ADMINISTRATIVE LAW SECTION NEWSLETTER

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Veronica E. Donnelly, William L. Hyde, Co-editors

From the Chair

by Steven Pfeiffer, Chair

Administrative agencies exist because they were created by the Legislature. They exercise powers that are granted by the Legislature. They do not have inherent authority to adopt rules. Authority that is delegated to agencies must be exercised following processes established by the Legislature.

Given these maxims, it is entirely appropriate that there be processes to ensure that agencies do not overstep delegated authority, and that they exercise it in the correct manner. The Administrative Procedure Act offers at least three opportunities to ensure that delegated authority to adopt rules is properly exercised: First, the Act sets detailed requirements for how rules must be adopted. *F.S.* 120.54. These processes include notice, opportunities for public participation, and publication of adopted rules as part of a systematic code.

Second, the Act establishes a process for challenging proposed and existing rules in administrative proceedings. *F.S.* 120.54(4), 120.56. Parties with the requisite interest can challenge proposed rules or existing rules through administrative hearings that offer a fair opportunity to challenge whether an agency's proposed or existing rules conform with the Legislative delegation.

Third, the Act provides for a direct legislative check on legislatively created authority through review of agency rules by the Joint Administrative Procedures Committee. *F.S.* 120.545. The Committee reviews every rule that is adopted, and has oversight authority with regard to existing rules and policies that have not been adopted as rules. The Committee is required to consult with the appropriate substantive committee in its review of proposed rules. *L.O.F. Ch.* 92-166, Section 8.

Questions have been raised as to whether these checks are adequate. There is legislative concern that they are not. House Bill 711 and Senate Bill 824 that were offered during the 1992 Legislative Session reflect this concern. The Bills would have eliminated the authority of agencies to adopt rules without express legislative approval, except in emergencies. Existing rulemaking procedures would not change, except that before proposed rules could be adopted and become effective, they would need to be expressly approved by the legislature.

"Emergencies" would justify immediate adoption of rules if that is necessary in order to preserve the public peace, health, safety, or welfare; or in order to comply with a time limitation set in Florida or Federal law. The Bills would have delegated responsibility to the Secretary of State to review emergency rules and to determine whether there is an emergency, whether the agency

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exceeded its authority, and whether the agency followed proper procedures.

Except in the case of emergencies, an agency's proposed rules would be reviewed by the Committee, then considered by the Legislature during its next session. The Legislature could approve the proposed rules, reject them, or approve them with modifications. Agency rules adopted in this manner would be called "legislative rules."

I believe there are significant constitutional infirmities to this approach. The Bills would in effect allow the Legislature to amend law, circumscribing the Executive's check on Legislative power—the veto. Article III, Section 8, *Fla. Const.* In addition there are clear separation of powers implications of this sort of day-to-day oversight of agency activity. Article II, Section 3, *Fla. Const.*. In recognition of these possible impediments, there were proposals to offer the Bills in the form of a Constitutional amendment.

Without regard to the Constitutional implications, I consider the Bills unnecessary for the following reasons:

1. The Legislature already has the ability to overturn agency rules. True, it would require legislation. There would need to be a majority vote in both houses of the Legislature, approval of the governor, and in the case of a veto, a two-thirds vote in each house to override the veto. Certainly the legislative process is an onerous one. It can be difficult to muster votes necessary to pass legislation. But, this is not a valid criticism of the legislative process. Instead, it is part of the genius of our system of checks and balances.
2. There already are checks and balances on agency rulemaking. Apart from the procedural requirements of the Administrative Procedure Act, including review of agency rules by the Committee, affected persons have the ability to challenge proposed and existing rules in proceedings conducted by Hearing Officers of the Division of Administrative Hearings. *F.S.* 120.54(4), 120.56. These are effective remedies. Take a look at the notes in *Florida Statutes Annotated* under these statutory headings. Take a look at Key Numbers 390-395 under the heading "Administrative Law" in *Florida Digest.* Look at Chapter 3, written by Professor Pat Dore, especially Section 9, of the *Florida Administrative Practice Manual.* Do not overlook the administrative determinations indexed under the heading "rules and rulemaking" in *Florida Administrative Law Reports.* Agency rules have been challenged lots of times. Successful challenges are not uncommon.
3. There will be gaps in any legislative prescription. As an attorney representing an agency, I assure you that it is an absolute delight when an issue is easily answered by reference to statute. But, it is a rare joy. Lawyers, including a few who have written columns elsewhere in this Newsletter, work between the gaps. They play tunes between the notes the Legislature composes. If legislation is going to be effectively implemented, the agency that does it will need to fill these gaps. As the Legislature clearly recognized when it adopted *L.O.F.* Ch. 91-30, policy decisions that are made to fill the gaps are best accomplished through rulemaking. If rules cannot become effective until passed upon by the Legislature, the gaps will need to be filled on a case-by-case basis. There really is no alternative.

Legislative delegation of rulemaking authority is not a new phenomena, and it is not unique to Florida. See *e.g.* Davis, *Administrative Law Treatise*, Sections 2.00-2.01. Delegations of authority to adopt rules recognize the complexity of the modern world, leave the larger policy making role where it belongs—with the legislative branch of government, and allow the entity with particular expertise in an area being regulated the ability to implement legislatively established policies. The agency's implementation is, of course, subject always to judicial or quasi-judicial review, and the legislature's power to change the delegation by adopting new laws.

I want to add some things about the oversight role of the Joint Administrative Procedures Committee. I confess that I did at one time consider the Committee's review

of proposed rules to be an encumbrance-a bureaucratic hurdle that added nothing to the process. One of my most dreaded phone messages was: "Scott Boyd on line 12." (Scott is one of the Committee's very able staff members). I hereby publicly apologize for this attitude. I was wrong. The Committee offers agencies a rare, truly unbiased appraisal of proposed rules. If you let them, the Committee will help with the readability of rules. They will tell you where you have problems. They will tell you when what you have said does not make sense, and they will tell you where your authority is suspect. It is good to hear these things from the Committee. You are sure to hear them later, and it is best to know. So, now I am glad to hear, "Mr. Boyd on 12." It offers an opportunity to improve my client's work.

These days I am even more pleased to hear from Scott. He is working with the Administrative Law Section to prepare a continuing legal education seminar that will be conducted in March. There will be an impressive group of speakers who will address many of the issues I have raised in this article. If these issues interest you, do not miss that program. In the meantime, it is clear that these issues will be considered during the 1993 session. The House of Representatives has already established a select committee, I understand, for that specific purpose.

Once again, I want to invite your response to this column. I know these are controversial matters. They are also fundamentally important. There is plenty of room in this Newsletter for other views. See, *e.g.*, Frank Mathews' rebuttal to my last column. (Incidentally Frank, when I ran this column through "spell check," my word processor suggested that I must have meant "madhouse," "mouthiest," or "myths," not "Mathews." Honest, if you use "WordPerfect," check it out.) I appreciate the letters I received in response to the last "From the Chair" column. I really do look forward to more.

There is an excellent discussion of delegation of rulemaking authority under Florida case law in Chapter 1 of *The Administrative Law Manual*, Third Edition, published by The Florida Bar. The Chapter is written by Professor Johnny Burris. The *Manual* is in the process of being revised. The Fourth Edition will be available by February, 1993. Place your order now.

Give DOAH Final Order Authority

by Frank E. Matthews and Michael P. Petrovich
Hopping, Boyd, Green & Sams,
Tallahassee

Chair Steven Pfeiffer surmised in his column in the October 1992 edition of the Administrative Law Section Newsletter, one of the most "provocative" and intelligent innovations of Florida's 1974 Administrative Procedure Act was the creation of the Division of Administrative Hearings (DOAH). The DOAH is composed of an independent pool of hearing officers fully capable of resolving the disputes that frequently arise between Florida's citizens and its government. *F.S.* 120.65. Administrative law practitioners would generally agree that hearing officers are fair, impartial, and intelligent—even Mr. Pfeiffer had these qualities as a hearing officer. Why then, aren't these highly qualified people authorized to issue final orders in most cases?

Mr. Pfeiffer accurately points out that the question of whether the state and its citizens might be better served by making hearing officer's orders final, subject to appeal to the judiciary, is a matter for fair debate—a debate which reached the floors of the Florida Legislature in 1992. Senate Bill 1674, if passed, would have given hearing officer's final order authority which could be appealed to the appropriate district court of appeal pursuant to Section 120.68, Florida Statutes, by an unsuccessful party, including the applicable agency. Contrary to Mr. Pfeiffer's conclusion, however, Senate Bill 1674, or a very close facsimile, *is* the correct approach to this issue.

As Mr. Pfeiffer knows, DOAH hearing officers function independently of agencies

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and of the political process, free from administrative supervision and political influence. Moreover, hearing officers are well qualified and intelligent, having to meet the same minimum qualifications as for circuit judges. Fla. Const. Art. V, S. 8; *F.S.* 120.65(4). If paid better and given additional staff, who is better able to make final determinations than these individuals? Currently the Administrative Procedure Act (APA) says agency heads. We beg to differ. In our view, hearing officer final order authority should be the rule, not the exception. Let's face it. Some unknown, invisible lawyer in the agency general counsel's office writes the agency's final orders. Are these people, whoever they are, the people that the citizens of Florida should go to for administrative justice?

Allowing the status quo to continue will only result in further degradation of the credibility of the APA. All too often, the current statutory procedure is abused by agencies through recharacterization of factual findings of hearing officers as conclusions of law or factual issues "infused" with policy considerations over which the agency asserts special expertise and knowledge. The cases have been few where the judiciary has agreed that an agency actually has special insight over certain factual questions.[1] The cases have been legion where agencies have attempted to mischaracterize findings of fact as conclusions of law or have asserted special "insights" into certain factual determinations as means to reach a desired end. *See, for example, Johnston v. Department of Professional Regulation, Board of Medical Examiners*, 456 So.2d 939 (Fla. 1st DCA 1984); *South Florida Water Management District v. Caluwe*, 459 So.2d 390 (Fla. 4th DCA 1984). We suggest that claims of "special insight" are euphemisms for "political agenda." We submit that the less politics and less agency rationalizations that the "end justifies the means," the better.

Moreover, the current process is a breeding ground for the dreaded pestilence of "incipient policy." This contagious disease allows agencies to use individuals like laboratory mice without benefit of promulgated rules so long as the evolving policy is "proven up" at hearing. This doctrine, in effect, allows agencies to pursue arbitrary and inconsistent policy decisions in the name of administrative flexibility and at the expense of an individual's procedural due process rights. The Florida Legislature has attempted to stifle this particular abuse by enactment of legislation in 1991, requiring that every agency maintain and index orders that represent final agency action and mandating that certain agency statements routinely relied upon be promulgated as rules. Chs. 91-30 and 91-191, Laws of Florida. The proper forum for policy direction, development and decision-making is formal rulemaking as set out in *F.S.* 120.54, not in *F.S.* 120.57(1) formal administrative hearings. Flexibility in the administrative hearing process should never be upheld (as it is currently) to the extent it extinguishes basic and fundamental public participation in the agency's deliberative processes. As set out above, hearing officers are more than able to guide public policy choices through the adjudicatory process, relying on an agency developing theories and interpretations of statutory and rule provisions. They are lawyers, and if they develop subject matter specific areas of concentration and

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sufficient support staff, they are fully capable of making appropriate final decisions necessary to guide and implement administrative policies.

Finally, from a practitioner's point of view, it is difficult to explain away the obvious inequities in the current process to clients whose interests have been substantially and adversely affected by an agency decision. It is extremely difficult to look into a client's eyes and recommend pursuit of a costly hearing process, and subsequently explain to that client that the APA allows one to contest an agency decision before an impartial hearing officer only to subject that hearing officer's decision to final review and possible modification by the very agency that made the initial adverse decision. Common sense (and the ongoing integrity of the formal hearing process as a meaningful remedy) dictates that a more fair and equitable process be devised. Perception is often reality, and substantially affected parties are understandably circumspect about a process that leaves the final decision to an agency head who has already ruled against them.

We believe the Section 120.57(1) process is in serious need of repair. Hearing officers should have final order authority except in those few (if any) processes where the decision clearly involves determinations that set significant policy directions for an agency. As Mr. Pfeiffer explains, history is the best teacher. Our view of history is quite different, and reveals a process that has been abused by numerous agencies at one time or another and chills the very citizen participation that the APA was intended to encourage.

This issue is ripe for determination by the 1993 Florida Legislature. We hope to see many of you in the halls of the Legislature stating your own particular final order horror stories.

Footnote:

[1]A 1984 survey of cases conducted by the Third District Court of Appeal in *Dade County Police Benevolent Association v. City of Homestead*, 444 So. 2d 465, 472, 473, fn.3 (Fla. 3rd DCA 1984) *vacated* 467 So.2d 987 (Fla. 1985) revealed that of 34 judicial decisions where findings of a Hearing Officer had been overturned, substituted, or modified by an agency, only in four instances was the agency's conduct deemed proper in that the determinations were infused with policy considerations involving special insight by the agency. The authors hypothesize that a substantially similar ratio exists today.

Some Thoughts on Hearsay, Case Management Via Mediation, Lawyer Stress, and the General State of the Art, *OR* Hard Work and Stress—It Ain't Much Baby, But It's All We've Got[1]

by: Ella Jane P. Davis
Hearing Officer, Division of Administrative Hearings

This article is written from the perspective of a sitting DOAH Hearing Officer (8 years) who came to the Division after 13 years of litigation experience. Mrs. Davis has recently been certified by the Florida Supreme Court as a county and circuit court mediator of state-wide jurisdiction pursuant to the educational, practical training, and good character requirements of Rule 1.760 Fla. R. Civ. P. *She writes this last in a series of three "practical advice" articles at the request of the Administrative Law Section Executive Committee. With Mary Smallwood and Larry Sellers, Mrs. Davis will be teaching "Administrative Law for Non-Lawyers" at the Florida Chamber's Environmental Permitting Short Course, January 20-22, 1993, in Tallahassee.*

This last installment in my series of practical tips discusses evidentiary hearsay, mediation in administrative proceedings, and more on lawyer stress. Just to make it more complex and erudite, I am starting backwards.

I put out six recommended orders (the equivalent of six 20-page briefs) last month, and, among other accomplishments, tried three cases in three cities in three days. One morning last week, I arose at 4:00 a.m., gulped down enough coffee to get my personal motor primed, showered, dressed, and hit the road at 5:00 a.m. I drove five hours, tried a case for five and a half hours (not counting the lunch break) and drove five hours home because the rest of the week's cases settled after I got on the road. This month, I am overdue with two recommended orders and a final order, and I am feeling the strain. Next month, I am trying a case, by agreement, on a legal holiday, in one of the lawyers' offices because that is the only way we can accommodate everybody's time constraints. DOAH hearing officers serve the people. We are under stress. This is nothing new, and there is no end in sight. And you know what? *You* are under stress too, and there is no end in sight for your situation, either.

If you are a government attorney, you are always in a travel/money bind, having to advance most travel costs yourself and being at the mercy of airlines, rental car companies, and motels. You owe your soul to the credit card company. Your trial materials disappeared with the rental car that was stolen from your motel parking lot. The airline went bankrupt and left you in a different city than your luggage, and neither city is where your deposition is scheduled. Your agency will not pay the freight for you to hire an out-of-house expert witness that you desperately need, and the ballpoint pens bought on bid either leak or will not write. I understand; I've been there.

If you are a private practitioner, you, too, are under stress. Most of the time, nobody in government who can give authoritative answers is available, without scheduling an expensive deposition, and you have to put off the deposition until s/he returns from vacationing in Outer Mongolia or inspecting

the hurricane relief projects. The IRS stonewalled on confidentiality grounds the release of information that is vital to your theory of the state administrative law case, but the opposing government lawyer probably will stipulate to a continuance of the formal Section 120.57(1) F.S. hearing while you get the feds straightened out. However, the opposing government lawyer returned your urgent phone call from a phone booth in an airport and you missed it. Meanwhile, your client is on the other line, complaining about the delay of his day in court, admitting that he cannot pay your fee in full this month anyway, and that maybe there was "just one little thing" he "forgot" to tell you. Your copier crashed yesterday; today, your secretary is out; and every day, your kids wonder why you do not come home to dinner on time. I understand; I've been *there*, too.

Does any of this sound familiar? Does *all* of it sound *too* familiar? It should. Each of these incidents actually occurred, not necessarily to the same attorney.

The foregoing illustrates that, despite each lawyer feeling that his/her opponent's "grass is always greener," one's opponent usually has his/her own share of crabgrass. Each side's respective miseries put the government lawyer and the private practitioner on a more "level playing field" than they often realize, and since you see your agonies related here, take heart that DOAH hearing officers appreciate your problems and have compassion for you.

In the military, the only comfort is to "tell it to the chaplain!" Unfortunately, the practice of trial law does not come equipped with chaplains or anybody else who can "make it all better!" One of the first things that new lawyers discover upon starting trial practice is that there is literally *no one* to whom they can tell their troubles. Professional ethics prevent lawyers from confiding in just anyone, and the frustration of trying to explain all the ramifications of an unfolding legal situation to anyone not trained in our discipline is such a long, complicated, and convoluted process that most lawyers give up early in the game. Or, we lawyers arrogantly, and often erroneously, assume others cannot grasp all the nuances of a situation with which we ourselves have been wrestling. One way or another, we add to our own stress by clamming up. Lawyers also tend to approach stress reduction via the methods that worked well on the hard climb to our professional degree and license. We study, research, overwork, limit personal relationships, and isolate ourselves.

Unfortunately, these methods do not always work once we are out in the "real world" practicing "real law" against "real people with real problems." Trial lawyer arrogance and isolationism partially accounts for why a national poll consistently shows that the public has more trust in its used car salesmen and aerobics instructors than in its lawyers and judges.

Our arrogance and isolationism also often results in PROFESSIONAL BURNOUT. "Burnout" has a technical definition, but for purposes of this article, think of "burnout" as, "a grown-up coming apart at his/her emotional seams." I lament it every time I see it happen, and it seems to be happening more and more.

By the foregoing lament, I am NOT volunteering to be the profession's chaplain, but I AM encouraging both my fellow hearing officers and the lawyers who appear before DOAH to be gentle with themselves and careful and courteous to one another. To that end, here are some survival rules and realities that I consider "tried and true" for staving off professional burnout.

Recognize at the outset that burnout is not a noble result that somehow makes one lawyer stand taller than his/her colleagues. It is a sad and dangerous condition that does not serve lawyers well as human beings. It also does not serve clients well if their lawyers are not willing to seek counsel elsewhere to perfect the client's case and to maintain the lawyer's own equilibrium.

Next, recognize that trial law is not for everyone. Some of us like all the blood sports: trial law, boxing, and bullfights, but that does not mean everyone else has to like any or all of them. Maybe Uncle Fred and Aunt Hattie wanted you to grow up to be "Perry Mason," but they are not the ones who wake up at four a.m. with the "blue dreads" about tomorrow's case. Roughly 70% of all legal disputes in the civil sector of circuit court jurisdiction never result in the filing of a lawsuit; they are resolved out of court or constitute what is normally called

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"office practice." Of those disputes that result in the filing of a case in circuit court, another 70% settle without a bench or jury trial. I don't have any statistics for administrative law practice, but I would bet they are similar. That means that the majority of lawyers in this state are not operating every day or even a majority of the year as "trial lawyers." Convince yourself that it is okay not to be "Perry Mason," and ultimately you may be a lot happier.

If you really want to try cases, more power to you. Trial lawyering is a noble calling, but you must be prepared to pay the price in continual study, preparation, curiosity, diligence for your client, and, yes, in STRESS! How you cope with stress will have a lot to do with your longevity in the profession. Knowledge, preparation, and knowing what to expect breed confidence as well as competence. *Competence* wins cases, but *confidence* reduces stress. Continue to study, research, and work hard, but do not isolate yourself.

The FIRST RULE OF COPING in the practice of trial law is: *Find somebody or several somebodies whom you consider skilled lawyers who will talk to you and upon whom you can rely when you need them.* Some suggestions in this regard are:

(1) Seek employment with a governmental body or law firm that will give you controlled "hands on" experience early, preferably one which will assign you a mentor for the first year, or seek employment clerking for a judge for a few years. Clerking and go-fering are generally considered noble starting points for a brilliant legal career. If you "second chair" several cases, you will know more than if you don't. You may even know more than your former "first chair" by the time you graduate to "first chair." Keep contact with this person after you move on; burn no bridges you do not have to burn. Professional friends who are familiar with your strengths and weaknesses are always nice to have around. "The young lawyer knows the rules. The old lawyer knows the exceptions."[2] Remember the military/corporate strategy to make friends on the way up, so that you avoid enemies when you get to the top and on your way down.

(2) Seek out professional mentors in the field of law that interests you most. Pick someone whose skills you really admire in your local bar association or agency and from whom you would like to learn. If you "get" a case, see if the person you want to learn from would be willing to be associated with you for the duration of that case. Flattery may get you in an expert trial lawyer's door, but if you associate him/her on a fee-producing case or offer your legal research services or go-fer talents in exchange for being able to learn from a master, it can act as insurance so you will have his/her assistance as a mentor when you really need it later on more complex cases.[3]

(3) Join professional societies right and left. Look for those professional groups that offer newsletters, case summaries, telephone help-lines for quick substantive research and procedural snafus, and frequent "hands-on" seminars that you can conveniently attend.[4]

(4) Go where you can talk to lawyers on the "cutting edge" of trial practice—seminars, conventions, local and specialized bar meetings, and social gatherings. Talk law and strategy. Listen three times as much as you talk. Volunteer to serve on those committees that attract the celebrity lawyers; it's a great way to learn something before everybody else does. Who knows? Someday, one of them may refer a case!

THE SECOND RULE OF COPING is: *Explore your options for emotional renewal. Locate one or several human safety valve(s) with whom you can share personal as well as professional confidences.* Your safety valve can be found via any of the methods listed under "The First Rule of Coping," above, but usually a human safety valve should be a non-lawyer, non-spouse. They can be good friends whom you really trust, provided you maintain all the ethical standards that apply in each situation. Frequently used "expert witnesses" do well in this role. Therapists trained to deal with the problems of professionals can be helpful. If you need to, tap into the Florida Bar's *Lawyers Assistance Program*, which centers its concerns around practical and confidential help for substance abusers, or its *Committee on Professional Stress*, which is

more of a policy body and referral source.

The nuts and bolts of procedure is the thing that scares the heck out of most lawyers because procedural foul-ups provide our greatest exposure to malpractice and to ridicule. Also, because procedure is so "out-in-the-open" and *seems* so simple, most of us are afraid to ask questions about it, even from a friend and/or mentor, for fear that our image with others will turn out like "the emperor's new clothes." It is better practice and less stressful in the long run to live by the old Chinese Proverb, "He who is afraid to ask questions, is afraid of learning."

Spare yourself some anxiety about procedure by following THE THIRD RULE OF COPING: *Do the obvious when no one is looking: Read the instructions.* Everyone has his own personal preferences for which items constitute "basic instructions." Mine are not magic. Here are a few of them:

(1) If you can do no other preparation for the practice of law between taking the bar examination and being sworn in, read every annotation on the rules of procedure (civil, criminal, probate, juvenile,—all of them!) contained in West's *Florida Statutes Annotated.*[5]

(2) For administrative practice, also read the *F.S.A.* annotations for Chapter 120 *F.S.* plus the rules and annotations in *The Florida Administrative Code* for DOAH and for the agency (agencies) with which you will be dealing.

(3) Build your own "briefcase library." This briefcase library is analogous to the "cans" you carried around in law school, but now that you are in "the real world" get the right resources and make them portable so you can carry them to court with you when necessary. At a minimum, invest in personal copies of: Trawick's *Florida Practice and Procedure*, published annually by Harrison Co., Publishers; the latest edition of Ehrhardt's *Florida Evidence*, from West Publishing Co.; and the latest editions of the Florida Bar CLE publications on *Florida Civil Practice Before Trial* and *Civil Trial Practice.* Get pamphlet-size copies of all the rules of procedure so that you can highlight and mark them up to your heart's content. These pamphlets stuff into even the smallest briefcase.

(4) The great cross-examiner, Professor Irving Younger, used to say that the trick to brilliant cross-examination was "just to not look foolish." The truth is, fear of Chapter 90 *F.S., The Florida Evidence Code*, petrifies most lawyers. So, read the annotations to Chapter 90 *F.S.A.*, and carry with you a one-volume advisor. I strongly recommend that your "one volume advisor" be Ehrhardt, *Florida Evidence*, (formerly Vol. 1 of) West's *Florida Practice* series, West Publishing Co. See above, (3) of this Rule. I like Ehrhardt's tome for a variety of personal and professional reasons, not the least of which is that the author taught me in law school and writes for the same publisher I did, but the big reasons I recommend the text to you is that it is geared to Chapter 90 *F.S.*, section by section; is updated faster than most similar sources; contains some references to administrative law cases not picked up in other sources; and is easy to carry and annotate. Between editions, make your own annotations in the margins of Ehrhardt's book from the administrative law cases you find in the advance sheets. Buy *lots* of books on evidence, but *carry* Ehrhardt.

(5) You may want to start a notebook, 3 x 5 card file, or computer storage file of your own substantive as well as evidentiary annotations of cases (such as environmental, professional licensing, or administrative procedure) that you think you may need one day, but be sure you purge your system regularly. With the availability of LEXUS, WESTLAW, and (soon) ACCESS[6] such a system may be more cumbersome than it is worthwhile. (See below on computer literacy).

(6) You *are* regularly reading the advance sheets, aren't you? If you have to limit your reading of advance sheets in their entirety, at least read the collection of headnotes in each pamphlet every time a pamphlet is issued. You can combine this approach with (4) and (5) of this Rule, above, and annotate administrative law cases as you go.

(7) The *Florida Standard Jury Instructions* and the standard forms contained in the *Florida Rules of Civil Procedure* will teach you a lot of useful law almost by osmosis if you will just refresh your recollection of them occasionally. Another good "nuts'n'bolts" book is Trawick's *Florida Forms*, also by Harrison Co., Publishers. While these matters seem at first glance to

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be confined to circuit court practice, administrative law practitioners before DOAH can use this information both in the discovery process and for formulating persuasive argumentation, if nothing else. You also will need to have a working knowledge of certain civil procedure rules if you ever want to use depositions in lieu of live testimony, publish interrogatories, or gain recognition of requests for admission.

THE FOURTH RULE OF COPING is *take advantage of every new innovation that comes along. At the very least, become computer literate on a number of systems* so that you can:

(1) Work and research independently.

(2) Network with other lawyers and experts.

(3) Solve your own deadline crises when your secretary is unavailable.

(4) Change jobs for upward mobility or to relieve job stress.

THE FIFTH RULE OF COPING is *communicate with the client, the other lawyers, and the court.* Try to find out what your client really wants out of every case and what result he will settle for. Sometimes you will only discover your client's personal agenda part way though a case, but once you do, it is often the key to making things easier on everyone while satisfying your client. Sometimes you will never know what your client's real goal is, but it's worth a try to find out. Don't *imagine* how tough a client is going to be to deal with, *deal* with him/her instead. The same goes for opposing counsel and the court/hearing officer. "A coward dies a thousand deaths, a brave soul only one."[7] The brave lawyer who has good and timely communication[8] with all parts of the triangle can usually adjust schedules for emergencies and better meet needs, including his or her own.

One of the situations DOAH hearing officers frequently complain about is that agency attorneys sometimes refuse to talk to an opposing *pro se* litigant even to settle a case or prepare a required prehearing stipulation. The applicable ethical consideration prohibits you, as opposing counsel, from talking to a party without his lawyer's presence or permission, but it does not prohibit you from talking to an unrepresented party, provided you do not offend some other ethical consideration. If you are afraid that an unrepresented party is going to cry "coercion" or worse, document something to clearly show that the *pro se* litigant is acting of his own free will. Do not abrogate your duties as a lawyer representing your client or as an officer of the court/forum just because of some speculative danger to your reputation.

This may be a good place to point out that lots of self-serving peripheral commentary shows up in pleadings every day. As officers of the court/forum, lawyers should strive to be precise in all representations they make. A "unilateral *statement*" is not synonymous with a "joint *stipulation*" when used in the context of complying with an order of prehearing instructions. If you unilaterally file such a pleading, caption your document, "statement," not "stipulation." However, if counsel states in any pleading that s/he has done or will do something, *that* is a stipulation or promise by an officer of the court/forum and his/her client will be bound by that stipulation/promise.

THE SIXTH RULE OF COPING is *view the scene personally; talk to the witnesses personally; and interview or depose your opponent personally.* Nothing compares with "hands on" lawyering. Your secretary and your associate are not you. One is not even trained as a lawyer. These folks will be more helpful to you in doing legal research than in practical preparation for trial. Do your own ground work or prepare to look foolish when "the other shoe drops" at trial/formal hearing. *Knowing* even bad news in advance is less stressful than *anticipating* it. See, commentary on cowardice in the FIFTH RULE discussion above.

The SEVENTH RULE OF COPING is *consider settlement.* First, convince yourself that settlement is not capitulation, because it isn't. Second, deal honorably with the system in all aspects. Mediation, arbitration, and alternative dispute resolution are the current trend in litigation today. Each circuit implements its family law and civil litigation mediation programs slightly differently, but apparently they are now all in place. Even my old stamping grounds of workers' compensation practice has instituted a "trial level" mediation program.[9] DOAH has

tried a voluntary "settlement assistance program" which has had very little success, but which remains available on a limited basis if requested.[10] Proposed mediation of administrative law and workers' compensation cases at the appellate level is due to be implemented by the First District Court of Appeal as soon as it secures a grant, if it secures a grant.

This brings us to the concept of MEDIATION.

Courts and hearing officers do and should perform very different functions than mediators. Both functions are valuable to the public. The practice of law in either category should be, in every sense, a "service profession." Every study supports the premise that if some alternative dispute resolution attempts are not made, litigation as we know it is doomed to die in a sea of paper, pleadings, and procrastination.

If lawyers, courts, and hearing officers have become impersonal, it is partly because of the system. It is more often because of their increased caseloads. Mediation is seen by the judiciary and all administrative forums as a means of docket control/clearing. Whether you agree with the concept in principle or not, I urge you to give it a fair try before you finalize your opinion.

Hearing officers are embroiled in the docket control problem at several levels. The most obvious is that of how to get the optimum number of cases heard on the same day in the same city and how to "control" each hearing. These concerns can impinge on evidentiary rulings.

For instance, at every formal hearing, witnesses are sworn or affirmed, ". . . to tell the truth, the whole truth, and nothing but the truth. . . ," yet every day hearing officers also sustain objections that ensure that they hear "the truth" and "nothing but the truth" but not necessarily "the whole truth." Irrelevant, immaterial, unnecessary, subordinate, and cumulative material gets screened out. With today's overcrowded dockets, no court or quasi-judicial forum has the time, energy, material, personnel, funding, or *stamina* to hear the *whole* truth.

DOAH, like an Article V court, can no longer introduce old-fashioned equity into the system. Whether the framers of the first *Administrative Procedure Act* would approve or not, even practice before DOAH has become highly complex and truly the practice of "law." It is DOAH's goal to ensure a level playing field that screens out prejudice and cuts to the heart of the disputed issues of material fact. Hearing officers, like Article V judges, are able to deal only with the facts and the law, not personalities or preferences.

Yet in other forums, mediation serves the purpose of allowing your client to "vent" all the ill will he wants and still come to terms with the fact that irrelevant and immaterial matters do not affect the outcome of his case. "Private agendas" are the kind of thing mediators are ideal to handle.

Mediation also is great "reality training" for the client over whom his/her lawyer has little control.

Mediation usually produces less stress for lawyer and client than courtroom appearances.

Mediators can be creative in working out settlements that make everyone "a little happy," or that "split the baby." Judges and hearing officers do not have the jurisdiction, power, or authority to do that.

When dockets were not backlogged, lawyers could be innovative with their objections and requests. Judges and hearing officers could take more time with their rulings from the bench. There were fewer short-form "sustained" or "overruled" rulings then and more explanation of what was going on. Trial work was also a lot more fun and led to some pretty amusing appeals. The following excerpts are taken from several transcripts. All names of lawyers and hearing officers/judges have been removed for obvious reasons.

Counsel: I object.
Court: Overruled.
Counsel: Judge, you need to stop this because it is rapidly going to become relevant.
Court: It's going to become *relevant*?
Counsel: Right.
Court: Right; overruled.

* * *

Counsel: Objection. It's irrelevant.
Court: I can't tell yet if it is or isn't, counsel. I'm inclined to think it is, but in the interests of justice and due process, I'm go-

continued . . .

SOME THOUGHTS

from preceding page

ing to let defense go down this rabbit trail a little longer. However, Mr. Defense Attorney, if you don't find that rabbit *real soon*, that is, connect this line of questioning up to *something* to do with the issues of this case, we're all going back to the campfire.

* * *

Counsel #1: Objection.
Court: Sustained.
Counsel #2: Oh, that's okay, Mrs. Witness. You can go ahead and answer.
Court: No, ma'm that means you can ask a different question.

* * *

Counsel: Objection, hearsay.
Court: Sustained.
Counsel: Okay, it's hearsay, your honor, but I just want it in for whatever it's worth.
Court: That's just the point, sir. If it's hearsay, it isn't worth anything. Sustained.

The last example is unlikely to occur in a formal hearing before DOAH. Which returns us to the matter you have been anxiously awaiting: the definitive pronouncement on HEARSAY IN ADMINISTRATIVE HEARINGS. Guess what? I'm not going to make it. Remember, I said I would have some words on evidentiary hearsay? did *not* say I was going to make a definitive pronouncement.

The definitive pronouncement on the use of hearsay in administrative proceedings still lies in Section 120.58(1) (a) F.S., which provides:

> . . . Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

Where evidentiary hearsay is concerned, DOAH hearing officers fall into two camps: "letter-inners" or "keeper outers." Like the "Big Endians" and "Little Endians" of *Gulliver's Travels*, it is hard to spot which type you have drawn until you are actually enmeshed in formal hearing. The two views have been thoroughly described in the following articles, which I commend to your reading. See, Johnston, "Admissibility and Use of Evidence in Formal Administrative Proceedings: An Alternative Possibility for Change," 65 *Florida Bar Journal* 63, (March 1991); Wyckoff, "Evidentiary Standards in Formal Administrative Proceedings," 64 Florida Bar *Journal* 67, (February 1990).

My practical tips for dealing with hearsay in Section 120.57(1) *F.S.* proceedings before DOAH are simple and sequential but will only work if you have a firm grasp on what is and is not hearsay in the first place.

Before you even try to do something by hearsay, try to get the information into the record by direct, competent evidence. If at all possible, develop the direct evidence early in your order of proof. You may find you do not need the hearsay, after all. If you still want to try to slip in the hearsay after the direct evidence, you will at least be able to point to the direct evidence already in the record and the precise language of Section 120.58(1)(a) *F.S.*, while representing that you want to "connect it up." Finally, keep in mind that hearsay is defined in Section 90.801(1)(c) *F.S.* as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[11]

Only when out-of-court verbal or nonverbal conduct which was intended as an assertion is offered to prove the truth of the matter asserted, do you have hearsay, and only at that point do the exceptions come into play. See, Sections 90.801(2)(a), (2)(b), and (2)(c) *F.S.* specifying certain matters which are not hearsay.

If testimony or other evidence is NOT hearsay, you do NOT have to rely on the 23 exceptions under Section 90.803 *F.S.* and several qualified exceptions under Section 90.804 *F.S.* or upon Section 120.58(1)(a) *F.S.*! In other words, "if it ain't broke, don't fix it."

To reiterate, Davis' simple and sequential tips for the use of hearsay in administrative proceedings are as follows:

(1) If you want to minimize problems with evidentiary hearsay, don't use it in the first place. Present direct evidence if you can.

(2) Try to put information/assertions into evidence in such a way that it/they do not constitute hearsay.

(3) If you must use hearsay, put on any

direct evidence before you put on the allegedly hearsay material. Then, only if you must, argue exceptions to the hearsay rule under Chapter 90 *F.S.* As a last resort, argue the provisions of Section 120.58(1)(a) *F.S.*

This concludes this offering. Live long and prosper.

Footnotes:

[1]With apologies to Jess Laird, psychologist, who wrote a series of self-help books with similar titles, dealing with "professional burnout." I recommend them.

[2]Davis, Ella Jane P., "Fine-Tuning Trial Practice Before DOAH Davis' 'Unwritten Rules' On Style, Substance, Strategy, Words, Witnesses, and Wiggles," *Administrative Law Section Newsletter,* Vol. XIV, No. 1 (October 1992).

[3]I am not sure how the new neutral gender directive would apply to this phrase. I do not know any woman lawyer who would respond well to a just-hatched lawyer of either gender asking her to be an expert "mistress," yet the terms "master lawyer" and "mentor" are not used synonymously here. "Specialist" and "highly skilled" in place of "master" are not precise terms, but might do. I hope I have communicated my meaning without offense; no offense was intended.

[4]If you practice *any* Florida administrative law, I recommend joining the Florida Bar Administrative Law Section (see this newsletter?) and Government Lawyers Section. If you qualify, join the Florida Academy of Trial Lawyers. If you are practicing administrative law in the federal sector, it is usually more to the point to join societies with a more narrow substantive focus, such as labor law, employment law, or civil rights, etc.

[5]Throughout this article, I have recommended several publications. My recommendations are based purely on my own taste and experience with such things. Nobody influenced me to make any particular recommendations. However, in the interest of full disclosure, the reader may wish to know that I was formerly under contract to West Publishing Co. and wrote "Workers' Compensation," comprising Vols. 6, 7, and 8 of West's *Florida Practice* series, which volumes have been out of print since 1986.

[6]By the end of the current fiscal year, (June 1993), DOAH anticipates having available this on-line computer research system which will cover all recommended orders, final orders, and District Court of Appeal opinions concerning DOAH cases from 1985 forward.

[7]I have rendered this quotation gender neutral. I think the original is from the poem "Horatio At The Bridge."

[8]"Good and timely communication," clearly does not include forbidden *ex parte* communication with the court or hearing officer.

[9]See, Section 440.25(3) (a), (3)(b)l. *F.S.*

[10]Thus far, DOAH Hearing Officers Diane Cleavinger, Don W. Davis, J. Lawrence Johnston, M. Michael Parrish, and Larry J. Sartin have served as "settlement assistance officers."

[11]Although inaccurate and incomplete due to oversimplification, my (Davis') rule of thumb is, "If this evidence were introduced against me/my client, would I have grounds to object for lack of the opportunity to cross-examine the 'creator' of the material?

Case Notes

by John Radey,
Aurell, Radey, Hinkle, Thomas and Beranek
Tallahassee

Our record contains nothing to explain why DOT, especially in this era of budget shortfalls, desired to pay the next lowest bidder an additional $150,000 of taxpayers' money to perform this work.

Overstreet Paving Company v. DOT, 17 FLW D2323, D2324 (Fla. 2d DCA, October 9, 1992). The court just could not stand the apparent absurdity of DOAH and DOT's failure to protect the public purse because of meaningless hypertechnical deficiencies in Overstreet's bid. DOT's final order dismissing Overstreet's bid protest because of a minor, technical omission in Overstreet's bid package was reversed. The court observed that DOT had the discretion to waive the minor irregularity, that Overstreet had presented prima facie evidence that the minor incompleteness in its bid package did not exist when the bid package was submitted, and that it was arbitrary for DOT to reject the Overstreet low bid because a technical document could not be found when the package was reviewed by DOT personnel. And so the court explained away *Grove-Watkins.* Observing that the subject project was already awarded and that no meaningful administrative remedy of a bid award could be provided, the court remanded for "ancillary relief" under Section 120.68(13)(a)2., "in an appropriate circuit court.".

In *Rod's Recovery Agency v. Department of State,* 17 FLW D2329 (Fla. 1st DCA, October 9, 1992), the court reversed part of the Department's final order based on the court's interpretation of Section 493.6126(2),

continued . . .

CASE NOTES

from preceding page

Florida Statutes (Supp. 1990). The Department had filed an administrative complaint, conducted Section 120.57(2) proceedings, and determined that Rod's was guilty of two violations. As to the first violation, the court accepted the Department's construction to the effect that a person merely locating cars to be repossessed was required to be licensed as a repossessor. As to the second violation, the court reversed in deference to the "valuable rights" that could not be properly divested for one holding a valid license to operate a recovery agency.

The court in *Metropolitan Dade County v. Coscan Florida, Inc. and DER*, 17 FLW D2341 (Fla. 3d DCA, October 13, 1992), reversed the adoption of a DOAH recommended order in DER's final order. This was a dredge and fill permitting case for a marina and the court remanded, apparently for more proceedings at both DER and DOAH. What caused the court to reverse was the failure of DOAH/DER to properly determine whether Coscan's proposal provided the reasonable assurances required by Section 403.918, Florida Statutes and the failure of DOAH/DER to properly determine whether the Coscan proposal would have an adverse impact upon manatees and what conditions could be imposed to minimize that risk of adverse impact.

In *K.M.T. v. HRS*, 17 FLW D2463 (Fla. 1st DCA, October 22, 1992), a divided court reversed an HRS final order based on a DOAH recommended order. K.M.T. sought to expunge her name from the central abuse registry after K.M.T. lost her job because HRS confirmed her name on the registry prior to giving her any right to an evidentiary hearing. The court held the repeal of the employment-termination penalty during the expungement proceedings meant that the penalty was eliminated instantaneously and therefore the penalty could not be applied to K.M.T. Therefore, the court found it unnecessary to apply numerous cited authorities providing due process protection for the right to pursue one's career. The court went on to find that the hearing officer's seat-of-the-pants common sense definition of what is "neglect" within the meaning of Chapter 415 was a "purely subjective standard" that was not a "sufficient standard" for defining "neglect." An objective standard was required—either as defined in a rule or by proof of general nursing home standards. As a result, the court reversed and ordered K.M.T.'s name expunged from the abuse registry.

Once again, a final order is vacated and reversed in *Son v. DPR*, 17 FLW D2421 (Fla. 3d DCA, October 20, 1992), where the Real Estate Commission changed DOAH findings of fact supported by competent substantial evidence. The court also reversed the Commission's final order insofar as it changed the hearing officer's conclusions of law as to the right of a licensee to show absence of guilt after entering a nolo contendere plea. In *Nicolitz v. Board of Opticianry and DPR*, 17 FLW D2659 (Fla. 1st DCA, November 24, 1992), the court on rehearing or clarification issued a writ of prohibition against the agency where the agency referred a matter to DOAH for a Section 120.57(1) hearing, later moved unsuccessfully for relinquishment of jurisdiction based upon an alleged absence of an issue of fact, and then filed a voluntary dismissal without prejudice. The court held that the Board could no longer prosecute the petitioner because the Board could not revest itself with the case without a recommended order or an order of relinquishment from DOAH.

In *Santacroce v. Department of Banking and Finance*, 17 FLW D2541 (Fla. 4th DCA, November 12, 1992), the court was presented with an agency order entered after Section 120.57(2) informal proceedings involving Santacroce's sale of securities before he was licensed. The court found that the evidence did not support the Department's determination of the number of sales made by Santacroce before he was licensed. Therefore, the court remanded "for correction and recalculation of appellant's fine." Then the court observed that the sanctions imposed upon Santacroce's future sale of securities were severe, that the court believed that the circumstances evidenced in the record "mitigated in favor of a less severe sanction," and that "on remand, the department may reconsider these sanctions." But the court didn't say please.

Section 120.565 was narrowly construed

in *Coastal Petroleum Company v. DNR*, 17 FLW D2495 (Fla. 1st DCA, October 29, 1992). Coastal sought a declaratory statement from DNR regarding a DNR policy prohibiting certain seismic activities in certain sovereign waters of Florida. DNR dismissed the Coastal petition. The court affirmed because it refused to extend Section 120.565 beyond determinations as to the applicability of statutes, rules, or orders.

Minutes

Administrative Law Section

Executive Council Meeting

Friday, November 13, 1992
10:00 a.m.
The Florida Bar, Tallahassee

I. Call to Order

The meeting was called to order by the Section Chair, G. Steven Pfeiffer.

Members present: G. Steven Pfeiffer, Vivian F. Garfein, Linda M. Rigot, Gary Stephens, Johnny C. Burris, Katherine A. Castor, Diane D. Tremor, Ralf G. Brookes, Carol A. Forthman, William E. Williams, Betty J. Steffens, P. Michael Ruff, Veronica Donnelly, David Watkins.

Members absent with excuse: Stephen T. Maher, M. Catherine Lannon, Thomas M. Beason, William R. Dorsey, Jr.

Also present: Gene Stillman.

II. Preliminary Matters

A. Consideration of the Minutes, September 18, 1992.

The minutes of the September 18, 1992 meeting were approved with minor corrections.

B. Treasurer's Report.

The Treasurer reported that there are still errors in the proposed budget. These will be corrected and the budget will be brought before the Executive Council for approval at the January meeting.

C. Chair Report.

The Chair welcomed new members Veronica Donnelly and David Watkins. He also acknowledged the excellence of the most recent newsletter.

III. Committee Reports

A. Long Range Planning Committee–Steve Maher No report.

B. CLE Committee–Bill Dorsey

140 people attended the Fall CLE, 30 audio tapes have been ordered.

Gary Stephens raised the issue of a conflict with the Fall CLE by a private session taught by Steve Maher. The Chair will discuss this with Steve.

The dates for the Spring CLE may need to be changed because of their proximity to the Patricia Dore Law Conference.

C. Publications–Linda Rigot

Jerry Stern's article appeared in the October Bar Journal. The December issue will carry an article by Segundo Fernandez and Chris Bryant of the Deference Doctrine.

Both publications are in great shape with articles committed.

The Administrative Law Manual is being revised. Al Clark and Ralf Brookes are on the Steering committee.

D. Finance Committee–Linda Rigot

Due to errors in the proposed budget, the committee will meet: again to revise the budget and present it at the January meeting when it is due.

E. Legislative Committee–Betty Steffens

The Health Law Section requested comments on three positions it was taking. Betty's recommendation that we take no position was accepted and she will respond accordingly.

The Select Committee on the APA has been established with a full time staff. It is anticipated that the issues this committee will look at are legislative oversight of agency rule-making and final orders issued by hearing officers.

F. Pat Dore Endowed Professorship Committee–Vivian Garfein

Judge J. Lewis Hall, Jr. recently sent a campaign surplus check in the amount $2,305.00 to Vivian for the fund. This prompted a discussion of what other individuals might also have surplus funds they might be willing to donate. Vivian will look into this further and send out letters.

G. Task Force Reports–Gary Stephens

continued . . .

MINUTES

from preceding page

Carol Forthman will serve on the Mediation Task Force; Diane Tremor on the Local Government Administrative Procedures Task Force. Reports will be made in the Spring, possibly at the Admin Law Conference.

H. Florida Bar Liaison–Stephen Maher No report.

I. 1st DCA Mediation Advisory Committee–Gary Stephens, No report.

J. Membership Committee–Kathy Castor

Documentation submitted shows an increase in membership from 574 in 1985 to a current membership of 804. Kathy has targeted 225 attorneys in state agencies to receive a letter and copy of our newsletter. The next targeted group will be previous members. She will monitor the success rate of these efforts.

There appears to be an error in the Bar's computer labeling system. Gene Stillman will look into this.

K. Model. Rules Revision Committee–Steve Pfeiffer

The Governor's office of Planning and Budget recently sent a letter thanking us for our efforts. Since they have no staff for this project, they may take our product and put it through rulemaking.

The Committee will consist of Johnny Burris, Steve Maher, Cathy Lannon, Mike Cerniga, and Ralf Brookes.

Betty suggested that Sharyn Smith and Carroll Webb also be included.

L. Administrative Law Conference–Bill Williams

Coming Up:

Annual Meeting of The Florida Bar
The Walt Disney World Dolphin
June 23-26, 1993
Orlando

See future issues of The Florida Bar *News* for details and registration forms.

We must change the date of the conference which currently conflicts with Easter and Passover. April 30–May 1 was suggested. Gene will check the Bar calendar.

A two-tiered pricing system for the conference was adopted unanimously: $70 for nonmembers, $50 for members. An attendee will have the option of joining the section up till the conclusion of the conference.

The central theme of the conference will be governing in the 90's with less resources.

IV. Old Business

A. Report on retreat–Ralf Brookes

Ralf presented several options for locations for a retreat for the Executive Council. There was discussion but no resolution.

B. Glitch Amendments to Section Bylaws

The amendments were adopted unanimously. Two remaining substantive amendments will be addressed at the January meeting.

V. New Business

A. All Bar Conference Issues

Gary Stephens and Steve Pfeiffer will attend the All Bar Conference.

B. Law Schools and Fla APA

There is a growing concern that the law schools of Florida are not offering Florida Administrative Procedure. Our action in establishing the Pat Dore Chair will ensure that it is taught at FSU. Bob Smith has been invited to teach it at UF? Veronica Donnelly reports that it is not being taught at Stetson. Johnny Burris now includes it with his Federal APA course. Johnny suggested that students be allowed to be section members for a nominal fee. If students create a demand, the schools will respond. Kathy Castor will look into this option regarding membership in the section.

C. Rescheduling of Spring CLE

Bill Dorsey and Bill Williams will confer on rescheduling.

D. The next Executive Council meeting will be held January 15

E. First DCA Judges

Betty Steffens suggests that more administrative lawyers are needed at the First DCA. In anticipation of the next vacancy, the section needs to do some lobbying. The Executive Council will adopt a resolution to be brought before the Judicial Nomination Commission and other appropriate bodies.

The meeting was adjourned at 11:58 a.m.

The Order of Presentation and Motions to Dismiss Burdens of Proof in Untimely Petitions

by Veronica E. Donnelly, Greene, Donnelly, Schermer, Tipton & Moseley, Tampa

Motions to dismiss petitions for formal hearing are regularly filed within the Division of Administrative Hearings based upon the assertion that a request for an administrative hearing was not timely made. If the moving party is correct in its determination that the point of entry for challenging proposed agency action has expired, then the Division of Administrative Hearings should dismiss the pending case because a controversy does not exist which can be decided in an administrative forum. The purpose of this article is to explore what issues and evidence should be presented during the motion hearing so that a correct ruling can be made by the hearing officer.

During its presentation, the moving party has the preliminary burden of demonstrating that the notice sent to the challenger of the proposed agency action was appropriate. The sufficiency of such notice is dependent upon the particular statutes and rules which govern such matters. Courts have consistently ruled that when notice is provided in accordance with statutes and agency rules, an untimely petition is properly dismissed. *See,* for example, *Rudloe v. Department of Environmental Regulation*, 517 So.2d 731 (Fla. 1st DCA 1987).

A copy of the notice provided to the challenger should be given to the hearing officer so that the contents of the notice can be examined to determine whether it was specific enough to inform interested and affected persons of the nature of the intended agency action. *Smith v. Department of Health and Rehabilitative Services*, 555 So.2d 1254 (Fla. 3rd DCA 1990). In addition, this review by the hearing officer should determine whether the affected party's Chapter 120 rights were adequately addressed. It is clear under Florida law that there must be strict and full compliance with due process notice requirements. Actual notice of agency action which does not inform the affected party of its right to request a hearing together with the time limits for doing so, is inadequate to "'trigger" the commencement of the administrative process and the point of entry period. *Sternman v. Florida State University Board of Regents*, 414 So.2d 1102 (Fla. 1st DCA 1982).

As part of the preliminary burden, the moving party must also show that the notice was actually received by the challenger and a formal hearing was not requested during the clear point of entry period. It should be noted, however, that this portion of required proof is not limited to a mathematical calculation. If only a short delay has occurred between the point of entry deadline lawfully established by the agency and the challenger's hearing request, a formal hearing should still be held. In *General Motors v. Gus Machado Buick-GMC. Inc.*, 581 So.2d 637 (Fla. 1st DCA 1991), the First District Court of Appeal recently warned it would not look favorably on arguments from agencies or other parties that short delays between deadlines and hearing requests should result in the forfeiture of substantive rights.

Once sufficiency of notice is established, the burden of proof shifts to the party requesting a formal hearing. To defeat the motion to dismiss, the challenger must show that the time frame provided for the hearing request is invalid due to special circumstances contributed to by the agency or the challenger's own excusable neglect. *Machules v. Department of Administration*, 523 So.2d 1132 (Fla. 1988). If special circumstances exist, the doctrine of equitable tolling can be applied by the hearing officer

continued . . .

ORDER OF PRESENTATION

from preceding page

to toll the original time allowed for seeking review of the agency's decision. Under such circumstances, jurisdiction remains in the Division of Administrative Hearings and the case can proceed to hearing.

It is interesting to note that the party who seeks to have the doctrine of equitable tolling applied to the point of entry deadline is not required to establish that its application will be without prejudice to the rights of others. *Stewart v. Department of Corrections*, 561 So. 2d 15 (Fla. 4th DCA 1990). Thus, if a party will suffer a greater prejudice if equitable tolling occurs, this overriding prejudice should be established during the hearing. Otherwise, a reviewing court will not address the prejudice, even if it is open and obvious. See, *State Department of Environmental Regulation v. Puckett Oil*, 577 So.2d 988 (Fla. 1st DCA 1991).

Based upon the foregoing developments in case law, it appears that whoever seeks to foreclose a challenger's opportunity for a formal hearing because of the passage of the point of entry deadline has a number of evidentiary burdens. First, it must be shown that the notice was appropriate and sufficiently advised an affected challenger of its rights. Second, more than a short delay needs to exist between the formal hearing request and the point of entry deadline. Third, if the doctrine of equitable tolling applies, the movant must establish that it should not be utilized in circumstances where it causes an overriding prejudice to the party moving for dismissal. If the movant is unable to meet all of these burdens, the case will remain in the administrative forum.

The Rule Challenge Challenge

by Robert T. Benton II, Hearing Officer
Division of Administrative Hearings,
Tallahassee

Suppose the outcome of a substantial interest proceeding hinges on the validity of an administrative rule you are convinced is not worth the paper it is written on, but you discover the agency's reliance on the defective rule only in the course of the Section 120.57 final hearing. The rule seems to support the agency's position, which you oppose; but without the rule, the agency does not have a prayer in the Section 120.57 proceeding, as far as you are concerned.

You cited the hearing officer *State* ex rel. *Department of General Services v. Willis*, 344 So. 2d 580, 592 (Fla. 1st DCA 1977) for the proposition that you could raise the rule's invalidity in the substantial interest proceeding without initiating a separate rule challenge proceeding, but the hearing officer was unwilling to consider rule validity questions in a substantial interest proceeding. See *Lee v. State Department of Transportation*, 596 So. 2d 802, 804 (Fla. 1st DCA 1992).

In such circumstances, the logical next step would seem to be to initiate a rule challenge under Section 120.56, despite the lateness of the hour. You might prevail on the rule challenge before the agency enters its final order or even before the recommended order is entered. If you prevailed in the rule challenge only after an adverse final order had been entered in the Section 120.57 case, you could hope for the appeals court to straighten things out.

Whether such hope would be well-founded is another question. In *Department of Business Regulation v. Martin County Liquors*, 574 So. 2d 170 (Fla. 1st DCA 1991), the First District upheld a hearing officer's order invalidating an agency form and part of a manual as rules never properly promulgated, but also upheld the agency's final order denying an application for licensure on grounds that the form had not been completed, as required by the manual.

The denied applicant's appeal was consolidated with the agency's appeal of a hearing officer's subsequent order invalidating the

form and policy manual provision as rules. In upholding the determination of invalidity, the appeals court said "the application form . . . and policy . . . will become void and ineffective as of the date the decision of this court [which simultaneously upheld the license denial based on the form and the policy] becomes final." 574 So. 2d at 174. See also *Capeletti v. Department of Transportation*, 499 So. 2d 855 (Fla. 1st DCA 1986) (reh. den. 1987).

Of course, a practitioner with your acumen would probably learn long before the final hearing that the agency intended to rely on our hypothetical, defective rule. We can assume that you prudently instituted a rule challenge well before the Section 120.57 hearing. Let us also assume that, when you brought a separate proceeding by filing a rule challenge petition directly with DOAH under Section 120.56, a hearing officer saw the wisdom of your position and determined the rule to be an invalid exercise of delegated legislative authority. Now you are all set to prevail in the substantial interest hearing, right? Not so fast, dear reader!

The hearing officer's order invalidating the rule is stayed for at least thirty days if the agency never appeals. "The rule or part thereof declared invalid shall become void when the time for filing an appeal expires or at a later date specified in the decision." Section 120.56(3). If the agency does appeal, the hearing officer's order invalidating the rule is stayed under the provisions of Fla. R. App. P. 9.310(b) (2), which grants agencies and other governmental entities an automatic stay upon their filing of a notice of appeal. *Department of Business Regulation v. Martin County Liquors*, 574 So. 2d 170, 174 (Fla. 1st DCA 1991); *State Board of Optometry v. Florida Society of Ophthalmology*, 538 So. 2d 878, 889 (Fla. 1st DCA 1988) (on reh. 1989). Contrast Section 120.68(3) (b) regarding appeals from orders entered pursuant to Section 120.535.

Not infrequently, parties agree to consolidate substantial interest and rule challenge proceedings for hearing in order to avoid duplication of effort. If the Section 120.56 and Section 120.57 hearings are consolidated and the hearing officer concludes that the rule challenge is well taken, the hearing officer faces the same dilemma in drafting the recommended order that a prior, stayed order of invalidation poses. The natural tendency and perhaps universal practice have been for the hearing officer to proceed on the premise that the rule found invalid has no application, even though, until a final order invalidating the rule becomes effective, the rule is presumptively valid. *Department of Business Regulation v. Martin County Liquors. supra; State Board of Optometry v. Florida Society of Ophthalmology, supra.*

At least in theory, an agency desiring the economies of a consolidated hearing might consent beforehand to vacation of the stay, in the event the hearing officer entered an order invalidating the rule, in order that the agency could take final agency action on the same premise regarding rule validity or invalidity as the hearing officer is likely to proceed on in preparing the recommended order. Although the stay that Section 120.56(3) creates may not be subject to vacation, Fla. R. App. P. 9.310(b) (2) provides: "On motion, the lower tribunal [the hearing officer] . . . may extend a stay, impose any lawful conditions, or vacate the stay."

In light of the statutory and appellate rule stay provisions, a party hoping for a substantial interest adjudication in which the agency will not have the benefit of a challenged rule, if the challenge succeeds, might oppose consolidation and seek a continuance of the Section 120.57 hearing until the rule challenge is finally resolved. Of course, final resolution of the rule challenge might take years, if an appeal is taken.

If the hearing officer finds the rule invalid and draws the recommended order on the assumption that the rule is invalid, it is almost always open to the agency whose rule has been invalidated to delay entry of the final order in the Section 120.57 case until after the statutory stay of the final order in the rule challenge case has expired. If the agency does not appeal the hearing officer's order determining the rule invalid, it can simply enter a final order consistent with the invalidation. See, *State Board of Optometry v. Florida Society of Ophthalmology*, 538 So. 2d 878, 889 (Fla. 1st DCA 1988) (on reh. 1989).

If the agency does appeal an order invalidating one of its rules while a substantial

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THE RULE CHALLENGE CHALLENGE

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interest case in which it has invoked the challenged rule is pending, the party who prevailed on the rule challenge can apply to the hearing officer in the Section 120.56 case to vacate the stay or to impose a condition on the stay requiring that the agency make no use of the invalidated rule in the Section 120.57 case against the challenger. A hearing officer modified the stay in force in *Phillip R. Davis v. Board of Geology*, No. 91-4085R (DOAH; July 10, 1992) (Order Granting Motion To Modify Automatic Stay) to forbid the agency's enforcing a rule against a successful challenger, whose license application was at issue in a related Section 120.57 case.

The views expressed are purely those of the writer. The Division of Administrative Hearings does not have a Division view of this particular topic.

Standing in Florida Power Plant Permitting Proceedings

by Ross S. Burnaman, Legal Environmental Assistance Foundation, Tallahassee

Power plants are among Florida's biggest LULU's (locally unpopular land uses). Because of the widespread distribution of air pollution from power plants, environmental impacts are regional as well as global. Under existing law, electric utilities usually use a Florida's two-stop approval process.[1] Utilities seek need determinations from the Public Service Commission (PSC) and power plant certification orders from the Siting Board[2].

Recently, utilities have challenged the standing of utility customers and public interest groups to intervene in the administrative proceedings in both venues.[3] In both cases, the decade-old decision in *Agrico Chemical Co. v.Dept. of Environmental Regulation*, 406 So. 2d 478, 482 (Fla. 2nd DCA 1981), *rev. denied* 415 So.2d 1359 (Fla. 1982), while important, did not resolve all standing issues, including organizational standing.

Lee County Garbage Burner

The Florida Electric Power Plant Siting Act states that the "location and operation" should have "minimal adverse effects on human health, the environment, the ecology of the land and its wildlife, and the ecology of state waters and their aquatic life."[4]

In the certification proceeding for the Lee County Resource Recovery Facility (garbage burner), Southwest Floridians for a Clean and Risk-free Environment, Inc. (SFCARE) was allowed to participate in the Section 120.57 (1), Florida Statutes, proceeding. SFCARE's intervention was conditioned upon proof that its substantial interests were affected.[5] The Siting Act grants standing to some, and allows others to demonstrate standing.[6] SFCARE met the organizational standard for mandatory environmental group intervention in certification proceedings, but SFCARE failed to timely notice its intent to be a mandatory party.[7] Hence, SFCARE was required to allege and prove that its substantial interests were affected and being determined by the proceeding.[8]

The Hearing Officer found that: SFCARE had about 600 persons on its mailing list; the actual number of members was unknown; that the facility would be about five miles from the nearest home of a (known)(sic) SFCARE member; that the facility's impacts on the public would be

"negligible"; and that no member of SFCARE would be affected in any manner different than the public at large.[9]

The Hearing Officer concluded that SFCARE failed to demonstrate that a substantial number of its members are substantially affected by the proceeding.[10] She also determined that SFCARE did not demonstrate "special injury."[11] SFCARE filed exceptions to the Recommended Order.

Since SFCARE had participated in the hearing, the Siting Board denied as moot SFCARE's exception to the Hearing Officer's legal conclusion on standing.[12] In dicta, the Siting Board said that SFCARE failed to prove standing under the *Florida Home Builders Assn.* standard, but the Board rejected the conclusion that SFCARE was required to show "special injury."[13]

Cypress Need Determination

Need determinations are governed by the Florida Energy Efficiency and Conservation Act (FEECA) based upon four statutory criteria.[14] Unlike the Siting Act, FEECA, does not contain specific standing provisions for third parties.[15] Citizen standing in need determinations is governed by Sections 120.52 (12) and 120.57, Florida Statutes, PSC rules, and caselaw.[16] Under *Agrico*, standing issues must be resolved by a review of the operable statute. FEECA's legislative intent finds that energy efficiency and conservation are critical to protect the public health, prosperity and general welfare of citizens.[17]

In the Cypress docket, the standing of the Legal Environmental Assistance Foundation, Inc. (LEAF) and a FPL customer was based upon natural resources and electric rates/service allegations. Building a power plant in lieu of conservation was alleged to damage natural resources and affect electric rates and service.

FPL moved to dismiss LEAF and the customer. FPL argued that environmental and health concerns over the proposed coal plant were properly considered during the certification rather than the need proceedings and that the intervenors failed to satisfy *Agrico* and *Florida Home Builders* requirements. Further, FPL asserted that the customer's financial interest in utility expenditures should be raised in a separate docket related to approval of the utility-independent power producer contract for energy and capacity. FPL's motion was denied by the PSC.

FPL persisted in its challenge to LEAF's standing throughout the proceeding. LEAF presented testimony and evidence that a substantial number of its members would be affected by the proceeding, and cited to an earlier determination of standing for the Sierra Club, Inc. in the Orlando Utilities Commission Stanton Two need determination.[18]

The PSC found that LEAF's substantial interests were affected, since "Section 403.519, Florida Statutes, provides that we shall expressly consider the conservation measures taken by or reasonably available to the applicant which might mitigate the need for the proposed plant."[19] The Cypress final order cited the Stanton Two need determination order as precedent.[20]

Discussion and Conclusion

The apparent dichotomy between the Lee County and Cypress decisions may result from adjudicatory facts, or the different exercise of discretion by the collegial bodies rendering the decisions.[21] Unfortunately, the agencies could not rely upon clear precedent, including *Agrico*, to decide the standing issues.

Agrico established a two prong test for standing: the party must show (1) that it will suffer injury in fact which is of sufficient immediacy to entitle it to a section 120.57 hearing, and (2) that its substantial injury is of a type or nature which the proceeding is designed to protect.

The Siting Board correctly rejected the notion that "special injury" must be demonstrated for access to Section 120.57, Florida Statutes, proceedings.[22]

Related to "special injury" is the issue of the extent to which an organization can represent the interests of its members in administrative proceedings. In rulemaking, injury can include having members subject to the contested rules. But in non-rule adjudication, the issue of organizational standing is less clear.

Florida Home Builders Assn. v. Dept. of Labor and Employment Security, 412 So.2d 351, (Fla. 1982), involved a trade association's challenge to an adopted *rule*, where some of the association's members were al-

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FLORIDA POWER STANDING

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leged to be substantially affected (regulated) by the rule.[23] The Florida Supreme Court held:

> To meet the requirements of section 120.56 (1) an association must demonstrate that a substantial number of its members, although not necessarily a majority, are substantially affected by the challenged rule. Further, the subject matter of the challenged rule must be within the association's general scope of interest and activity, and the relief requested must be of the type for a trade association to receive on behalf of its members.

Florida League of Cities, Inc. v. Dept. of Environmental Regulation, 17 F.L.W. (D) 1966 (1st DCA August 18, 1992), cited *Florida Home Builders*, and added "it is not necessary . . . to elaborate how each member would be personally affected . . . because a substantial portion of . . . members will be *regulated* by the rule."[24]

In *Farmworker Rights Org. v. Department of Health and Rehabilitative Services*, 417 So.2d 753, 754 (Fla. 1st DCA 1982), the First District held that the *Florida Home Builders* standard for associations should be expanded to non-rule adjudication. While not overruling *Farmworker Rights Org.*, the First District has stated that there may be a different predicate for organizational standing for rulemaking than for licensing. *Soc. of Ophthalmology v. Bd. of Optometry*, 532 So.2d 1279, 1287 (Fla. 1st DCA 1988); *Florida Medical Assn. v. Dept. of Professional Regulation*, 426 So.2d 1112 (Fla. 1st DCA 1983).[25] *Agrico*, distinguished in *Fla. Medical Assn.*, has not resolved the issue of organizational standing.[26]

In power plant proceedings, both economic and non-economic injury to members' interests should be sufficient to obtain organizational standing. The Lee County order indicates that organizational standing is not a given, however. It is difficult to reconcile the finding that the impacts of the Lee County garbage burner would be "negligible" with the major contribution of electric power plants to macro-level environmental impacts such as acid rain, ozone layer depletion, the "Greenhouse Effect," global warming, and widespread land and water use impacts.[27]

The cumulative air pollution impacts of power plants are somewhat analogous to impacts to "vast quantities of water" discussed in *In the Matter of Surface Water Management Permit No. 50-01420-S*, 515 So.2d 1288, 1292-1294 (Fla. 4th DCA 1987). The Siting Act's grant of standing to environmental groups suggests that the Lee County decision should be limited to its facts. In need determinations there are obvious links between environmental (and health) interests and the deferral or avoidance of power plants via energy conservation.

Neither the Lee County final order nor the Cypress final order addressed whether the injury alleged was appropriate to the power plan approval process. The PSC's denial of FPL's motion to dismiss did not address FPL's argument that environmental and health concerns could only be addressed in the certification proceedings.[28] The Cypress order refutes FPL's suggested dichotomy; the PSC's denial of the coal plant was aided by DER's intervention and the order addresses environmental issues.[29]

Environmental groups clearly have standing in both power plant licensing venues without a showing of special injury. Given the Lee County order, any statutory party should intervene in time to trigger mandatory standing in certificaiton proceedings. In both certification and need proceedings, substantially affected parties include environmental groups, but care must be taken to allege environmental or health injury to a substantial number of the organizations members given the uncertain application of *Agrico* standing principles to licensing proceedings involving third party membership organizations.

Footnotes

[1]For a general description of the process, see O'Neill, "Florida Electrical Power Plant Siting Act: Perpetuating Power Industry Supremacy in the Certification Process", 36 *Univ. of Fla. L.Rev.* 817 (1984).

[2]Need determinations are governed by Fla. Stat. s. 403.519; certification is governed by the Florida Electrical Power Plant Siting Act, Fla. Stat. ss. 403.501–403.518.

[3]*In Re: Application for Power Plant Site Certification of Lee County Solid Waste Resource Recovery Facility*,

DOAH Case No. 90-3942EPP (Siting Board, June 17, 1992) [Lee County case]; *In Re: Joint Petition to Determine Need for Electrical Power Plant to be Located in Okeechobee County by Florida Power and Light Company and Cypress Energy Partners. Limited Partnership*, Order No. PSC-92-1355-FOF-EQ, Docket No. 920520-EQ (Florida Public Service Commission, November 23, 1992) [Cypress case].

[4]Fla. Stat. s. 403.502.

[5]Lee County case, Recommended Order, p. 38.

[6]The Act creates a streamlined "certification hearing" at Section 403.508, Florida Statutes, and enumerates the "parties" to that hearing. In addition to the agencies and applicant, if a "notice of intent to be a party" is filed at least 15 days prior to the date of the *land use* hearing, the following are allowed to be parties: other agencies, "any domestic nonprofit corporation or association" for conservation, health, historical sites, consumer protection, labor or industry groups, or planning groups.

Other parties *may* include any person [defined in 403.503 (20)], who timely files a notice of intent to be a party, whose substantial interests are affected *and* who timely files a motion to intervene under Chapter 120, Florida Statutes.

[7]Fla. Stat. s. 403.508 (4)(c)2; Lee County Final Order, p. 5.

[8]Fla. Stat. s. 403.508 (4) (e).

[9]Lee County Recommended Order, p. 35.

[10]Citing *Florida Home Builders Assn. v. Dept. of Labor*, 412 So.2d 351, 353 (Fla. 1982); *International Jai-Alai Players Assn. v. Florida Pari-Mutual Comm.*, 561 So. 2d 1224 (Fla. 3d DCA 1990); and *In the Matter of Surface Water Management Permit No. 50-01420-S*, 515 So.2d 1288 (Fla. 4th DCA 1987).

[11]Citing *Florida Society of Ophthalmology v. State Board of Optometry*, 532 so.2d 1279 (Fla. 1st DCA 1988), rev. den. 542 So.2d 1333 (Fla. 1989); *Board of Optometry v. Florida Society of Ophthalmology*, 538 So.2d 878 (Fla. 1st DCA 1988); and *Grove Isle, Ltd. v. Bayshore Homeowner's Assn., Inc.*, 418 So.2d 1046, 1047 (Fla. 1st DCA 1982).

[12]Lee County Final Order, p. 4, citing *Hamilton County Brd. of County Commissioners v. Dept. of Environmental Requlation*, 587 So. 2d 1378, 1383 (Fla. 1st DCA 1991)

[13]Lee County Final Order, p. 5, citing Fla. Stat. s. 403.502.

[14]Cf. *Nassau Power Corp. v. Beard*, 17 F.L.W. 314, 315 (Fla. May 28, 1992), at footnote 5, where the court implied that Section 403.519, Florida statutes, is part of the Siting Act.

[15]Fla. Stat. ss. 366.80–366.85 and 403.519.

[16]Rule 25-22.080, FAC, pertains to need determinations generally. Rule 25-22.081, FAC, sets required contents for a utility petition, which must include an alternative analysis and discussion of "viable nongenerating alternatives".

[17]Fla. Stat. 5. 366.81.

[18]Order 24986, (Public Service Comm. August 28, 1991).

[19]Cypress Final Order,p. 4.

[20]*Id.* citing PSC Order 24968.

[21]Ironically, the PSC rejected "as unnecessary to decide the factual matters in this case", LEAF's proposed finding that "a substantial number of LEAF's members are affected by the proposed (project) (sic)". Cypress Final Order, p. 55 (Proposed Finding 126).

[22]See also, *Friends of the Everglades v. Board of Trustees of the Internal Improvement Trust Fund and Department of Natural Resources*, 595 So.2d 186 (Fla. 1st DCA 1992).

[23]The decision cited *Sierra Club v. Morton*, 405 U.S. 727 (1972), a decision discussed in *Lujan v. Defenders of Wildlife*, 60 U.S.L.W. 4495, 4497-4498 (U.S. June 9, 1992)

[24]On rehearing, original opinion at 16 F.L.W. 1933.

[25]"There can be . . . a difference between the concept of 'substantially affected' under section 120.56 (1) and 'substantial interests' under section 120.57 (1)." 532 So.2d at 1288.

[26]In *Soc. of Ophthalmology v. Bd. of Optometry*, the First District, citing *Fla. Medical Assn.* rejects a reading of *Agrico* that suggests that standing must be determined by reference to the statute being implemented in the licensing proceeding. 532 So.2d at 1287.

[27]See, Pace University Center for Environmental Legal Studies, *Environmental Costs of Electricity*, 1991.

[28]PSC Order No. PSC-92-0607-PCO-EQ (July 7, 1992).

[29]Cypress Final Order, pp. 14-16.

Inspection Procedures Under OSHA: Employer Rights and Responsibilities OR What to do if OSHA Shows Up on Your Doorstep

by John M. Hament, Esquire, Abel, Band, Russell, Collier, Pitchford, Gordon, Sarasota

On October 26, 1990, Congress passed the Federal Budget Reconciliation Act of 1990, which increased OSHA maximum penalties seven-fold. Federal OSHA began enforcing the new fines on March 1, 1991. The new maximum penalties ensure enhanced OSHA enforcement and importance in the future. In view of the likelihood of an increased frequency in occupational safety and health inspections, it is important for management

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OSHA

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officials to be familiar with inspection procedures and their procedural rights during inspections. Most of these rights will be lost unless asserted at the time–use it or lose it! As a practical matter, the most important record in an OSHA case is not the record of the hearing, but the inspector's report. This is true for two reasons: first, it is the inspector's report that triggers the issuance of a citation or the decision by OSHA not to issue a citation. Second, the inspector's report will be introduced into evidence at the hearing. Although the agency technically has the burden of proof, once the inspection report is entered into evidence, as a practical matter, the employer has the burden of proof to rebut it. It is well known that the party which has the better documentation often wins. In other words, an *employer should not have a passive sort of approach to an inspection. He should treat the inspection as its first, and best, opportunity to defend itself*

Warrants

While it is not necessary or advisable to demand a warrant in most cases, management officials should be aware that the company has the option to exclude OSHA inspectors from company property or work site if they do not have an administrative inspection warrant. For purposes of obtaining a warrant, only "administrative cause" need be shown by the agency; OSHA need not make out the "probable cause" showing of a violation that would be required to support a search warrant for criminal prosecution purposes. Rather than demand a search warrant at every occasion, *it is advisable to undertake a cooperative, yet cautious, approach when confronted with an OSHA inspection. The fact that the company has the option of demanding a warrant frequently permits the negotiation of more reasonable inspection terms.*

There are essentially three instances where OSHA can lawfully inspect and issue citations without first obtaining a warrant:

- where *exigent circumstances* (emergencies) create an urgent need for immediate search which would be deemed to outweigh the employer's right to privacy;
- when the employer voluntarily *consents* to be inspected; and
- violations that the inspector sees in *plain view* on the employer's premises or work site, although denied entry to the workplace.

The most significant factors to balance with regard to whether a warrant should be demanded are whether the employer can benefit by delaying the inspection for several days while the agency obtains a warrant, or whether a reasonable compromise as to time, scope and duration of inspection can be negotiated with the inspector. Because OSHA inspections are almost always conducted without prior notice, they may not occur at times convenient for the employer. Production exigencies or the unavailability of the predetermined company representative or safety official responsible for safety policies sometimes makes the unannounced OSHA inspection a true hardship on the employer. Additionally, there will be circumstances where a 24-hour delay during which the employer can take care of various "housekeeping" chores (as well as review with supervisors the need to ensure that all safety requirements are in full force and effect) will work to the employer's significant benefit.

Presentation of Credentials by Inspector

The OSHA Act requires that an inspector present his credentials to the "owner, operator, or agent in charge at the commencement of the inspection". An employer has a right to verify the compliance officer's identity, so long as it is handled in a reasonable manner. Normally, the employer may delay the inspection long enough to copy the information from the inspector's credentials and call the agency to verify the officer's identity. Employers have generally not succeeded in defending citations on the grounds of an inspector failing to present his credentials.

Opening Conference

The compliance officer typically conducts an opening conference in which he explains

the purpose for the visit (i.e., type of inspection), the scope of the inspection, and the standards that apply.

If an inspection is made because of an employee complaint, the compliance officer must give a copy of the complaint to the employer upon request. In virtually every instance, the employee's name will have been expunged from the complaint provided to the employer. Upon the receipt of the complaint, the employer should review the specifically alleged violations and determine which areas of the plant are the subject of the complaint. If the employer suspects that the complaint is a form of harassment or otherwise has been lodged with the agency for some ulterior purpose, the employer should bring those matters to the inspector's attention orally, and to the attention of the inspector's supervisor in writing.

The employer should at least make an effort to limit the OSHA inspection to the areas specified in the complaint. Several courts have held that an employee complaint does not necessarily justify issuance of a warrant authorizing a wall-to-wall inspection. The employer should also be aware, however, that failure to object to an inspection beyond the scope of the complaint will operate as a waiver of any legal challenge based on the area of the search.

Walk-Around Rights of Employees

Just as the employer has walk-around rights to permit him to monitor the OSHA inspection, the Act also provides that a representative of employees shall have an opportunity to attend the opening conference and accompany the compliance officer on his physical inspection of the workplace. The employees' authorized representative may be selected by the employees themselves or, if represented by a labor organization, by the employees' union. Where there is no authorized employee representative (often the case in a non-union facility), the compliance officer may consult with and interview a reasonable number of employees during the course of his inspection. The employer has no right to interfere with the employees' selection of a representative nor to impose the function upon any employees.

Walk-Around Inspection Procedures

Once the inspector is permitted on the work site, his activity should be closely monitored. A company official familiar with OSHA inspection procedures should accompany the inspector at all times and take careful notes as to all inspection activities. During the course of the walk-around, the inspector may wish to speak to employees. While OSHA regulations provide that the OSHA inspector may question employees privately, the company representative should at least make an attempt to be present during such interviews, particularly those of supervisors or managerial personnel. The company representative should not volunteer information, but should answer the inspector's questions briefly and to the point. He should not volunteer to demonstrate any equipment unless it would indicate that an apparently unsafe process is safe in operation.

Responses to Evidence Gathering by Inspector

The employer should take certain steps in response to sampling, photographing, and other kinds of evidence gathering during the course of the OSHA inspection.

- The company representative should, after the inspection, conduct parallel tests and take parallel samples (e.g., soil) to be available in enforcement proceedings to rebut the accuracy of the inspector's tests and samples.
- The company representative should have photographs taken of the same items that the inspector photographs, including photographs from angles other than those taken by the inspector.
- The company representative should make note of any unusual work conditions which would make the inspector's sample unrepresentative.
- The company representative should record and document apparent mistakes by the compliance officer.

Employee Complaints During Inspection

During the course of a walk-around, em-

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OSHA

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ployees may bring complaints to the inspector's attention. Even though these complaints may not meet the requirements of the Act for a formal complaint (i.e., be in writing, signed, and describe the violations with particularity), the compliance officer nevertheless will probably investigate the nature of the workplace hazard alleged. Under such circumstances, the employer again has the option of terminating the investigation, advising the inspector that he would rather take up those matters on another day, or acquiescing to the inspection if no violation is anticipated.

Closing Conference

Following completion of an inspection, the compliance officer is required to conduct a closing conference with employer and employee representatives to discuss his preliminary findings, any citations likely to be issued, and how any penalty computation will be made. At the closing conference, the company representative should ask the OSHA inspector exactly what would constitute abatement of the alleged violations. Special note should be made if the inspector indicates that he does not know what would constitute abatement or how the problem might be abated. Evidence that abatement is not possible could later be used in enforcement proceedings to defend against a citation. Although a closing conference (as well as an opening conference) is required by the regulations, the inspector's failure to hold such a conference does not necessarily invalidate an inspection unless the employer can demonstrate that he was prejudiced by the failure.

Hurricane Relief Attorney Application

Complete and Mail to: Janice M. Fleischer, J.D.; Hurricane Andrew Pro Bono Project; 123 NW 1st Ave.; Miami, Florida 33128; (305)579-5733

NAME: _____

ADDRESS: _____

CITY, STATE, ZIP: _____

PHONE: _____ FAX: _____

AREAS OF LAW/INTEREST: _____

_____

Hurricane Andrew Pro Bono Project

Funded by a grant from The Florida Bar Foundation and administered through the Dade County Bar Association Legal Aid Society

Dear Colleague:

Hurricane Andrew has affected all of us in Dade County. But Andrew did not spread his work evenly over the county. Some communities were affected as if they were only in a bad storm, while others (as we are all painfully aware) were completely devastated. If you are from Dade County, this is not news to you.

I am aware of how busy your schedules are and of how many times you are asked and "reminded" of your obligation to your community to provide pro bono assistance to those in need. We each do his/her best. However, as Project Coordinator, I am also aware of the growing need for your services by the victims of the Hurricane. ANY commitment from you is appreciated. WHATEVER YOUR TIME LIMITS ARE, WE CAN FIND A SERVICE YOU CAN PERFORM FOR THIS COMMUNITY. Further, because we are asking for you to give time over and above your normal pro bono activity, we will see to it that your services are only provided to Hurricane victims.

The "Hurricane Andrew Pro Bono Project" has been funded by a grant from The Florida Bar Foundation and is being administered by the Dade County Bar Association Legal Aid Society. The purpose of the grant is to: "... bring together pro bono efforts of all bar associations, ad hoc lawyer groups and individual lawyers to provide legal assistance to victims of Hurricane Andrew..."

It is becoming increasingly apparent that the number of members of our community in need of pro bono legal services is growing. More and more problems are materializing in all areas of the law: real estate, landlord/tenant, insurance claims, administrative issues, to name but a few. The vast majority of people affected are of poverty level income. Additionally, the numbers of us who have volunteered to assist the victims of the Hurricane are small in comparison to the need of the community.

If you are from Dade County, any work which is done for the "Hurricane Andrew Pro Bono Project" will earn you credit with "Put Something Back". If you are not from Dade, and you are interested in volunteering, please let us know. We are working on possible projects for out of county attorneys which might free up more time for our "in county" pro bono attorneys to assist greater numbers of hurricane victims. Your commitment does not have to be one of continuing legal representation. Our grant calls for Community Education and Advice and Counsel activities as well. This is a wonderful opportunity for those of us in the legal community to build confidence and trust in the legal system by assisting our neighbors in need. If you can help *in any way*, please complete the form below and mail it to me as soon as possible.

Thanking you in advance for your commitment.

Very truly yours,
Janice M. Fleischer, Project Coordinator

The Florida Bar Continuing Legal Education Committee
and the Administrative Law Section present

Florida Administrative Rulemaking

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

March 12, 1993

One Location
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COURSE SYNOPSIS

This course examines administrative rulemaking under Florida's Administrative Procedure Act. It includes individual presentations from the perspective of a legislative oversight committee, an administrative agency, and the private practitioner. These presentations will be followed by oral argument on the standards of judicial review of rulemaking before a panel of judges from the First District Court of Appeal. The judges will render their opinion, and all participants and members of the audience will then discuss the issues.

LECTURE PROGRAM

8:00 a.m.-8:25 a.m.
Late Registration

8:25 a.m.-8:30 a.m.
Opening Remarks
William R. Dorsey, Chair, CLE Committee
Administrative Law Section, The Florida Bar

8:30 a.m.-9:20 a.m.
Legislative Oversight: The Role and Functions of the JAPC
Senator Curt Kiser, Chair
Administrative Procedures Committee

9:20 a.m.-10:10 a.m.
Rule Promulgation — An Agency Perspective
Janet Ferris, Secretary
Department of Business Regulation

10:10 a.m.-10:30 a.m.
Coffee Break

10:30 a.m.-11:20 a.m.
Challenge To Nonrule Policy Under S.120.535
Professor Stephen Maher
Stephen T. Maher, P.A.

11:20 a.m.-12:40 p.m.
Oral Argument and Panel Discussion: Judicial Review of Rulemaking
F. Scott Boyd, Moderator

Honorable Edward T. Barfield, Judge
First District Court of Appeal

Honorable James R. Wolf, Judge
First District Court of Appeal

Honorable Peter D. Webster, Judge
First District Court of Appeal

Sharyn L. Smith, Director
Division of Administrative Hearings

G. Steven Pfeiffer, General Counsel
Department of Community Affairs

Professor Stephen Maher
Stephen T. Maher, P.A.

Robert M. Rhodes, Esquire
Steel, Hector & Davis

12:40 p.m.-1:00 p.m.
Questions and Answer Period

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Requests for refund or credit towards the purchase of audiotapes of this program **must be in writing and postmarked** no later than 48 hours after the course presentation. Registration fees are non-transferrable. A $10 service fee applies to refund requests.

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(125) Radisson Hotel, Tallahassee (3/12/93)

Register me for "Florida Administrative Rulemaking" Seminar

TO REGISTER OR ORDER TAPES/MATERIALS, MAIL THIS FORM (OR A COPY) TO: The Florida Bar, CLE Programs, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar. If you have questions, call 904/561-5831. ON SITE REGISTRATION, ADD $10.00. **Registration is by check only.**

Name _____ Florida Bar # _____
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( ) Administrative Law Section member: $75

( ) Florida Bar member but not an Administrative Law Section member: $85

( ) Full-time law college faculty or full-time law student: $42.50

( ) Enclosed is my (separate) check in the amount of $20 to join the Administrative Law Section. Membership expires June 30, 1993.

NONSECTION MEMBER SURCHARGE REVERTS TO COSPONSORING SECTION.

SPECIAL NEEDS: If you have special needs as addressed by the ADA, please notify us at least two weeks prior to the date of presentation.

COURSE MATERIALS — AUDIOTAPES — RELATED PUBLICATIONS

Private taping of this program is not permitted.

Delivery time is 4 to 6 weeks after the date of taping. PRICES BELOW DO NOT INCLUDE TAX.

_____ COURSE MATERIALS ONLY. Cost: $15.00 plus tax

_____ AUDIOCASSETTES (includes course materials).
Cost: $75.00 plus tax (section member) $80.00 plus tax (nonsection member)

_____ RELATED PUBLICATIONS: Call (904) 561-5843 to order

- __FLORIDA ADMINISTRATIVE PRACTICE (4th ed. 1993).
  Available March 1993. Fla. Bar CLE

* Discounts on some publications may be offered at the seminar.

Designation/Certification/CLER credit is not awarded for the purchase of the course materials only.

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a *tax-exempt* organization, the course materials or audiotapes must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

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FLORIDA ADMINISTRATIVE RULEMAKING SEMINAR continued

— REMEMBER YOUR EDUCATION REQUIREMENT —

DESIGNATION PROGRAM

(Maximum Credit: 5.0 hours)

Administrative and Governmental Law .... 5.0 hours
Appellate Practice ..... 3.5 hours
General Practice ..... 5.0 hours

CLER PROGRAM

(Maximum Credit: 5.0 hours)

General: 5.0 hours

Credit may be applied to more than one of the programs above but cannot exceed the maximum for any given program. Please keep a record of credit hours earned. SEE BAR *NEWS* LABEL FOR CLER REPORTING DATE. TO AVOID SUSPENSION, RETURN YOUR COMPLETED CLER AFFIDAVIT PRIOR TO THAT DATE (Rule Regulating The Florida Bar 6-10.5).

A Word of Thanks

To our registrants, the driving force behind The Florida Bar Continuing Legal Education Program, we appreciate your continued support and value your comments and suggestions. Please take a few minutes to complete the course evaluation form.

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Michael A. Tartaglia, Director, Programs Division

Administrative Law Section Final Statement of Operations

For Year Ending June 30, 1992

Revenues	Budget	Actual
Dues	$ 15,200	$ 15,500
Dues Retained by TFB	7,600	7,740
CLE Seminars	1,275	2,188
Audiotape Sales	200	918
Videotape Sales	100	358
8th Admin.	12,600	12,549
*Section Workshop	0	4,739
Interest	2,116	2,261
Total Revenue	$ 23,891	$ 30,753
Expenses		
Postage	800	769
Printing	300	113
Officer's Office Expense	500	0
Newsletter	1,350	3,051
Membership	500	0
Photocopying	150	301
Officer's Travel Expense	2,300	1,941
Meeting Travel Expense	500	128
Committee Expense		
Board or Council	400	191
Bar Annual Meeting	1,200	1,172
Complimentary Seminar	0	3,391
Administrative Conference	13,795	13,795
Membership Directory	2,390	0
Awards	350	362
Legislative Reception	500	0
Miscellaneous	100	0
Fax Processing	0	47
Professional Dev. Fax	75	111
Employee Travel	836	345
Total Expenses	24,710	26,217
Beginning Balance	32,257	35,274
Plus Revenue	23,891	30,753
Less Expenses	24,710	26,217
Ending Balance	$31,438	$39,810

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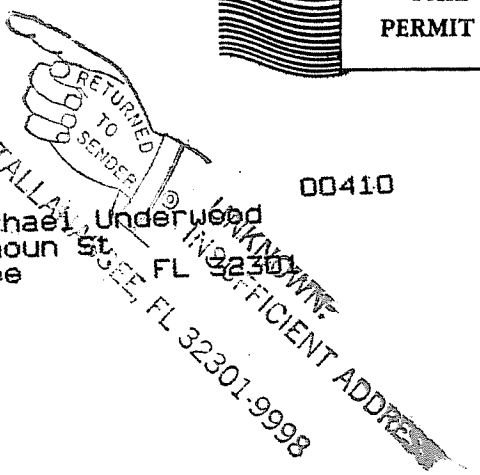

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