge the adequacy of services provided to her as a person with disabilities. The Agency dismissed her petition, holding that she was not entitled to a hearing.

On appeal, the court affirmed. It held that Lassor's substantial interests were not affected by her dissatisfaction with the adequacy of services being provided, although she would have been entitled to a hearing if the Agency had denied her services or reduced the scope of such services.

Survivors Charter Schools, Inc. v. School Board of Palm Beach County, 32 Fla. L. Weekly 670 (Fla. 4th DCA 2007) (Opinion filed July 11, 2007)

The Palm Beach County School Board (the "Board") took action to immediately terminate two charters for schools operated by Survivors Charter Schools, Inc. ("Survivors"), one in West Palm Beach and one in Boynton Beach. The charters were terminated pursuant to Paragraph J of the charter agreements and Section 1002.33(8), Florida Statues. Paragraph J provided that the Board could immediately terminate the charter for good cause upon twenty-four hours notice. The statutory provision allowed for immediate termination but did not specify any timeframe for notification to the charter school.

After receiving an audit report with unfavorable findings regarding the two schools, the Board published a notice on January 23, 2006, calling a special meeting for January 25 to consider the findings. A notice of the Board's intent to immediately terminate the charters was hand delivered to the two schools on January 24. At the meeting, the Board decided to immediately terminate both charters. The schools appealed that decision to the Charter School Appeal Commission ("CSAC"). The CSAC, following an informal hearing, upheld the immediate termination of one of the schools, but not the other. It held that the Board had competent substantial evidence to support the severity of the audit report for both schools. Survivors then appealed to the State Board of Education. That Board found that the charters for both schools should be immediately terminated.

On appeal to the District Court, the issue presented was whether the provisions of the Administrative Procedure Act should apply to the termination process below. The court considered the provisions of sections 120.569 (relating to administrative proceedings) and 120.525 (relating to public meetings). It attempted to reconcile the requirements of the APA to Chapters 1001 and 1002, Florida Statutes, relating to school governance. In particular, the court noted that section 1002.33 specifically exempted the appeal to the CSAC and State Board of Education from the APA. There was no corresponding exemption for the decision of the School Board. Having concluded that the APA applied to the Board's actions, the court addressed what APA protections should apply. In particular, the court struggled with an apparent inconsistency between the fourteen-day notice requirement of section 120.569(2)(b), and the forty-eight-hour notice requirement in Paragraph J of the charter agreement. The court concluded that the Board could terminate a charter forty-eight hours after a hearing at which good cause is demonstrated. The Board must provide the charter school with fourteen days notice before holding the hearing to determine good cause, however.

[Note: The court incorrectly states that the APA does not provide for an emergency procedure where a person's substantial interests are to be determined, failing to recognize the existence of section 120.569(n), Florida Statutes.]

Licensing

Bemenderfer v. Department of Business and Professional Regulation, 32 Fla. L. Weekly 1231 (Fla. 4th DCA 2007) (Opinion filed May 9, 2007)

An administrative complaint was filed against Bemenderfer, a licensed real estate broker, alleging five counts of technical accounting violations. After a formal hearing, the administrative law judge recommended dismissal of all except two counts. The recommended order proposed a penalty of one year suspension of her license, one year of probation, and a penalty. The agency filed a number of exceptions to the recommended order, all of which were adopted by the Florida Real Estate Commission ("FREC"). The final order modified the

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recommended order, reweighing evidence and reinstating all counts to the complaint. However, FREC, on advice of counsel, reduced the suspension to ninety days, finding that a lengthier suspension would be a hardship.

On appeal, Bemenderfer represented herself. The agency requested that the court relinquish jurisdiction to allow it to correct errors. The court granted the request and set a timeframe for the corrections to be made. Bemenderfer was unable to attend the hearing before FREC, as she had surgery scheduled. However, FREC determined that it would proceed without her because of the deadline imposed by the court. Before FREC, counsel requested that the final order be vacated and a new order entered adopting all of the administrative law judge's findings and conclusions and suspending the license for ninety days. At this time, counsel also stated that the guideline penalty was eight years, whereupon a commission member made a motion to increase the penalty to eight years. That motion passed.

The appellate court reversed the order. It held that the motion for relinquishment did not put the licensee on notice that a modification in the penalty would be sought. Moreover, the agency had never sought an eight-year suspension of the license in the original proceeding.

Rulemaking
Vale v. McDonough, 32 Fla. L. Weekly 1212 (Fla. 1st DCA 2007) (Opinion filed May 8, 2007)

Vale, a prisoner, sought a refund from the Department of Corrections for funds taken from his prison account to pay for copying his legal records. His request was based on a determination in another proceeding invalidating a Department rule on payment of copying costs. That request was denied.

On appeal, the denial was affirmed. The court declined to apply the invalidation of the rule retroactively, citing *Board of Optometry v. Florida Society of Ophthalmology*, 538 So. 2d 878 (Fla. 1st DCA 1988). The court concluded that it would be too chaotic to apply a determination of the invalidity of a rule retroactively.

Declaratory Statements
Adventist Health System/Sunbelt, Inc. v. Agency for Health Care Administration, 32 Fla. L. Weekly 1124 (Fla. 1st DCA 2007) (Opinion filed April 30, 2007)

Adventist Health System/Sunbelt, Inc. ("Adventist") filed a petition for a declaratory statement with the Agency for Health Care Administration ("AHCA") requesting a determination of whether an oncology group it proposed to form and own would be prohibited from billing certain patients for radiation treatment under the Patient Self-Referral Act. Adventist asserted that either it or a controlled subsidiary would be a member of the group and have a significant ownership interest. AHCA dismissed the petition, holding that Adventist had presented a hypothetical scenario that might never occur.

On appeal, the court reversed. It held that the fact that the oncology group had not yet been formed did not mean that Adventist was not a substantially affected person. Instead, the court noted that the purpose of the declaratory statement provisions was to allow persons to seek an interpretation of law by the agency in advance of choosing a course of action.

Appeals
Cocktail Plus v. Department of Business and Professional Regulation, 32 Fla. L. Weekly 1610 (Fla. 1st DCA 2007) (Opinion filed June 29, 2007)

On appeal of an amended final order of the Department of Business and Professional Regulation, the court issued a show cause order as to the timeliness of the appeal. Upon the appellant's response, the court held that the time for the appeal did not begin to run upon filing of the initial "final" order of the agency with the agency clerk, as it was not actually final. The agency had failed to make explicit rulings on the exceptions to the recommended order. Accordingly, an amended final order was filed.

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

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

Agency Snapshot
Department of Health

This agency snapshot was prepared by the Department of Health's General Counsel's Office.

The present Department of Health opened for business on January 1, 1997, the day following the last day of the Department of Health and Rehabilitative Services ("HRS"). *See* Ch. 96-403, Laws of Florida. The Department of Health's mission is to promote and protect the health of all residents and visitors to Florida. Agencies created over the past sixteen years to assume other duties of the former HRS are the Agency for Health Care Administration, the Department of Juvenile Justice, the Department of Elder Affairs, the Department of Children and Family Services, and the Agency for Persons with Disabilities. Coinciding with the anniversary of the Department of Health's first decade of service is the Legislature's creation of the position of State Surgeon General, who now serves as the Department's chief executive officer.

The Department of Health administers the State's public health programs through the county health departments and ten headquarters divisions, including Environmental Health; Disease Control; Family Health Services; Children's Medical Services; Emergency Medical Operations; Health Access and Tobacco; and Disability Determinations. The Department of Health administers the health practitioner regulation program through its division of Medical Quality Assurance (MQA). The Department of Health and the twenty-two collegial boards housed within the Department regulate forty-one health care professions and occupations. Each board has adjudication and rulemaking authority for the professions and occupations it regulates. A board is composed of members of the regulated profession and consumer members appointed by the Governor, and a board has its own counsel from the Attorney General's Office. The Department of Health's General Counsel's Office consists of the Prosecution Services Unit of forty-six lawyers, which prosecutes disciplinary violations by health practitioners, and another thirty-four lawyers, including the headquarters' staff lawyers and the lawyers stationed throughout the State representing the county public health departments.

Head of the Department:
Ana M. Viamonte Ross, M.D., M.P.H.
State Surgeon General
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Hours of Operation:
8:00 a.m.—5:00 p.m.
Monday—Friday

General Counsel:
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Prather Building—General Counsel
4052 Bald Cypress Way, bin A-02
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Josefina "Josie" M. Tamayo received her undergraduate degree from Emory University and her law degree from Georgia State University. She became a member of the Florida Bar in 1985, and has since served in many capacities in state government.

Ms. Tamayo served as General Counsel for the Department of Children and Families from 1998 to 2005. She then served as General Counsel for the Department of Business and Professional Regulation from November 2005 to March 8, 2007. She also served as an Assistant State Attorney for numerous years in Hillsborough and Sarasota counties.

Ms. Tamayo has been a guest lecturer for the Media Section of the Florida Bar, the Dependency Court Improvement Summit, as well as the Pat Dore Administrative Law Conference. She has also served on various Supreme Court committees. She has extensive experience in managing large professional organizations.

Number of Lawyers on Staff: 80

Kinds of Cases:
The largest volume of cases handled by the staff attorneys are the disciplinary proceedings resulting from complaints against health care practitioners. Typically, a disciplinary case is litigated at the Division of Administrative Hearings ("DOAH"), with the appropriate board entering a final order. However, an emergency order suspending the license is entered early on if the practitioner poses an immediate danger to the public's health, safety, or welfare. Other kinds of administrative cases include denials of applications for licensure, rule challenges, bid protests, and citations for unsanitary conditions that may pose a threat to public health. Finally, there is a category of benefits cases that are excepted from the general requirement that disputed material facts cases must be litigated at DOAH. The benefits programs included in this exception are the Special Supplemental Nutrition Program for Women, Infants, and Children ("WIC"); the Child Care Food Program; the Children's Medical Services Program; and the Brain and Spinal Cord Injury Program.

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APA Interaction:

Most cases handled by the general counsel's office are adjudicatory proceedings under sections 120.569 and 120.57(1) and (2) and rule challenge proceedings under section 120.56. The exception for the benefits programs is found at section 120.80(15).

Practice Tip:

A lawyer representing a health care practitioner who may be the subject of a disciplinary investigation must carefully familiarize him/herself with section 456.073, Florida Statutes, and the applicable rules governing the specialty. The lengthy statutory provision describes the disciplinary process from informal complaint through investigation and disposition. The statute provides the lawyer with opportunities for legal and factual input into the process.

Minutes — Administative Law Section Executive Council

February 9, 2007
Melhana Plantation, Thomasville, GA

I. CALL TO ORDER: Executive Council Chair-Elect Andy Bertron called the meeting to order at approximately 9 a.m.

Present: Allen R. Grossman, Clark Jennings, Bruce Lamb, Debby Kearney, Donna Blanton, Bill Williams, Li Nelson, Kent Wetherell, Linda M. Rigot, Cathy Sellers, Scott Boyd, Wellington Meffert, Andy Bertron, Seann Frazier, Dave Watkins, Larry Sellers (Board of Governors liaison) and Jackie Werndli (Section administrator)

Absent: Booter Imhof, Cathy Lannon, Mary Ellen Clark, Cynthia Miller, Elizabeth McArthur

II. PRELIMINARY MATTERS

The minutes of meetings on September 9, 2006, and January 12, 2007, were approved.

There was extended discussion of the Section's Unaudited Statement of Operations and the new allocation of expenses by the Bar. It is not yet clear how the Section's finances will be affected by this change. The Executive Council agreed to wait and see what the numbers look like at the end of the fiscal year. It was reported that the Board of Governors is willing to address the formula if necessary.

Chair-elect Andy Bertron reported that Chair Booter Imhof will contact Executive Council members whose terms are expiring to see if they wish to continue serving. Booter also has reactivated the Nominating Council. Andy also noted that Booter has written a strong "Chair's column" for the Newsletter about the Bar's proposed new allocation of expenses and the potential impact on the Section.

III. COMMITTEE/LIAISON REPORTS

There was discussion about the administrative law CLE program conducted in conjunction with the Young Lawyers Division. The program was a success, with about 75 people attending in Tallahassee and more than 80 in South Florida for the video replay. Unfortunately, none of the revenues come back to the Administrative Law Section because the course is classified as "basic." There was general discussion about whether to do future programs with the YLD.

Debby Kearney reported that a number of articles are lined up for the Bar Journal. Linda Rigot reported that the Administrative Practice Manual is under revision and articles were in the process of being submitted to the Bar.

There was discussion about several bills that may be proposed in the 2007 session affecting chapter 120. Scott Boyd discussed two bills that began as recommendations from the Joint Administrative Procedures Committee. One is expected to address unadopted rules, and the other relates to incorporation by reference. It was agreed that the bills will be monitored through the session. Linda Rigot said the Senate is looking at exemptions from chapter 120 and has asked agencies where their exemptions are and whether they are still needed. There was discussion about whether all exemptions from chapter 120 should be placed in chapter 120 and whether we ought to advocate that as a Section. It was generally agreed that some exceptions are appropriate in other parts of the Florida Statutes, though it would be useful if they could be referenced in chapter 120. Seann Frazier made a motion that the Executive Council advocate that all exemptions from chapter 120 be included for informational purposes within chapter 120. The motion carried, with Debby Kearney and Scott Boyd abstaining.

Kent Wetherell reported that the Section now has 1200 members. There was discussion about creating a listserv on the Section's website. It was agreed that the listserv initially be used only for outward communication from the Council to members. Members would receive email communication from the Section through the listserv, but would not be able to respond. Members would have the option of opting out if they did not wish to receive the emails.

Linda Rigot reported that the Uniform Rules are now available on Westlaw, Lexis, and the DOAH website. There was discussion about some changes made to the rules by the Administration Commission that were not recommended by the Section.

Larry Sellers reported that the Board of Governors is looking at increased regulation of attorney websites at the request of the Florida Supreme Court. He also said the Board is encouraging lawyers to apply if they wish to serve on a Judicial Nominating Commission.

Cathy Sellers discussed liaison activities with the law schools. She noted that a panel discussion on administrative law at Florida State College of Law in October was attended by about 35-40 people. Both Barry and FAMU law schools have expressed interest in a similar program. Cathy's committee also is working on projects relating to a speaker's bureau to talk to law school classes, a brown bag lunch series at the law schools, and mentoring programs for law students.

There was discussion of proposed changes to the appellate rules relating to the automatic stay provision for state agency appeals. The proposed changes, which eliminate the stay, still need to be approved by the Board of Governors and the Florida Supreme Court.

The Executive Council's next meeting will be Thursday afternoon on June 28 at the Orlando World Center Marriott in conjunction with the Bar Convention.

The regular meeting was adjourned at 12:38 p.m. and the Executive Council began its Long-Range Planning Retreat.

IV. LONG-RANGE PLANNING RETREAT

There was a lengthy discussion of Continuing Legal Education programs and how best to focus our resources. It was agreed that the Pat Dore Conference would be held in the Fall every other year. The next one will be in the Fall of 2008. The "Practice Before DOAH" CLE was discussed, and it was generally agreed that sponsoring this program with the Young Lawyers Division would be beneficial.

Andy Bertron asked how best our CLE programs can reach lawyers outside of the Tallahassee area. It was agreed that working on programs with the YLD helps achieve this goal, as beginning lawyers are required to take a certain number of basic classes. Young lawyers practicing in other parts of Florida may be interested in an overview course of administrative law at the basic level. The Council agreed to talk further with the YLD about potential joint sponsorships of CLE programs.

The group discussed the new certification program and what role the Executive Council might play in CLE programs preparing certification applicants for the exam and in sponsoring advanced courses that certified lawyers will need to take. The exam this year will be held in October; in subsequent years it will be held in May. Bill Williams, chair of the Certification Committee, reported that 60% of the test will be based on Florida law, and 40% will be based on federal law. Of the Florida section, 50% will have an administrative law focus, while the remaining 50% will be on non-administrative government issues, such as the Sunshine Law and public records law. It was agreed that the section should discuss CLE programs related to certification with the Environmental and Land Use Section and with the Government Lawyers section.

The Council agreed to work toward the following CLE schedule: Fall 2007, Practice Before DOAH; March 2008, certification exam review course; Spring 2008, possible basic administrative law course in conjunction with the YLD; Fall 2008, Pat Dore Conference; March 2009, certification exam review course; Fall 2009, Practice Before DOAH or something similar.

The meeting was adjourned at 2:26 p.m.

Respectfully submitted,

Donna E. Blanton

Editor's note: These minutes were inadvertently left out of an earlier edition of this newsletter. They are being published now to keep the membership fully apprised of Executive Council discussions and decisions.

Section Budget/Financial Operations

	2006-2007 Budget	2006-2007 Actual	2007-2008 Budget
REVENUE			
Dues	28,125	27,147	27,500
Affiliate Dues	125	0	50
Dues Retained by Bar	(19,788)	(19,728)	(19,290)
Administrative Fee Adjustment	650	0	0
Online CLE	0	92	700
CLE Courses	5,000	10,171	5,000
Audiotape Sales	0	4,750	0
Course Material Sales	5	0	0
Section Service Programs	2,000	0	5,000
Interest	10,004	15,967	12,106
Miscellaneous	150	0	150
TOTAL REVENUE	**26,271**	**38,399**	**31,216**
EXPENSE			
Staff Travel	1,190	392	1,306
Postage	200	101	208
Printing	2,700	120	2,808
Officer Expense	500	0	500
Newsletter	2,500	4,238	3,000
Membership	500	0	500
Supplies	50	0	50
Photocopying	150	95	156
Officer Travel	2,500	390	2,500
Meeting Travel	3,000	0	3,000
CLE Speaker Expense	100	0	100
Committees	500	29	500
Council Meetings	600	396	600
Bar Annual Meeting	1,700	1,821	1,950
Section Service Programs	5,000	320	5,000
Retreat	4,500	1,436	4,500
Public Utilities	500	0	500
Awards	600	469	600
Writing Contest/Law School Liaison	4,900	1,175	4,900
Website	6,000	335	3,000
Legislative Consultant	5,000	0	5,000
Council of Sections	300	0	300
Misc.	500	2	500
Operating Reserve	4,506	0	4,338
TFB Support Services	1,575	2,145	1,902
TOTAL EXPENSE	**49,571**	**13,464**	**47,718**
BEGINNING FUND BALANCE	**142,919**	**174,359**	**172,945**
PLUS REVENUE	**26,271**	**38,399**	**31,216**
LESS EXPENSE	**(49,571)**	**(13,464)**	**(47,718)**
OTHER COST CENTER	**(5,605)**	**0**	**(5,400)**
ENDING FUND BALANCE	**114,014**	**199,294**	**151,043**

SECTION REIMBURSEMENT POLICIES:
General: All travel and office expense payments are 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) or 5.61(e)(6) which is available from Bar headquarters upon request.

Protest-Proof Procurements?: A Commentary on *Mae Volen Senior Center, Inc. v. Area Agency on Aging Palm Beach/Treasure Coast, Inc.*

by Amy W. Schrader

In the *Mae Volen* case decided by the Fourth District Court of Appeal on August 8, 2007,[1] the State Department of Elder Affairs ("DOEA") found itself arguing against affording a bidder, Mae Volen Senior Center, Inc. ("Mae Volen"), the right to challenge an intended award of a contract pursuant to a Request for Proposal ("RFP") issued by an Area Agency on Aging ("Area Agency") for provision of services to Florida's elderly population. Mae Volen was appealing an Administrative Law Judge's ruling that an Area Agency, subject to DOEA's control, is not an "agency" for purposes of Florida's Administrative Procedure Act ("APA").[2] The appellate court disagreed, holding that the Area Agency meets the definition of "agency" in section 120.52(1)(b), Florida Statutes.[3] The case raises interesting questions about whether state agencies can delegate their public procurements to "private" entities, thereby insulating them from bid protests under the APA.

Area Agencies can be either public or non-profit private corporations designated by DOEA for the purpose of coordinating and administering DOEA programs to provide services to the elderly through contracting agencies within a state-designated Planning and Service Area ("PSA").[4] Area Agencies serve the dual function in Florida of administering both DOEA programs and programs under the federal Older Americans Act ("OAA").[5] Florida has eleven Area Agencies operating throughout the state.

Area Agencies are directed in section 430.203(9), Florida Statutes, to designate Lead Agencies to provide services pursuant to the state's Community Care for the Elderly program.[6] The RFP issued by the Area Agency for Palm Beach/Treasure Coast also sought Lead Agency services for the Home Care for the Elderly program and the Alzheimer's Disease Initiative, two other DOEA programs.[7] Area Agencies are required to designate a Lead Agency for each Community Care Service Area within the PSA through the RFP process unless an Area Agency, through consultation with DOEA, "exempts from the competitive bid process any contract with a provider who meets or exceeds established minimum standards as determined by the department [DOEA]."[8] DOEA, however, has not established minimum standards for exempting providers from the competitive bid process.

Procurement Protests Under Section 120.57(3), Florida Statutes

The Florida APA, in section 120.57(3), Florida Statutes, provides a procedure by which a non-winning bidder can challenge an agency's notice of intent to award a contract to a competing bidder through a contract solicitation process. Among the reasons an agency's decision to award a contract can be invalidated are the agency's failure to properly score proposals, failure of the winning proposal to contain mandatory components, and conflicts of interest in the evaluation process.

Section 120.57(3) requires an agency to provide all bidders submitting proposals in response to an RFP with a notice of intent to award the contract, which sets forth the requirements for protest of the intended award. Specifically, bidders wishing to challenge the notice of intended award must provide the agency with a notice of protest within seventy-two hours of the posting and must file a formal written protest with the agency, along with a bond in an amount specified by the agency,[9] within ten days of the notice of protest.[10] Upon receipt of the formal written protest, the agency stops the contract award process.[11] The agency and the protesting party then have seven days to attempt to resolve the protest by mutual agreement.[12] If no resolution can be reached, the agency is required to forward the formal written protest to the Division of Administrative Hearings ("DOAH") for a hearing before an administrative law judge ("ALJ") pursuant to section 120.57(1), Florida Statutes.[13] The ALJ is charged with conducting a de novo review of the decision to award the contract to determine whether it is contrary to the agency's governing statutes, rules or the solicitation document. The protesting bidder must establish that the agency's proposed award is "clearly erroneous, contrary to competition, arbitrary, or capricious" to invalidate the intended award.[14]

The purpose behind affording non-winning bidders the opportunity to challenge an agency's intended contract award is to ensure fair competition for state contracts and to ensure that the state receives the best value for taxpayer money. Chapter 287, Florida Statutes, governs public procurement of commodities and contractual services in Florida. Section 287.001, Florida Statutes, sets forth the Legislature's intent that public procurements be both ethical and fair:

> The Legislature recognizes that fair and open competition is a basic tenet of public procurement; that such competition reduces the appearance and opportunity for favoritism and inspires public confidence that contracts are awarded equitably and economically . . . *It is essential to the effective and ethical procurement of commodities and contractual services that there be a system of uniform procedures to be utilized by state agencies in managing and procuring commodities and*

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> *contractual services*; that detailed justification of agency decisions in the procurement of commodities and contractual services be maintained; and that adherence by the agency and the vendor to specific ethical considerations be required.[15]
>
> The Florida Supreme Court has also broadly interpreted public procurement statutes, stating:
>
> [P]ublic bid statutes serve the object of *protecting the public against collusive contracts and prevent favoritism* toward contractors by public officials and tend to secure fair competition upon equal terms to all bidders, [and] they remove temptation on the part of public officers to seek private gain at the taxpayers' expense, are of highly remedial character, and *should receive a construction always which will fully effectuate and advance their true intent and purpose* and which will avoid the likelihood of same being circumvented, evaded, or defeated.[16]

Mae Volen's Protest of the Area Agency's Intended Award Under the RFP

On February 17, 2006, the Area Agency for PSA 9 (covering Indian River, Martin, Okeechobee, Palm Beach and St. Lucie counties) issued an RFP to designate Lead Agencies to provide services to carry out state programs providing services to the elderly. These state programs are managed by the Area Agency and funded completely by DOEA. Mae Volen and Ruth Rales Jewish Family Service of South Palm Beach County, Inc. ("Ruth Rales") both submitted responses to the RFP to provide Lead Agency Services in one of the Community Care Service Areas encompassed in PSA 9. After evaluating the responses, the Area Agency recommended an award to Ruth Rales.

The Area Agency provided Mae Volen with a notice of intent to award the contract as required by agencies under section 120.57(3), Florida Statutes. Specifically, the Area Agency's notice provided that pursuant to the Florida Administrative Code, any affected entity could file a written notice of protest with the Area Agency within 72 hours after receipt of notice and within ten calendar days could file a formal written protest with the Area Agency to be accompanied by a protest bond. The Protest Guidelines included in the notice of intent to award further adopted the requirements of section 120.57(3), Florida Statutes, and rule 28-106.201, Florida Administrative Code, relating to formal written protests, and provided that protests containing disputed issues of material fact would be forwarded to DOAH.

In accordance with these procedures, Mae Volen filed a formal written protest of the intended award alleging, among other things, that there was a fundamental error in scoring. Specifically, Mae Volen alleged that the Area Agency failed to give it any points for its proof of workers' compensation insurance. Had Mae Volen been appropriately scored for this item, it would have received the most points and presumably have been the intended contract awardee. The Area Agency accepted Mae Volen's protest and bond and forwarded the protest to DOAH for hearing on the merits. However, DOEA intervened in the DOAH case, asserting that the administrative proceeding should be dismissed for lack of subject matter jurisdiction because the Area Agency was not an "agency" for the purposes of Chapter 120 and that DOAH thus lacked jurisdiction. The ALJ entered an order dismissing the bid protest on this basis and Mae Volen filed its appeal.

Are Area Agencies "Agencies" Under the APA?

The central issue on appeal was whether an Area Agency is an "agency" for the purposes of Chapter 120, Florida Statutes. Section 120.52(1)(b), Florida Statutes, sets forth a list of entities subject to Florida's APA. This list includes, but is not limited to: each state officer and state department, authority, board or commission (when acting pursuant to statutory authority derived from the Legislature), regional planning agency, multi-county special district, and educational unit.[17] Section 120.57(3)(g), Florida Statutes, further adopts the definitions in section 287.012 as applicable to bid protests under Chapter 120. Section 287.012(1), Florida Statutes, defines the term "agency" as "any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government."[18] Mae Volen asserted that an Area Agency is in fact an "agency" subject to Florida's procurement laws and the APA because it is a "unit of organization" designated by DOEA to carry out DOEA's programs under its supervision pursuant to Florida Statutes, the Florida Administrative Code, and DOEA guidelines.

Where there is uncertainty regarding agency status, Florida courts have employed two tests in determining whether an entity is an "agency" for Chapter 120 purposes.[19] These are: 1) whether the entity performs traditional governmental functions ("functional test"); and 2) whether the entity is operating in multiple counties in Florida ("territorial test").[20] The Legislature has determined that providing certain services to elders is a state function and has charged DOEA with the responsibility for designated programs. Specifically, DOEA is to "[s]erve as the primary state agency responsible for administering human services programs for the elderly" and to "[o]versee implementation of federally funded programs and services for the state's elderly population."[21] DOEA has been given statutory authority under various provisions of Chapter 430 to utilize Area Agencies to perform its contracting and administrative functions relative to DOEA-sponsored programs for the elderly.[22] DOEA implemented this statutory authority and delegates many of its duties to Area Agencies by adopting a comprehensive set of administrative rules governing the Area Agencies, including rules requiring them to adhere to state procurement laws.

In addition to performing traditional agency functions, the Area Agency satisfies the territorial test for determining whether an entity is an "agency" for Chapter 120 purposes because it operates in multiple counties. Only recently, the Fifth District Court of Appeal found an entity's

scope of operation significant in determining that the entity was not in fact an "agency" subject to Chapter 120, Florida Statutes. In *Coastal Fuels Marketing, Inc. v. Canaveral Port Authority*,[23] the court held that the Canaveral Port Authority, an independent special district performing governmental functions, was not subject to the APA because it operated solely in Brevard County. Like a city or municipality, an entity operating within the boundaries of a single county will not be subject to the APA unless expressly provided by the Legislature or judicial decision.[24] The court contrasted this decision with its opinion in *Orlando-Orange County Expressway Authority v. Hubbard Construction Company*,[25] in which it determined that the entity at issue was an "agency" under Chapter 120 because its jurisdiction encompassed more than one county. Under the analysis in *Coastal Fuels*, the Area Agency would certainly qualify as an "agency" under the "territorial test" because it covers a five county area.

It also appears that prior to DOEA's intervention in Mae Volen's bid protest, the Area Agency considered itself to be subject to Chapter 120. This is evidenced by its actions in providing Mae Volen with a notice of intent to award as required under section 120.57(3)(a), and then forwarding Mae Volen's protest to DOAH for adjudication. The Area Agency's presumption that its procurement was subject to the requirements of Chapters 120 and 287, Florida Statutes, appears well-founded upon review of the rules adopted by DOEA governing Area Agencies. Specifically, DOEA's rules impose the following requirements on Area Agencies: 1) they must utilize competitive bidding procedures in accordance with state and federal regulations;[26] 2) they have the responsibility of contracting for Lead Agency and core services according to manuals, rules and contract procedures of DOEA;[27] and, perhaps most importantly, 3) they are required to "[c]omply with State of Florida procedures regarding solicitation and execution of agreements with providers of services."[28]

DOEA's position, however, as intervenor in Mae Volen's bid protest and in the appeal, was that DOAH lacks jurisdiction over procurements by Area Agencies because administrative hearings in bid protests under sections 120.569 and 120.57, Florida Statutes, are limited to matters involving "state agency" decisions or intended decisions. DOEA argued that because Mae Volen's protest did not involve a state agency decision or intended decision, DOAH lacked jurisdiction over the dispute under section 120.65(4), Florida Statutes. In support of this interpretation of "agency," DOEA cited section 430.203(1), Florida Statutes, which defines an "Area Agency on Aging" as "a public or non-profit private agency . . . designated by the [D]epartment . . ." DOEA contended that the fact that "agency" is in the title does not make Area Agencies "agencies" under the definitions in Chapters 120 and 287, Florida Statutes. DOEA also cited *Vey v. Bradford Union Guidance Clinic, Inc.*,[29] for the proposition that a private entity does not become a state agency simply by providing services to a state agency. At issue in the Vey case was whether a private mental health services clinic contracting to provide services through the state Mental Health Board was an "agency" for the purpose of Chapter 120, Florida Statutes. The First District Court of Appeal upheld the ALJ's determination that the private clinic was not an "agency" simply because it received state funds. The court found it persuasive that the clinic was an independent contractor authorized to receive money for its services both from the state and private sources.[30]

In *Vey* and other similar cases cited by DOEA, it is clear that the entity contesting "agency" status was simply providing services to a state agency and not acting in its stead. The Area Agency, charged with agency status in Mae Volen's appeal, however, was in fact carrying out functions delegated to DOEA by the Legislature. For example, section 430.502(4), Florida Statutes, provides: "Pursuant to the provisions of s. 287.057, [DOEA] may contract for the provision of special model day care programs in conjunction with the memory disorder clinics." Section 430.502(5), Florida Statutes, further provides: "Pursuant to s. 287.057, [DOEA] shall contract for the provision of respite care." Instead of contracting directly for these services, DOEA has adopted administrative rules allowing for Area Agencies to conduct procurements on its behalf.[31] Thus, DOEA has effectively delegated its duty to contract with service providers to Area Agencies.[32] It is incongruous that a bidder in a DOEA procurement would be afforded Chapter 120 rights, including entitlement to a formal hearing at DOAH, while a bidder participating in a procurement conducted by an Area Agency for the exact same services would be without remedy from a faulty procurement.

The Appellate Court Decision

The Fourth District Court of Appeal concluded that Area Agencies are in fact "agencies" for purposes of Chapter 120 and that DOAH indeed does have jurisdiction over Mae Volen's bid protest.[33] In reaching this conclusion, the Court cited section 20.41, Florida Statutes, under which the Legislature provided in pertinent part:

> (2) [DOEA] shall plan and administer its programs and services through planning and service areas as designated by the department.
>
> * * *
>
> (6) In accordance with the federal Older Americans Act of 1965, as amended, the department shall designate and contract with area agencies on aging in each of the department's planning and service areas. Area agencies on aging shall ensure a coordinated and integrated provision of long-term care services to the elderly and shall ensure the provision of prevention and early intervention services. The department shall have overall responsibility for information system planning. The department shall ensure, through the development of equipment, software, data, and connectivity standards, the ability to share and integrate information collected and reported by the area agencies in support of their contracted obligations to the state.
>
> (7) *The department shall contract with the governing body, hereafter referred to as the "board," of an area agency on aging to fulfill programmatic and funding requirements.*

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> *The board shall be responsible for the overall direction of the agency's programs and services and shall ensure that the agency is administered in accordance with the terms of its contract with the department, legal requirements, established agency policy, and effective management principles.* The board shall also ensure the accountability of the agency to the local communities included in the planning and service area of the agency.[34]

In section 20.41(7), the Legislature specifically stated that the governing body of an Area Agency would be deemed a "board." This designation brings Area Agencies within the definition in section 120.52(1)(b), Florida Statutes, which includes "boards" in the definition of entities subject to Florida's APA.[35] The Court also concluded that the Area Agency here exercised authority in a multi-county area, lending further support to the conclusion that the Area Agency qualifies as an "agency" under Chapter 120. Had the Court failed to overturn DOAH's order that it lacked jurisdiction, DOEA would be allowed to contract with Area Agencies to procure services, many of which could otherwise be procured by DOEA, with no enforceable standards or guidelines governing the procurement.

Conclusion

At least in this case, it appears Mae Volen will be given its Chapter 120 rights to challenge the Area Agency's decision to award the contract under the RFP. Disappointingly, though, the Court did not reach the question of whether Area Agencies are functionally "agencies" under the APA. If DOEA or any other state agency can independently determine whether to procure certain services itself and be subject to Chapters 120 and 287, or instead choose to assign these procurements to other entities, agencies could effectively make the determination that certain procurements are insulated from review because they are not subject to administrative challenge. This surely could not have been the intent of the Legislature in Chapter 430, Florida Statutes, whereby it allowed DOEA to delegate some of its duties to Area Agencies.

Endnotes:

[1] *Mae Volen Senior Center, Inc. v. Area Agency on Aging Palm Beach/Treasure Coast, Inc.*, 2007 WL 2254587 (Fla. 4th DCA August 8, 2007). The opinion is not yet final, as DOEA has filed motions for rehearing, rehearing en banc, and certification.
[2] *Mae Volen Senior Center, Inc. v. Area Agency on Aging Palm Beach/Treasure Coast, Inc.*, Final Order of Dismissal for Lack of Subject Matter Jurisdiction, Case No. 06-2291BID (DOAH July 21, 2006).
[3] 2007 WL 2254587 at *2.
[4] § 430.203(1), Fla. Stat.
[5] 42 U.S.C. § 35.3025 (Older American's Act of 1965, as amended).
[6] §§ 430.201-.207, Fla. Stat.
[7] §§ 430.601-.606; 430.501-.504, Fla. Stat.
[8] §§ 430.203(9)(a), (b), Fla. Stat.
[9] §287.042(2)(c), Fla. Stat.
[10] §120.57(3)(b), Fla. Stat.
[11] The agency may only continue the contract award process where the agency head substantiates in writing that the contract award process must continue "to avoid an immediate and serious danger to the public health, safety, or welfare." §120.57(3)(c), Fla. Stat.
[12] §120.57(3)(b), Fla. Stat.
[13] This assumes the bidder has alleged disputed issues of material fact that are properly resolved in a formal hearing pursuant to section 120.57(1), Florida Statutes.
[14] § 120.57(3)(f), Fla. Stat.
[15] (Emphasis supplied.)
[16] *Liberty County v. Baxter's Asphalt & Concrete, Inc.*, 421 So.2d 505, 507 (Fla. 1982) *quoting Wester v. Belote*, 138 So. 721, 724 (Fla. 1931) (emphasis supplied.).
[17] § 120.52(1)(b), Fla. Stat. (2006).
[18] (Emphasis supplied.)
[19] *See Fla. Dep't of Ins. v. Fla. Ass'n of Ins. Agents*, 813 So. 2d 981(Fla. 1st DCA 2002) (adopting functional test in determining an entity qualifies as an "agency" where it performs traditional governmental functions); *Coastal Fuels Marketing, Inc. v. Canaveral Port Auth.*, 2007 WL 2065777 (Fla. 5th DCA July 20, 2007) (holding port authority was not an "agency" where it operated solely in one county); *Orlando-Orange County Expressway Auth. v. Hubbard Constr. Co.*, 682 So. 2d 566 (Fla. 5th DCA 1996) (holding expressway authority was an "agency" since it encompassed two or three counties); *cf. Fla. Gov. Council on Indian Affairs v. Tuveson*, 384 So. 2d 217, 218 (Fla. 1st DCA 1980) (An entity's status as a non-profit corporation does not impact its ability to be considered an "agency" under the APA.).
[20] *Orlando-Orange County Expressway Auth.*, 682 So. 2d at 566-67.
[21] §§ 430.03(1), (7), Fla. Stat.
[22] *See* notes 6 and 7, *supra.*
[23] 2007 WL 2065777 (Fla. 5th DCA July 20, 2007).
[24] *Id.*
[25] 682 So. 2d at 566-67.
[26] R. 58A-1.008, F.A.C.
[27] R. 58C-1.003(1)(a)16., F.A.C.
[28] R. 58D-1.005(2)(b), F.A.C.
[29] 399 So. 2d 1137 (Fla. 1st DCA 1981).
[30] *Id.* at 1139.
[31] *See, e.g.,* R. 58C-1.003(1), F.A.C. (allowing DOEA to directly administer community care service systems or to administer the program through an Area Agency).
[32] Mae Volen's appeal also raised a constitutional issue relating to a violation of the non-delegation doctrine. This subject is not addressed here.
[33] 2007 WL 2254587 at *2.
[34] *Id.* at *1 (emphasis supplied.)
[35] Interestingly enough, neither Mae Volen nor DOEA discussed in their briefs whether section 20.41 gave the Area Agency "agency" status under Chapter 120.

Amy W. Schrader *received her J.D. from Florida State University College of Law in 2001 and currently practices administrative law in the Tallahassee office of GrayRobinson, P.A.*

DUE PROCESS
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After receiving testimony and evidence from so many citizens and experts, the FWCC initially decided to study the matter further, and deferred adopting the rule to ban marine life feeding. However, during the summer of 2001, the now famous "Jesse Arbogast" shark attack occurred in Pensacola. In that tragic case, the young boy was wading in shallow water when he was attacked by a bull shark.[4] The shark grievously injured Jesse, causing him to lose a large amount of blood and, as a result, causing significant brain damage. The news media could not get enough of the story.[5]

To complicate matters, there were a large number of other shark attacks that same summer, almost all of them on surfers near New Smyrna Beach, and none of them within 100 miles of a shark feeding site.[6] Time magazine labeled 2001 as the "Summer of the Shark".[7] The Discovery Channel continued its highly popular "Shark Week" (now in its 20th year), which features sensational stories on sharks and their attacks on unsuspecting bathers.[8] As a result of the media exposure and resulting political pressure, the FWCC re-opened the rulemaking process. Within a matter of three months, but without taking any additional testimony or evidence, and without conducting any further public workshops, the FWCC voted to adopt a ban on the feeding of all marine life, including sharks, in Florida waters effective January 1, 2002.

Following established administrative law procedures, the Diving Equipment and Marketing Association ("DEMA"), the worldwide trade organization for the diving industry, in concert with more than 60 Florida divers and dive operators,[9] filed challenges to the proposed rule, both with the Division of Administrative Hearings ("DOAH") and the circuit court in Leon County (Case No. 01-CA-2553).

Attorneys for the FWCC immediately moved to dismiss the petition challenging the proposed rule at DOAH. Their argument was that because the proposed rule was promulgated pursuant to the FWCC's constitutional authority (Article IV, Section 9), rather than its statutory authority (Chapter 372, Florida Statutes), DOAH did not have jurisdiction. The administrative law judge assigned by DOAH agreed, and the petition challenging the proposed rule was dismissed.

In Leon County circuit court, in response to the nearly-identical complaint, FWCC lawyers filed a motion for summary judgment, along with a single supporting affidavit by the FWCC's reef fish expert. At the hearing on the motion, the circuit court judge stated that the test for challenging the proposed FWCC rule, since it was based upon the FWCC's constitutional authority, was the "rational basis test"- the least stringent test for an agency to meet, and the most difficult to overcome by a person challenging state action. The FWCC lawyers argued that proposed rules based upon the FWCC's constitutional authority are tantamount to statutes enacted by the Florida Legislature and are entitled to the same deference. The FWCC's argument meant, of course, that if it were able to present any "rational basis" for the proposed rule, then the court would have no choice but to grant the state's motion for summary judgment and dismiss the rule challenge.

That is exactly what happened. The circuit court judge denied all requests by the Plaintiffs that she conduct an evidentiary hearing and, even though the FWCC's affidavit was refuted by the affidavits of three experts in the field of shark feeding, the judge stated at the hearing, "I have no choice. Because a rational basis is evident, there is no dispute of material fact precluding summary judgment."

The divers appealed the trial court's decision to the First District Court of Appeal (DCA Case No. 04-0974). Attorneys for both parties submitted briefs, and oral argument was held before a three-judge appellate panel on January 19, 2005. During the argument, one judge stated that because the proposed rule was based on the FWCC's constitutional authority, the only test that could be applied was the rational basis test and, therefore, "the Appellants have to argue that no reasonable person sitting as trial judge could have reached the conclusion that the rule was rational." Within a week, on January 25, 2005, the First District issued a "per curium" opinion affirming the trial court's decision to dismiss the case. That opinion closed the courthouse doors on more than sixty plaintiffs, including several dive businesses located in Florida, and on the more than three million divers residing in Florida who may, at some time, be affected by a decision of the FWCC.

DUE PROCESS

When the FWCC was created in 1999, through a merger of the Florida Game and Fresh Water Fish Commission and the Florida Marine Fisheries Commission, Florida citizens were promised "due process" in the decision making of the newly formed FWCC. In fact, the very language adopted in the constitutional amendment states: "The commission shall establish procedures to ensure adequate due process in the exercise of its regulatory and executive functions."

The FWCC was created through the enactment of proposals considered and published by the 1998 Florida Constitution Revision Commission, in particular, Proposal 45[10] and Revision 5.[11] When Proposal 45 was first written (by the Constitution Revision Commission's Executive Committee and Commissioner William Clay Henderson), it did not include a provision requiring that the new Fish and Wildlife Commission conduct its affairs with adequate due process for the citizens.

The proposal that the new FWCC afford due process to those regulated was added by the Constitution Revision Commission's Legislative Committee, as a committee substitute for Proposal 45.[12] The committee substitute made it clear that members of the Constitution Revision Commission knew and understood the importance of granting only limited constitutional authority to such an all-encompassing new agency, and they expected that agency to adopt procedures that ensured due process for the citizens affected by its regulatory and executive functions. The constitutional amendment creating the FWCC went to the voters in 1998 with the due process requirement firmly affixed.

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DUE PROCESS
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In its brief and oral argument to the First District Court of Appeal, the lawyers for the FWCC frequently cited and relied upon the constitutional status of the now-superseded Game and Fresh Water Fish Commission. The Game and Fresh Water Fish Commission also was a constitutional agency (unlike its sister agency, the Marine Fisheries Commission, which had only statutory authority), but unlike the FWCC, the Game and Fresh Water Fish Commission was not required to adopt due process procedures in the exercise of its regulatory and executive functions. Regardless of the explicit due process requirement applicable to the FWCC, attorneys for the state argued that the FWCC had, in effect, inherited the Game and Fresh Water Fish Commission's powers to adopt "constitutional rules," and to sidestep the typical due process requirements that other agencies provide to persons whose interests are substantially affected by proposed agency rules. In their rulings on the issue, the courts and the FWCC appeared to ignore the "adequate due process" provision in Article IV, Section 9. No other explanation can account for the decision.

The importance of adequate due process in matters relating to the FWCC continued after the adoption of the constitutional amendment in 1998. In 1999, the Legislature adopted implementing legislation in the form of Senate Bill 864, a 194-page bill that merged the Game and Fresh Water Fish Commission and the Marine Fisheries Commission into the new FWCC (Ch. 99-245, Laws of.Florida).[13] Section 1 of that bill created section 20.331, Florida Statutes, establishing three separate provisions that underscored the concerns of the Legislature with the unparalleled grant of power to a single agency like the FWCC. The substantive due process provisions were enacted in subsection 20.331(6).[14]

First, section 20.331(6)(a) required that the FWCC "[s]hall implement a system of adequate due process procedures to be accorded to any party, as defined in s. 120.52, whose substantial interests will be affected by any action of the Fish and Wildlife Conservation Commission in the performance of its constitutional duties or responsibilities." The Legislature readily understood the importance of due process and the rights of its citizens to be able to challenge proposed rules of the Commission at the time of its very inception.

Second, section 20.331(6)(b) provides that the Legislature "encourage[d] the commission to incorporate in its process the provisions of s. 120.54(3)(c), F.S., when adopting rules in the performance of its constitutional duties or responsibilities."[15] The Legislature did not require the FWCC to adopt the provisions of section 120.56 for challenges to proposed rules, but again, understood the importance of providing adequate due process. The Legislature merely encouraged the adoption of these

New Bar password procedure outlined

Florida Bar members who don't already have a password to access restricted areas of the Bar's Web site will soon have an opportunity to select two methods to obtain one. A form will be mailed along with the annual membership fee statement enabling Bar members to instantly get a password to access members-only sections of the Bar's Internet Web site.

Communications Committee Chair-elect Richard Tanner presented details at the Board of Governors' recent meeting.

Having a password gives Bar members access to a variety of online services through the Bar's Web site, www.floridabar.org. Those include the Fastcase free legal research service, paying annual membership fees, changing their membership records such as their official Bar address, designating an inventory attorney for their practice, inquiring about their CLE credits, posting CLE credits for a course, and registering and paying for CLE courses.

Members who want an instant password must provide the Bar with their e-mail address and the last four digits of their Social Security number, Tanner said, using the form in the annual membership fee statement. Once the Bar has received that information, the member can instantly get a password online through the Bar's Web site by following the instructions.

Having the e-mail address and last four digits of the member's Social Security number enables the Bar to verify the specific member requesting the password, Tanner said.

Members who don't want to use the form will be able to use the current system. That system allows members to request a password online, but it is then mailed to them, a process that usually takes five to seven business days, he said.

In response to a question, Tanner said that under public records laws, members' e-mail addresses becomes public record once the Bar has them. However, the last four digits of their Social Security numbers remain confidential to prevent identity theft.

Members who already have a password for the restricted areas will see no change and can continue to use their current password, Tanner said. However, the new system can be used if they lose or forget their password or need to replace it for security reasons.

procedures in light of the battles that had been engendered over the years between the old Game and Fresh Water Fish Commission and the Legislature's enactment of general and special local acts impacting fishing and hunting.

Finally, in section 20.331(6)(d), the Legislature required that the FWCC report to the President of the Senate and Speaker of the House by December 1, 1999, on the development and implementation of its due process provisions. In response to the requirement that it report to the Legislature, the 1999 FWCC report stated that the FWCC had adopted due process procedures, by policy and not by rule, for the provision of due process to the citizens.

It was not until June 2006, when, for the first time, the FWCC adopted its due process procedures by rule. The rule incorporated — unchanged — the policy of not allowing challenges to rules based upon the FWCC's constitutional authority. In 2007, the Legislature finally required that the FWCC adopt its due process procedures by rule, rather than by policy (CS/HB 7173).[16]

To this day, what the FWCC has done to provide "adequate due process" for rules based upon the Commission's statutory authority, is to give affected persons the right to provide input into the rulemaking process before a proposed rule is published, and to allow challenges to the rule at DOAH after the rule is published. Thus, if a proposed rule is based on the FWCC's statutory authority, the rule can be challenged, an administrative law judge from DOAH assigned, and an evidentiary hearing conducted. Most importantly, the proposed rule does not go into effect until the rule challenge process is concluded. In other words, substantially affected persons are given their day in court. That is true due process.

Contrary to the procedure described above, if a proposed rule is based upon the Commission's constitutional authority, then the FWCC only allows affected persons to "participate" on the input side, i.e., to attend workshops and provide information and testimony, very much like what was done in the adoption of the marine life feeding rule. However, there is no meaningful provision in the "due process" procedures of the FWCC that provides a realistic remedy for substantially affected persons to challenge a constitutionally based rule, even if the evidence against the rule is overwhelming. As long as there is some scintilla of evidence to support the FWCC's view, some "rational basis," then it is, for all practical effect, fruitless to challenge that proposed rule either at DOAH or in circuit court.

In August 2006, in response to criticism, and an inquiry by at least two members of the Florida Legislature, the FWCC conducted a series of seven "Due Process Review Workshops." The workshops were billed as an opportunity for individuals and organizations to become familiar with and comment on FWCC due process procedures, specifically including the due process provisions for challenging the FWCC's rules based on constitutional authority. Not surprisingly, at its meeting on September 13-16, 2006, the FWCC members reviewed and adopted the final report prepared by its staff, which recommended that the agency not change its procedures, and continue its policy of limiting the standard that the FWCC must meet to uphold its rules based on constitutional authority to that of a rational basis.[17] Comments by Commission members focused entirely on improving the input-side of the equation and assuring that more citizens made their views known to the Commission before rules were adopted.[18] No meaningful avenue of relief was provided in the event the Commission ignored those views.

A simple analogy may be made to local law enforcement. If a citizen was told that he was to be charged with a criminal act, but would be entitled to "due process," he would likely and logically assume that he would have a right to a trial, the right to present evidence, and if the evidence was heavily in his favor, he would receive a favorable judgment. That same citizen would be appalled if he was told that "due process" meant only that the citizen had the right to "provide input" on the charges before they were actually filed but, once he was charged and arrested, would have no meaningful right to challenge that charge. If that were "due process," there likely would be rioting in the streets and immediate calls for justice.

When the people of Florida voted in 1998 to merge Florida's two wildlife commissions into the FWCC, and saw the language in the amendment that assured "adequate due process," they had no reason to believe that the FWCC would take the position that it could avoid any meaningful challenge to rules promulgated under its constitutional authority. In fact, other than for a few enlightened members of the Florida Legislature, those persons in the diving community, and those persons who have followed the endless battle regarding the net-ban amendment, there are few who know that a large and essential part of the actions of the FWCC face no realistic scrutiny.

The current FWCC system for challenging rules based on their constitutional authority is not what the framers of the Florida Constitution meant, is not what the people expected, is not what the Legislature intended, and is not adequate due process. The question is who has the ability and willingness to call for a change.

Endnotes:

[1] **68B-5.005 Divers: Fish Feeding Prohibited; Prohibition of Fish Feeding for Hire; Definitions.**

(1) No diver shall engage in the practice of fish feeding.

(2) No person shall operate any vessel for hire for the purpose of carrying passengers to any site in the saltwaters of the state to engage in fish feeding or to allow such passengers to observe fish feeding.

(3) For purposes of this rule:

(a) "Diver" means any person who is wholly or partially submerged in the water, and is equipped with a face mask, face mask and snorkel, or underwater breathing apparatus.

(b) "Fish feeding" means the introduction of any food or other substance into the water by a diver for the purpose of feeding or attracting marine species, except for the purpose of harvesting such marine species as otherwise allowed by rules of the Fish and Wildlife Conservation Commission.

Specific Authority Art. IV, Sec. 9, Fla. Const. Law Implemented Art. IV, Sec. 9, Fla. Const. History–New 1-1-02.

[2] The feeding of sharks and other marine life, including rays, moray eels and other species, is performed as part of a recreational activity in which marine animals are drawn to a site where divers are allowed to observe the animals at close range and in their natural

continued...

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environment. The animals are not harmed in any way. At the time of the adoption of the proposed rule, there were two sites at which marine life feeding occurred in Florida waters (Palm Beach and Broward counties), and one additional site in federal waters (near Monroe County). There were more than 300 marine life feeding operations worldwide at the time the proposed rule was adopted.

[3] **SECTION 9. Fish and wildlife conservation commission.**

There shall be a fish and wildlife conservation commission, composed of seven members appointed by the governor, subject to confirmation by the senate for staggered terms of five years. The commission shall exercise the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life, and shall also exercise regulatory and executive powers of the state with respect to marine life, except that all license fees for taking wild animal life, fresh water aquatic life, and marine life and penalties for violating regulations of the commission shall be prescribed by general law. The commission shall establish procedures to ensure adequate due process in the exercise of its regulatory and executive functions. The legislature may enact laws in aid of the commission, not inconsistent with this section, except that there shall be no special law or general law of local application pertaining to hunting or fishing. The commission's exercise of executive powers in the area of planning, budgeting, personnel management, and purchasing shall be as provided by law. Revenue derived from license fees for the taking of wild animal life and fresh water aquatic life shall be appropriated to the commission by the legislature for the purposes of management, protection, and conservation of wild animal life and fresh water aquatic life. Revenue derived from license fees relating to marine life shall be appropriated by the legislature for the purposes of management, protection, and conservation of marine life as provided by law. The commission shall not be a unit of any other state agency and shall have its own staff, which includes management, research, and enforcement. Unless provided by general law, the commission shall have no authority to regulate matters relating to air and water pollution.

History.--Am. C.S. for H.J.R. 637, 1973; adopted 1974; Am. proposed by Constitution Revision Commission, Revision No. 5, 1998, filed with the Secretary of State May 5, 1998; adopted 1998.

[4] Bull sharks are not a species of marine life that is fed in any known recreational feeding and viewing operation.

[5] http://www.time.com/time/2001/sharks/side_jessie.html

[6] http://news.ufl.edu/2002/02/18/sharks02/

[7] http://www.time.com/time/2001/sharks/cover.html

[8] http://www.discovery.com/stories/nature/sharkweek2000/sharkweek2000.html

[9] Petitioners consisted not only of DEMA, but a number of Florida scuba divers, Florida-based scuba diving shops, and their owners: Aqua Shot; Atlantic Pro Dive; Atlantis Dive Center; Best Dive Centers; Dean's Dive Centers; Deep Blue Divers; Depth Perception; Divers Cove; Diversion Excursion, Inc.; Dixie Divers (Deerfield); Dixie Divers of Palm Bay; Eagle Ray Dive Center; Extreme Wet Watersports; Fantasea Scuba; Frog International, Inc.; Hal Watts Scuba; Hammerhead Dive Center, Inc.; Jim Abernathy's Scuba Adventure; Kissimmee Professional Dive Center; Lauderdale Diver; Lighthouse Dive Center; Miami Fantasia Scuba; Mid-Florida Divers; Narcosis Scuba Center; Nautilus, Inc.; Neptune's Lair Dive Center; Ocean Dwellers; Ocean Promotion Scuba Inc.; Orlando Scuba Center; Pro Scuba Outlet; Scuba Network, Inc.; Scuba Resorts Inc.; Scuba Schools; Sea Cam Productions; South Florida Diving Headquarters; Spruce Creek Scuba; Tackle Shack; The Scuba Center; U.S. 1 Scuba; Undersea Sports; Jim Abernathy; Karen Schroeder; Steve Park; Lance Briner; Brent Woodhouse; David Shaw; Joyce Cordy; Skip Commegere; Howie Patterson; Jose Fuster; Safe-Jane Brown; David Badali; Harry Fischein; Steve Dapuzzo; Mike Rohrbaugh; Mike Olson; Montero; Charlie McDaniel; Lynn Willis; Charlie Coary; Pete Pollotta; Lorie Horner; Spencer Slate; and Jeff Torode.

[10] http://www.law.fsu.edu/crc/pdf/0045c1.pdf

[11] **SECTION 9. Fish and wildlife conservation ~~Game and fresh water fish~~ commission**.

There shall be a fish and wildlife conservation ~~game and fresh water fish~~ commission, composed of seven ~~five~~ members appointed by the governor, subject to confirmation by the senate for staggered terms of five years. The commission shall exercise the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life, and shall also exercise regulatory and executive powers of the state with respect to marine life, except that all license fees for taking wild animal life, ~~and~~ fresh water aquatic life, and marine life and penalties for violating regulations of the commission shall be prescribed by general law ~~specific statute~~. The commission shall establish procedures to ensure adequate due process in the exercise of its regulatory and executive functions. The legislature may enact laws in aid of the commission, not inconsistent with this section, except that there shall be no special law or general law of local application pertaining to hunting or fishing. The commission's exercise of executive powers in the area of planning, budgeting, personnel management, and purchasing shall be as provided by law. Revenue derived from license fees for the taking of wild animal life and fresh water aquatic life shall be appropriated to the commission by the legislature for the purposes of management, protection, and conservation of wild animal life and fresh water aquatic life. Revenue derived from license fees relating to marine life shall be appropriated by the legislature for the purposes of management, protection, and conservation of marine life as provided by law. The commission shall not be a unit of any other state agency and shall have its own staff, which includes management, research, and enforcement. Unless provided by general law, the commission shall have no authority to regulate matters relating to air and water pollution. ~~Revenue derived from such license fees shall be appropriated to the commission by the legislature for the purpose of management, protection and conservation of wild animal life and fresh water aquatic life.~~

[12] http://www.law.fsu.edu/crc/pdf/0045c1.pdf

[13] http://election.dos.state.fl.us/laws/99laws/ch_99-245.pdf

[14] § 20.331, Florida Statutes, provides:

(6)(a) [The FWCC] [s]hall implement a system of adequate due process procedures to be accorded to any party, as defined in s. 120.52, whose substantial interests will be affected by any action of the Fish and Wildlife Conservation Commission in the performance of its constitutional duties or responsibilities.

(b) The Legislature encourages the commission to incorporate in its process the provisions of s. 120.54(3)(c) when adopting rules in the performance of its constitutional duties or responsibilities.

(c) The provisions of chapter 120 shall be accorded to any party whose substantial interests will be affected by any action of the commission in the performance of its statutory duties or responsibilities. For purposes of this subsection, statutory duties or responsibilities include, but are not limited to, the following:

1. Research and management responsibilities for marine species listed as endangered, threatened, or of special concern, including, but not limited to, manatees and marine turtles;
2. Establishment and enforcement of boating safety regulations;
3. Land acquisition and management;
4. Enforcement and collection of fees for all recreational and commercial hunting or fishing licenses or permits;
5. Aquatic plant removal and management using fish as a biological control agent;
6. Enforcement of penalties for violations of commission rules, including, but not limited to, the seizure and forfeiture of vessels and other equipment used to commit those violations;
7. Establishment of free fishing days;
8. Regulation of off-road vehicles on state lands;
9. Establishment and coordination of a statewide hunter safety course;
10. Establishment of programs and activities to develop and distribute public education materials;
11. Police powers of wildlife and marine officers;

12. Establishment of citizen support organizations to provide assistance, funding, and promotional support for programs of the commission;
13. Creation of the Voluntary Authorized Hunter Identification Program; and
14. Regulation of required clothing of persons hunting deer.
(d) The commission is directed to provide a report on the development and implementation of its adequate due process provisions to the President of the Senate, the Speaker of the House of Representatives, and the appropriate substantive committees of the House of Representatives and the Senate no later than December 1, 1999.

[15] (c) *Hearings.*--
1. If the intended action concerns any rule other than one relating exclusively to procedure or practice, the agency shall, on the request of any affected person received within 21 days after the date of publication of the notice of intended agency action, give affected persons an opportunity to present evidence and argument on all issues under consideration. The agency may schedule a public hearing on the rule and, if requested by any affected person, shall schedule a public hearing on the rule. Any material pertinent to the issues under consideration submitted to the agency within 21 days after the date of publication of the notice or submitted at a public hearing shall be considered by the agency and made a part of the record of the rulemaking proceeding.
2. Rulemaking proceedings shall be governed solely by the provisions of this section unless a person timely asserts that the person's substantial interests will be affected in the proceeding and affirmatively demonstrates to the agency that the proceeding does not provide adequate opportunity to protect those interests. If the agency determines that the rulemaking proceeding is not adequate to protect the person's interests, it shall suspend the rulemaking proceeding and convene a separate proceeding under the provisions of ss. 120.569 and 120.57. Similarly situated persons may be requested to join and participate in the separate proceeding. Upon conclusion of the separate proceeding, the rulemaking proceeding shall be resumed.

[16] http://www.flsenate.gov/session/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&SubMenu=1&Year=2007&billnum=7173

[17] http://myfwc.com/commission/2006/Sept/index.html

[18] Five of the Commissioners said:
1. "We are open and we listen. That is due process. But we need to do more communication."
2. "We do a good job in notifying people. Rule challenges are exhausting. We can do a better job and can tweak the process. The problem is that people don't like the outcome."
3. "Can we do better or provide more notice, sure, and decisions should be linked to science. But our authority is constitutional and you can be mad at us."
4. "We are appointed by Governor and confirmed by Senate. The FWCC has an open and public process and we listen. We need to notice the public better. The due process is by law and it constrains us and you. It is the best system."
5. "We need to improve and do a better job of notification. We are bound by the law."

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Editor's Note: *An article by James Antista, general counsel of the Florida Fish and Wildlife Conservation Commission, is scheduled to be published in the December issue of this Newsletter. Mr. Antista's article will present a different perspective on this topic.*

THE FLORIDA BAR

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