Administrative Law Section Newsletter

Vol. XXVI, No. 1 **Elizabeth W. McArthur, Editor** **October 2004**

From the Chair

by Robert C. Downie, II

A couple of years ago, the book that was all the rage in management circles was about moving cheese. "Cheese" was a metaphor for anything important in one's life, like employment, and the book told us we had to be ready to adapt when someone "moved our cheese." I read it and professed to agree that indeed a big wheel of cheese closely approximated the image I had of my job, and also agreed that if anyone took my cheese I would not be happy as they had just taken my job. The part I either did not understand or did not agree with, though, had to do with the idea that somewhere were beings able to manipulate cheese at will, and I was supposed to just accept that it was beyond my power to have any say about such things.

My guess is that some of you reading this column may feel rather distant from the cheese movers of the Administrative Law Section – the Executive Council. If so, please take this as an invitation to get closer. The Council is made up of intelligent and hard-working people, but we can always use new ideas and people. After all, cheese is heavy.

Here are some areas where members can provide us some necessary feedback. We are re-launching the Section's website and need to know what people think. Where can we add helpful content? What links are we missing? How user-friendly is it? Remember that your dues pay for the site. Paul Flounlacker, our website liaison, has done a great job but would love some more input.

We also need some writers to pen articles for the Section's Bar Journal column as well as for this newsletter. Seems like everyone I speak to has an idea for a piece, but we are not seeing many finished products.

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Campbell v. Department of Business and Professional Regulation: The Right Decision for the Wrong Reason

by Lisa ("Li") Shearer Nelson

It is no secret that when the Administrative Procedure Act was amended in 1996, there was a substantial reorganization of the existing statutory provisions. "The entire Act was reorganized and renumbered, opportunities to challenge proposed rules were expanded, waiver or variance was permitted, mediation and summary hearing procedures were created, and legislative oversight provisions were strengthened. S. Boyd, "Overview of the Administrative Procedure Act," Florida Administrative Practice, §2.1 (6th ed. 2001). Several articles have been written to describe the changes to the Act. See, for example, 24 Fla. St.U.L.Rev. (1997); 48 Fla. L.Rev. 1 (1996), and Florida Bar Journal, March 1997 issue. Thanks to the meticulous work of Scott Boyd, cross-referencing tables were developed to aid practitioners in tracing old provisions to the new and vice versa. See Florida Administrative Practice,

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CAMPBELL
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§2.2, APPX-129-137. Unfortunately, someone forgot to tell the Fourth DCA.

In *Campbell v. Department of Business and Professional Regulation*, 868 So. 2d 1265 (Fla. 4th DCA 2004), the Fourth District Court of Appeal recently grappled with the recurring issue of how to deal with disputes of fact that arise during a section 120.57(2) hearing. According to the facts recited in the opinion,

> Doreen Campbell is a state certified real estate residential appraiser. She was charged with violating the standard for developing or communicating an appraisal and for failing to exercise reasonable diligence in developing the report. Campbell disputed some of the factual allegations in the complaint and the case was referred to the division of administrative hearings. After a hearing, the Department of Business and Professional Regulation suspended Doreen Campbell's real estate license for one year and imposed an administrative fine of $2,500.
>
> On appeal, Campbell asserts that disputed issues of material fact came up at the informal hearing that should have resulted in a formal hearing being conducted.

868 So. 2d 1265. This short portion of the decision alone raises several issues. One must wonder how Ms. Campbell ended up with a real estate license being suspended when her appraiser license was actually the subject of discipline. That slip of the pen aside, if the case was referred to DOAH, then how did a dispute of fact arise at an informal hearing? Has the Court simply neglected to reference a relinquishment of jurisdiction from DOAH to the licensing board? A check of DOAH's website revealed no record of the case having been at the Division, and a telephone call to defense counsel for Ms. Campbell confirmed that fact. Although I am told that Campbell originally elected a formal hearing pursuant to section 120.57(1), the Department agreed to amend the charging document to delete what was thought to be the relevant factual disputes, and the case went directly to the Real Estate Appraisal Board for a section 120.57(2) hearing. At that hearing, however, disputed issues of fact arose that were the basis of Ms. Campbell's appeal.

The Fourth DCA decided that Ms. Campbell was entitled to a formal hearing, and quoted from the current portion of section 120.57(1) that allows for relinquishment of jurisdiction by the Division of Administrative Hearings when an ALJ determines that no dispute of material fact actually exists. Had the case ever gone to DOAH, certainly this provision might apply. What is startling, however, is the next paragraph of the opinion:

> We find it telling that under the notes of the amendments to this statutory provision the original statute included the sentence: "[u]nless waived by consent of all parties and the agency involved, subsection (1) shall apply to the extent that the proceeding involves a disputed issue of material fact." However, that sentence is no longer part of the statute. Rather, the statute now provides the procedures that *shall* apply when there is a disputed issue of material fact. As a result, we believe that the legislature specifically intended the right to a formal hearing under this provision to not be subject to waiver.

868 So. 2d at 1266 (emphasis supplied).

Wait a minute. My cursory review of the APA reveals that the language the Fourth DCA claims is missing has not left the building, but simply moved to the room next door. The 1996 amendments created section 120.569, Florida Statutes, for the purpose of putting in one place all of the provisions common to proceedings dealing with decisions affecting substantial interests, regardless of the type of proceeding involved. *See* s.18, ch. 96-159, Laws of Fla. Subsection (1) provides in part:

> (1) The provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency, unless the parties are proceeding under s. 120.573 or s.120.574. Unless waived by all parties, s. 120.57(1) applies whenever the proceeding involves a disputed issue of material fact. Unless otherwise agreed, s. 120.57(2) applies in all other proceedings. . . .

While the language is slightly different, the meaning is clearly the same. So why did the Fourth DCA ignore this language and hold that the right to a formal hearing is not subject to waiver?[1] Moreover, the very language that the Court quoted from section 120.57(1)(e) contemplates waiver of the right to formal hearing if a party could have raised the dispute of material fact before the ALJ and did not do so in the face of a motion for relinquishment of jurisdiction.[2] Does the Court's decision mean that the right to formal hearing is absolute? If so, is the language in section 120.57(1)(i) a nullity?

It may be that the Fourth District arrived at the right result in this disciplinary proceeding for the wrong reason: as it notes in the opinion, the Uniform Rules provide that "if during an informal hearing a disputed issue of material fact arises, the proceeding will be terminated and proceed as a formal hearing."[3] There are those who argue the rule may not be valid in light of changes in section 120.57(2) concerning the contents of a petition for hearing. However, a similar provision exists in section 455.225(5), Florida Statutes, which states,

> 5) A formal hearing before an administrative law judge from the Division of Administrative Hearings shall be held pursuant to chapter 120 if there are any disputed issues of material fact. The administrative law judge shall issue a recommended order pursuant to chapter 120. If any party raises an issue of disputed fact during an informal hearing, the hearing shall be terminated and a formal hearing pursuant to chapter 120 shall be held.

Unlike the language in section 120.57(1) that prohibits a remand for a section 120.57(1) hearing if a party was already at DOAH and had the opportunity to raise the dispute of material fact, section 455.225(5) provides no such caveat: once a dispute arises, termination of the section 120.57(2) hearing is mandatory. Moreover, disputes of material fact contemplated under section 455.225(5) ex-

tend to issues related to penalty as well as the underlying violations. *See Klein v. Department of Business and Professional Regulation*, 625 So. 2d 1237, 1239 (Fla. 2d DCA 1993). While both Rule 28-106.305, cited by the Court, and section 455.225(5), which is not mentioned, require that Ms. Campbell receive her section 120.57(1) hearing, the *Campbell* decision has the potential for mischief outside the disciplinary arena. The number of avenues where such a case could prove problematic is only limited by the imaginations of lawyers using the process. Because the reach of Chapter 120 and those cases interpreting the Act are great, we can only hope that the Court will see fit to re-address the issue in the near future and clarify its decision. In the meantime, I will be on the lookout for the final resolution of Ms. Campbell's disciplinary proceeding to see whether her dispute of material fact actually changes the result in the proceedings against her.

Endnotes

[1] A motion for rehearing filed by the Department raising this issue was denied as untimely filed.

[2] "If the administrative law judge enters an order relinquishing jurisdiction, the agency may promptly conduct a proceeding pursuant to subsection (2), if appropriate, but the parties may not raise any issues of disputed fact that could have been raised before the administrative law judge." §120.57(1)(i), Fla. Stat.

[3] Although cited as Rule 28-106.35, F.A.C., there is no such section. The correct provision is Rule 28-106.305(2), F.A.C., which provides,

> (2) If during the course of the proceeding a disputed issue of material fact arises, then, unless waived by all parties, the proceeding under this Part shall be terminated and a proceeding under Part II shall be conducted.

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Minutes
Administrative Law Section Executive Council Meeting
June 25, 2004, Annual Meeting

Draft – Not Yet Approved by Executive Council

CALL TO ORDER: Executive Council Chair Donna Blanton called the meeting to order at 10:30 a.m.

Present: Andy Bertron, Donna Blanton, Mary Ellen Clark, Bobby Downie, Natalie Futch Smith, Allen Grossman, Booter Imhof, Clark Jennings, Debby Kearney, Cathy Lannon, Li Nelson, Judge Stampelos, and Jackie Werndli.

Attending by telephone: Seann Frazier, Elizabeth McArthur, Judge Rigot, Dave Watkins, and Bill Williams.

Absent: Rick Ellis, Chris Moore, and Cathy Sellers.

PRELIMINARY MATTERS: The minutes of the January and October meetings were approved. Booter Imhof gave the Treasurer's Report. In the course of discussing the budget an issue was raised with respect to the Board of Governors looking to recoup a greater portion of the costs to the Bar of section activities. Jackie Werndli reported that this has indeed been a topic of discussion. Any changes would be effective for the 2005-2006 fiscal year which will be constructed in October 2004. Currently, the Bar retains one half, or $10, of the dues for each member of the section to cover the costs of staff, printing, mailing, and other miscellaneous items.

A consensus was reached for Clark Jennings to express to the Council of Sections that the Administrative Law Section understands that the costs to the Bar of operating the sections are increasing while the amounts retained from section dues is not increasing to the same degree. The Section would be agreeable to increasing the portion of the dues the Bar retains from $10 to a greater figure—as much as $15 per member.

COMMITTEE REPORTS:

Continuing Legal Education Committee: Li Nelson gave the CLE Committee report.
The *Practice Before DOAH* seminar was very well received and enjoyed maximum attendance. Li distributed a rough draft outlining a schedule for the Pat Dore Conference to be held this fall. The theme of the conference will revolve around the 30th Anniversary of the APA. Suggestions for additional topics and speakers were solicited.

Legislative: Judge Rigot gave the legislative report. A motion was made and adopted to roll over the currently-adopted legislative positions for the next term. Booter Imhof and Debby Kearney abstained from voting on the motion.

Public Utilities Law: Natalie Futch reported that the Administrative Law Section-Public Utilities Law Committee CLE in December was well-attended and successful.

Law School/Student Writing Liaison: It was reported that there were no submissions for the Section's writing competition this year. A discussion ensued about changes or alternatives to the writing competition. It was decided to continue the discussion at the long-range planning retreat.

Webpage: Bill Black, principal of the Black Group, who was retained by the Section to maintain our website, walked us through a sample of how our new website will look. Council members were favorably impressed with the new look and the breadth of information that will be available on the site. Mr. Black estimates that the site will be ready to launch by the end of July.

OLD BUSINESS:

Uniform Rules of Procedure: Chris Moore will circulate the latest draft

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APPELLATE CASE NOTES

by Mary F. Smallwood

Licensing

Aldrete v. Department of Health, 29 Fla. L. Weekly 967 (Fla. 1st DCA 2004)

Aldrete appealed the imposition of a penalty by the Board of Medicine suspending his license for one year, imposing a penalty of $5000.00, and assessing costs of $25,427.37 for failure to practice medicine with the acceptable level of care. He claimed that there was no competent substantial evidence to support the penalty, that he was penalized for an uncharged offense, that the penalty was improperly increased based on prior licensing problems in Ohio, that the costs impermissibly included attorney's fees, and that the penalty was too harsh in comparison to others assessed by the Board in comparable circumstances.

The court found that there was competent substantial evidence to support the disciplinary action. However, it did remand the matter to the Board to reevaluate the penalty. First, the court agreed with Aldrete that it appeared the penalty might be based in part on allegations that a patient was left in the care of an unqualified nurse. Since that charge was not included in the administrative complaint, the court remanded with instructions to the Board to assure that the charge was not considered in assessing the penalty. It further agreed that it was unclear whether the Board considered allegations regarding licensing issues in Ohio. The court also agreed with Aldrete that attorney's fees are not properly included within the term "costs" as that is used in statutes allowing the assessment of costs of litigation. The court rejected Aldrete's arguments regarding the harshness of the penalty, however, noting that penalty assessment is a complex issue that involves the weighing of multiple factors by the agency.

Hospice of Palm Beach County, Inc. v. Agency for Health Care Administration, 29 Fla. L. Weekly 1030 (Fla. 1st DCA 2004)

In 1990, North Broward Hospital District ("NBHD") purchased Hospice of Gold Coast Home Health Care Services allowing it to provide hospice services in both Broward and Palm Beach Counties. The Agency for Health Care Administration ("AHCA") allowed NBHD to "split" its license into two licenses, one for each county. Subsequently, NBHD offered the Palm Beach County operation for sale. Vitas Healthcare Corporation was the successful bidder against Hospice of Palm Beach County ("HPBC"). HPBC then filed a petition for hearing arguing that the sale of the Palm Beach County operation was in violation of state law which prohibits the sale, assignment, or transfer of a license. Because Vitas did not go through a Certificate of Need ("CON") review before being licensed by AHCA or receive a CON exemption, HPBC argued that Vitas had received a "de facto" CON which HPBC was entitled to challenge in a Section 120.57 proceeding. AHCA dismissed the petition on the grounds that HPBC had no standing to challenge the license.

The court reversed and remanded. The court noted that in determining the standing of a party to seek a formal proceeding, the factual allegations in the petition must be taken as accurate. Since the petition alleged that AHCA had issued a new license to NBHD when it split the existing license into a Broward County and Palm Beach County operation, that resulted in the issuance of a new license without the Certificate of Need process. Under Section 408.039(5)(c), Fla. Stat., an existing health care facility has standing to initiate a proceeding challenging the issuance of a Certificate of Need. The fact that AHCA had already issued a license to Vitas does not deprive HPBC of the right to challenge the need for such a new facility.

Lapp v. Department of Business and Professional Regulation, 29 Fla. L. Weekly 1158 (Fla. 4th DCA 2004)

Lapp applied for a license as a pool and spa contractor. The Department denied his request for a license, finding that he lacked good moral character. After an informal hearing, the Department issued a final order finding that Lapp had misrepresented certain facts on his application, that he had engaged in the unlicensed practice of contracting, and that he had aided others in the unlicensed practice of contracting. Lapp appealed.

The court reversed the final order. It found that the alleged misrepresentations were minor in nature and not intended to mislead the agency. It further found that the allegations of unlicensed practice of contracting were not sufficient to support denial of his license. Two of the allegations were based on notices of violation issued by Palm Beach County. The court noted that the County subsequently found that Lapp was in substantial compliance and required no further action. Finally, the court held that there was no competent substantial evidence of any other violation presented at the final hearing.

Phillips v. Department of Health, 29 Fla. L. Weekly 934 (Fla. 4th DCA 2004)

Phillips, a dentist, appealed the order of the Board of Dentistry revoking his license to practice dentistry. The Board had charged Phillips with practicing below the applicable standard of care, inadequate recordkeeping, and failure to maintain malpractice insurance or demonstrate financial responsibility. The administrative law judge recommended suspension of Phillips' license.

On appeal, Phillips argued that the Board inappropriately increased the penalty. He contended that the penalty of revocation was not within the Board's statutory authority and that the Board had failed to comply with Section 120.57(1)(l), Fla. Stat.

The court affirmed the final order. It held that Section 466.028(1)(x), Fla. Stat., recognizes revocation as a possible penalty for failing to meet the minimum standards of performance in diagnosis and treatment. In addition, it noted that the Board had ex-

pressly adopted by reference the exceptions to the recommended order in its final order. Those exceptions provided the particular circumstances justifying an increase in the penalty. Recognizing the broad authority of an agency to increase penalties in light of their expertise in the substantive area, the court upheld the increased penalty.

Jones v. Department of Business and Professional Regulation, 29 Fla. L. Weekly 1273 (Fla. 5th DCA 2004)

Jones, a real estate broker, appealed from a final order revoking his real estate license. He had been the qualifying agent for Premier Place. A dispute arose as to who was entitled to a real estate commission when a sales person for another company, The Landings, procured a contract three days before she resigned to work for Premier. The sales commission of $15,1200 was paid to Premier. After arbitration and an appeal, it was determined that The Landings was entitled to the commission, and a judgment was entered against Jones. When he failed to satisfy the judgment, the Florida Real Estate Commission then filed an administrative complaint against Jones alleging violation of two provisions of Chapter 475, Fla. Stat. Specifically, the Commission alleged that Jones had failed to account for delivery of the commission in violation of Section 475.25(1)(d)1. and that he had engaged in dishonest dealing by trick or scheme in violation of Section 475.23(d). The Commission, after an informal hearing, found Jones to be in violation of both provisions and revoked his license. The appeal followed.

The court reversed in part, affirmed in part and remanded the matter to the Commission for recalculation of the penalty. It agreed with the Commission that Jones had failed to account for the delivery of the commission. However, the court noted that the penalty for that violation could not exceed a fine of $1000.00 and a five-year suspension of his license. It did not agree that Jones had engaged in dishonest dealing. Instead, the court found that the record did not support that allegation. Apparently, the Commission believed that Jones' attorney had deceived them by stating that Jones had attempted to satisfy the judgment against him when, in fact, he had offered to settle with The Landings by offering them 20% of the commission as a referral fee. The court did not agree that Jones' action constituted dishonest dealing.

Levenson v. Office of Insurance Regulation, 29 Fla. L. Weekly 1594 (4th DCA 2004)

Levenson appealed a denial of his motion to set aside an order revoking his insurance license on the grounds that service of process was inadequate. The agency attempted personal service at Levenson's last known address, but it was unsuccessful. It then published notice in a local newspaper.

On appeal, the court reversed. It noted that Section 120.60(5), Fla. Stat., provided that publication of notice in a newspaper in the county of respondent's last known residence was allowed only "[w]hen personal service cannot be made." In this case, the agency made no attempt to contact Levenson through his known counsel nor did it attempt to contact him by telephone. The court noted that the agency's counsel had previously had telephone contacts with Levenson. The court concluded that reasonable diligence in attempting to contact a licensee included inquiry of persons likely to know of the licensee's whereabouts.

Standing

O'Connell v. Department of Community Affairs, 29 Fla. L. Weekly 1220 (Fla. 4th DCA 2004)

Several individual petitioners and the Martin County Conservation Alliance appealed a final order of the Department of Community Affairs finding certain provisions of the Martin County Comprehensive Plan to be in compliance. The court held that the petitioners were not "adversely affected" by the final order within the meaning of Section 120.68(1), Fla. Stat.

The court cited *Daniels v. Fla. Parole & Probation Comm'n*, 401 So. 2d 1351 (Fla. 1st DCA 1981), for the proposition that a person who has the requisite standing to appear as a party in an administrative proceeding under Chapter 120 does not necessarily have the standing to appeal a final order. The court relied on a U.S. Supreme Court case, *Sierra Club v. Morton*, 405 U.S. 727 (1972), for an analysis of the degree of interest necessary to demonstrate that a person is adversely affected. In that case, the federal statute required that the person be "adversely affected or aggrieved." *See* 5 U.S.C. § 702.

In this challenge, the Conservation Alliance had alleged that the subject matter of the proceeding was within the scope of the group's purposes and goals, which included preservation of community and natural resources. According to the court, none of the individual petitioners had stated how the comprehensive plan amendments would affect them. The court held that the Alliance's interest in maintaining the quality of life in Martin County was not a sufficient interest to establish that it or its members would be adversely affected. The court contrasted this case with *Challancin v. Florida Land and Water Adjudicatory Comm'n*, 515 So. 2d 1288 (Fla. 4th DCA 1987), where the Audubon Society had demonstrated that it would be adversely affected by issuance of a permit because it actually owned land in the vicinity of the proposed project that could potentially be affected by flood waters and depletion of water supply.

Rule Challenges

NAACP, Inc. v. Florida Board of Regents, 29 Fla. L. Weekly 1461 (Fla. 1st DCA 2004)

The NAACP had challenged rules of the Board of Regents prohibiting consideration of certain factors in admission to the State University System ("SUS"). In the initial case, the district court of appeal held that the petitioners did not have standing to pursue the rule challenge; however, the court certified the question of standing to the Florida Supreme Court. *NAACP, Inc. v. Florida Bd. of Regents*, 822 So. 2d 1 (Fla. 1st DCA 2002). The Supreme Court reversed and remanded. *NAACP, Inc. v. Florida Bd. of Regents*, 863 So. 2d 294 (Fla. 2003). On remand, the district court issued an order to show cause why the matter was not moot.

When the petitioners initially filed the rule challenge, the Board of Regents was a legislatively created body with delegated authority to adopt rules. The Board was abolished by the

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Legislature in 2001; however, a constitutional amendment was adopted in November 2002, establishing a state-wide Board of Governors for the SUS and local Boards of Trustees for each individual institution. The amendment gave the Board of Governors responsibility for operation, regulation, control and management of the whole university system. At its first meeting, the new Board of Governors adopted all of the rules previously challenged by petitioners.

On remand, the court held that the Board's authority to adopt rules flowed directly from the constitution and did not require a legislative delegation of authority. Accordingly, the court held that such rules were not subject to challenge under the Administrative Procedure Act.

Osterback v. Agwunobi, 29 Fla. L. Weekly 1031 (Fla. 1st DCA 2004)

Osterback, a state prison inmate, filed a complaint for declaratory relief arguing that the Department of Health ("DOH") had unlawfully repealed Rule 10D-7 governing health and safety conditions in correctional facilities without following the rulemaking provisions of Chapter 120, Fla. Stat. The circuit court entered a final summary judgment holding that repeal of the existing rule was not subject to rulemaking requirements because it did not have the effect of replacing the former rule.

The court reversed and remanded. Since the trial court's order contained no findings of fact, the appellate court's review was de novo.

DOH had originally stated that the purpose of repealing the rules was that they were duplicative of rules already in place. Before the trial court, DOH argued that its statutory authority to regulate conditions in correctional facilities had been repealed by the Legislature under Chapter 91-297, Laws of Florida. The district court rejected DOH's interpretation of Chapter 91-297, stating that the section of the act cited by DOH had little or nothing to do with regulation of environmental conditions in prisons.

Moreover, the court concluded that DOH had a statutory duty to adopt regulations regulating prison conditions pursuant to Section 381.006(6), Fla. Stat., which provides that the environmental health program apply to "all places used for the incarceration of prisoners and inmates of state institutions for the mentally ill." DOH had argued that the statute was limited to mental institutions. The court rejected this position, finding that "mentally ill" modified only "state institutions," not places of incarceration generally.

Since the court determined that DOH had a statutory duty to regulate conditions in prisons, it held that repeal of the existing rules had effectively resulted in the substitution of the American Correctional Association standards used by the Department of Corrections. As those standards had not been adopted as rules pursuant to Section 120.54, Fla. Stat., the court remanded the matter for further proceedings.

Sullivan v. Department of Health, 29 Fla. L. Weekly 1434 (Fla. 3d DCA 2004)

Sullivan and the Florida Chiropractic Physicians' Association challenged a rule of the Board of Chiropractic Medicine which prohibited chiropractic physicians from prescribing or administering any "legend drug." A legend drug was defined in the rule as "a drug required by federal or state law to be dispensed only by prescription." Rule 64B2-17.0025(4), Fla. Admin. Code. The rule further provided that chiropractors could not inject any substance. This prohibited chiropractors from injecting vitamins and nutrients.

At the final hearing, the chiropractors argued that the rule was arbitrary and capricious, citing a 1986 amendment of Section 460.403(3)(c), Fla. Stat. Prior to 1986, the statute allowed chiropractors to treat the human body by the oral administration of certain substances. The petitioners argued that the deletion of the reference to "oral administration" in the 1986 amendment should be construed to allow those substances to be injected. They also suggested that the term "legend drug" was not a commonly understood term.

The administrative law judge entered a final order finding that the rule was not an invalid exercise of delegated legislative authority. The judge rejected the argument that legend drugs was not an understood term, relying in part, on the definition of that term in Chapter 499, Fla. Stat., the Florida Drug and Cosmetic Act. Moreover, the judge noted that the term is used in other licensing statutes without being defined. Finally, the administrative law judge found that the Federal Drug Administration included injectable vitamins and nutrients in its definition of legend drugs.

On appeal, the district court quoted extensively from the final order and affirmed the administrative law judge's conclusions. Interestingly, there was no discussion of whether the agency had the statutory authority to adopt a definition of legend drugs.

Appeal of Non-final Order

International Truck and Engine Corp. v. Capital Truck, Inc., 29 Fla. L. Weekly 1036 (Fla. 1st DCA 2004)

International Truck and Engine Corporation ("ITEC") and Ward International Trucks ("Ward") entered into an agreement giving Ward franchise rights for sale and service of International Trucks in Tallahassee. Capital Truck, the existing franchisee, had statutory standing to challenge the awarding of the franchise to Ward. To forestall that event, ITEC filed an action in circuit court seeking a declaratory judgment that Capital Truck had no franchise rights. It also filed an administrative petition with the Department of Highway Safety and Motor Vehicles ("DHSMV") requesting the same relief.

DHSMV entered an order issuing a license to Ward, and Capital Truck filed an administrative petition challenging that action. The challenge and the request for relief filed by ITEC were forwarded to the Division of Administrative Hearings and consolidated. Without objection of the parties, the administrative law judge abated the consolidated proceedings pending the outcome of the circuit court proceedings.

Upon issuance of an order by the circuit court extinguishing any rights of Capital Truck to the franchise, Ward and ITEC filed motions with the administrative law judge seeking to have the case remanded to DHSMV

for entry of a final order. DHSMV entered an order abating the administrative proceeding pending the appeal of the circuit court order, finding that entry of a final order would not be appropriate until the district court had ruled. That non-final order was appealed.

On appeal, the court first determined that review of a final order would not be sufficient since Ward was precluded from operating his business without a license from DHSMV. It held that the economic losses to Ward that could not be recovered later provided a sufficient basis for review of a non-final order.

The court reversed the DHSMV order abating the proceeding. It concluded that the effect of that order was to grant a stay of the circuit court order to Capital Truck when no such stay had been requested or issued under Florida Rule of Appellate Procedure 9.310(a). Without such a stay, the circuit court's order was final; and Ward should have been issued a license by DHSMV.

Imami v. University of Florida, 29 Fla. L. Weekly 1230 (Fla. 1st DCA 2004)

Dr. Imami filed an appeal related to a letter issued by the University. The court dismissed the appeal on the grounds that it was an appeal from a non-final order because the letter had never been filed with the agency clerk in accordance with Section 120.52(7), Fla. Stat.

Bid Protests

General Electric v. Department of Transportation, 29 Fla. L. Weekly 968 (Fla. 1st DCA 2004)

General Electric appealed a final order of the Department dismissing its bid protests for failure to post an adequate bond. The successful bidder had moved to dismiss the bid protests before the Division of Administrative Hearings arguing that General Electric had listed the incorrect principal on the bond. The administrative law judge agreed and recommended dismissal. DOT adopted the recommended dismissal. On appeal, General Electric argued that it was entitled to an opportunity to correct any deficiency in the bond, citing *ABI Walton Ins. Co. v. Department of Management Services*, 641 So. 2d 967 (Fla. 1st DCA 1994).

The court reversed and remanded. It agreed with General Electric that a protestor has the right to notice of any deficiency in the bond and an opportunity to correct that deficiency before dismissal of the bid protest. The court rejected the Department's argument that *ABI Walton* should be distinguished since it dealt with a different statutory provision. Moreover, it held that it is the obligation of the Department to provide notice of any deficiency. That failure was not cured by the filing of a motion to dismiss by the successful bidder.

Immediate Final Orders

UNIMED, Professional Liability Insurance Co., Ltd. v. Office of Insurance Regulation, 29 Fla. L. Weekly 889 (Fla. 1st DCA 2004)

UNIMED appealed an immediate final order issued by the Office of Insurance Regulation ordering it to cease and desist from transacting any new or renewal insurance business in the state. The final order cited certain violations of statutory provisions requiring licensing by UNIMED as grounds for the immediate final order.

The court reversed the final order, finding that the agency had failed to state any factual basis in the order for the conclusion that there was an immediate danger to the public health safety and welfare. Citing numerous cases, the court held that it is not sufficient for the agency to simply cite a statutory violation. Instead, the order must demonstrate the existence of an immediate threat.

Bertany Ass'n for Travel and Leisure, Inc. v. Department of Financial Services, 29 Fla. L. Weekly 1614 (Fla. 1st DCA 2004)

The Department, through the Office of Insurance Regulation, issued an immediate final order requiring the respondents to cease and desist from marketing unauthorized insurance products. On appeal, the appellants argued that the order was insufficient in that it did not allege facts supporting a conclusion that the illegal conduct was likely to continue and that the remedy was too broadly tailored.

The court affirmed. With respect to the likelihood that the activity would continue absent an immediate final order, the court noted that the order contained allegations that appellants had continued to market an unauthorized product after being notified by the issuer of the insurance product that it was not authorized in Florida, that they continued to market the product for a number of months before action by the Department, that there were more than 2000 unrevoked solicitations at the time the order was issued, and that the product was still being advertised on a website maintained by the appellants. The court concluded that these allegations were sufficient to establish the likelihood that the conduct would continue.

Likewise, the court held that the order was narrowly conditioned to preclude only marketing of unauthorized products. The appellants were not precluded from conducting legitimate business activities.

Government-in-the Sunshine and Public Records

WFTV, Inc. v. The School Board of

continued...

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Statements or expressions of opinion or comments appearing herein are those of the contributors and not of The Florida Bar or the Section.

APPELLATE CASE NOTES

from page 7

Seminole County, 29 Fla. L. Weekly 1169 (Fla. 5th DCA 2004)

WFTV sought access to certain records of the School Board of Seminole County, specifically, student transportation discipline forms and video tape of students on school buses related to specific disciplinary actions. The School Board argued that the requested documents were exempt from disclosure under Section 228.093, Fla. Stat., which provided that "[p]ersonally identifiable records or reports of a pupil or student, and any personal information contained therein, are *confidential and exempt* from the provisions of § 119.07(1)." (Emphasis added). WFTV countered that under Section 228.093(2)(e) records that do not permit personal identification of a student are not "records" or "reports" subject to the exemption. WFTV argued that the School Board should redact any identifying information from the requested records and disclose them. The trial court concluded that the requested documents were both exempt *and* confidential, and thus distinguishable from documents that were simply exempt under statutory provisions. In reaching this conclusion, it relied upon *Florida State University v. Hatton*, 672 So. 2d 576 (Fla. 1st DCA 1996), which construed the provisions of Section 228.093(3)(d), Fla. Stat., and concluded that even redacted records were confidential. The *Hatton* case involved the request by an FSU student for access to redacted records of other FSU students who had been the subject of disciplinary action by the university. The administrative law judge's order allowing discovery of these records was overturned by the appellate court.

On appeal, the court adopted the reasoning of the trial court but certified the following questions to the Supreme Court:

> DO THE PROVISIONS OF SECTION 228.093(3)(d) CREATE AN EXEMPTION FROM THE PUBLIC RECORDS LAW FOR THE ENTIRE CONTENTS OF A STUDENT'S RECORD WITHIN WHICH THERE IS A STUDENT'S PERSONALLY IDENTIFIABLE INFORMATION OR DOES IT CREATE AN EXEMPTION ONLY FOR SUCH PERSONALLY IDENTIFIABLE INFORMATION WITHIN THAT RECORD SO THAT UPON A PROPER REQUEST, THE CUSTODIAN MUST REDACT THE PERSONALLY IDENTIFIABLE INFORMATION AND PRODUCE THE BALANCE OF THE RECORD FOR INSPECTION UNDER SECTION 119.07(2)(a)?

The Sarasota Herald-Tribune v. Department of Children and Family Services, 29 Fla. L. Weekly 1184 (Fla. 2d DCA 2004)

The Sarasota Herald-Tribune sought access to certain records of the Department of Children and Family Services ("DCFS") and several private organizations which conducted child placement and supervision services for DCFS after three children were found to have been abused by their uncle after being placed in his care by DCFS. While child abuse records are exempt from disclosure under Section 39.202(1), Fla. Stat., Section 119.07(7) provides that any person may seek a court order requiring disclosure of such records for good cause. In determining whether good cause exists, the statute requires that the court "balance the best interest of the … child who is the focus of the investigation, and … the interest of that child's siblings, together with the privacy right of other persons identified in the reports against the public interest." The statute recognized that the general public interest included the right of the public to know whether DCFS was fulfilling its duty to assure that children are protected from abuse.

The Herald-Tribune argued that since several reports of abuse of the three children had apparently been ignored or not followed-up, the public had a right to know why these series of errors occurred. DCFS countered that the allegations of errors by the agencies and the private organizations acting on its behalf had already been published in the newspaper. Therefore, it argued release of the records was not necessary and would harm the children.

The trial court refused to release the records and rejected the request of the Herald-Tribune that it conduct an in camera review of the records. On appeal, the Herald-Tribune argued that the court had abused its discretion, that the statute created a presumption that the records should be disclosed when a public interest was demonstrated, and that the court should have conducted an in camera review of the documents.

The appellate court reversed and remanded. It did not accept the Herald-Tribune's argument that the statute created a presumption that exempt records should be disclosed when a showing of public interest is made, noting that such a presumption would place the interest of the child in a position inferior to that of the public. The court also did not agree with the Herald-Tribune that the state had the burden of establishing that the documents were exempt. Instead, the court held that under Section 119.07(7) (unlike proceedings to establish the applicability of an exemption), the burden was on the party requesting the record to demonstrate that good cause exists for its disclosure. However, the court held that the trial court had abused its discretion by refusing to conduct an in camera review of the records. It concluded that it was impossible to judge the potential impacts of disclosure on the child without knowing the content of the records.

Attorney's Fees

G.E.L. Corp. v. Department or Environmental Protection, 29 Fla. L. Weekly 1352 (Fla. 5th DCA 2004)

The Department of Environmental Protection issued a notice of intent to issue a permit to G.E.L. Corporation to operate a construction and demolition debris facility. Orange City filed a petition challenging the permit which was referred to the Division of Administrative Hearings. Prior to a final hearing, G.E.L. filed a motion for attorney's fees pursuant to Section 120.595, Fla. Stat. Orange City then voluntarily dismissed its petition. The administrative law judge initiated a hearing on the request for attorney's fees but never concluded the proceeding. Subsequently, he entered a recommended order concluding that he lacked the authority to award attorney's fees where the matter had

not proceeded to a final hearing on the merits.

The Department entered a final order adopting the recommended order. In the final order, the Department noted that it disagreed with the administrative law judge on the issue of attorney's fees but concluded that the agency did not have the authority to reverse on that issue as it was not a conclusion of law within the agency's substantive jurisdiction. G.E.L. appealed after entry of the final order.

On appeal, Orange City argued first that the court did not have jurisdiction to review the order of the Department because the adverse ruling of the administrative law judge should have been directly appealed to the District Court. While agreeing that the order should have been directly appealed, the court held that failure to do so did not preclude relief where, as here, the issue was fully argued below.

The court reversed the final order with respect to attorney's fees. Section 120.595 relating to attorney's fees refers to the final order in "a proceeding pursuant to s. 120.57(1)." Orange City had argued, and the administrative law judge agreed, that "proceeding" in this section had the same meaning as "hearing" in Section 120.57(1). On that basis, the administrative law judge concluded that a hearing on the merits must occur before a party is entitled to attorney's fees as the prevailing party. The court rejected that reasoning. It concluded that a proceeding and a hearing may have different meanings in the context of the judicial process, with proceeding meaning, more broadly, the initiation of the overall process. The court agreed with the Department that limiting the award of attorney's fees to situations where a hearing on the merits had occurred would allow parties to unfairly avoid the imposition of fees and costs simply by voluntarily dismissing a petition right before a hearing. Finally, the court noted that a similar attorney's fee provision, Section 57.105(5), Fla. Stat., had been amended by the Legislature in 2003 to provide that voluntary dismissal by a non-prevailing party did not deprive the administrative law judge of jurisdiction to award fees. The court noted the legislative history of the provision indicating that the amendment was intended to address two recent administrative cases that had held otherwise.

With respect to the jurisdiction of the Department to reverse the administrative law judge, the court agreed that the Department lacked jurisdiction over conclusions of law related to the availability of attorney's fees as that was not within the agency's substantive jurisdiction.

Exhaustion of Administrative Remedies

Agency for Health Care Administration v. MIED, Inc., 29 Fla. L. Weekly 502 (Fla. 1st DCA 2004)

John Carter purchased Southlake Nursing and Rehabilitation Center (of which he was then a co-owner) through a wholly owned corporation, MIED, Inc. The Center was in serious financial straits and Carter intended to apply to AHCA for a rate step-up in Medicaid reimbursements. To qualify for the rate step-up, he had to demonstrate to AHCA that he was an unrelated purchaser. He spoke with an AHCA official who, allegedly, informed him that MIED would qualify if Carter resigned from his position at Southlake and exercised no control over the center. Apparently on that basis and without a formal determination from AHCA on the issue of whether MIED was an unrelated purchaser, the sale went forward.

Shortly after the purchase by MIED in February, AHCA was successful in having a receiver appointed to operate the facility. After being unsuccessful in receiving a final determination as to the eligibility for a rate step-up, MIED filed a petition for a formal administrative proceeding on that issue. At about the same time, MIED's lender declared the company to be in default and indicated it would foreclose on the center. AHCA then gave MIED thirty days to either find an unrelated buyer or relocate the residents of the center.

MIED, its lender, and AHCA entered into a settlement that allowed the receivership to continue during the foreclosure action, provided for monthly payments to Carter for a twelve-month period, excused Carter's personal guarantee of the mortgage, and required MIED to dismiss its petition for an administrative hearing.

Several months after the settlement agreement was finalized, MIED and Carter filed suit in circuit court against AHCA alleging, inter alia, breach of contract, equitable estoppel, and misrepresentation. The trial court allowed the matter to proceed to a jury trial, and the jury awarded MIED (the only remaining plaintiff) $20,000,000. AHCA appealed.

On appeal, the court reversed. It held that the trial court had erred in allowing the breach of contract claim to be considered by the jury. Specifically, the court held that MIED had failed to exhaust its administrative remedies when it voluntarily dismissed its petition for hearing. It rejected MIED's argument that pursuing the administrative hearing would have been futile because it would have been out of business as a result of AHCA's withholding of Medicaid payments. The court noted that MIED used the threat of proceeding with an administrative challenge as leverage to reach a settlement that resulted in benefits to it. The court further held that MIED waived its right to pursue a breach of contract claim by entering into a settlement.

With respect to the equitable estoppel claim, the court held that, under Florida law, a claim of equitable estoppel is a defensive doctrine and not a cause of action. MIED's estoppel claim did not seek to prevent AHCA from taking some action but, instead, sought damages from AHCA.

Finally, the court rejected MIED's argument that the AHCA official made misrepresentations to MIED. It found that any misrepresentation was one of law, not fact, which is insufficient to support a claim of estoppel against the state.

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

FROM THE CHAIR

from page 1

Seann Frazier is our Journal article coordinator, and Elizabeth McArthur runs the newsletter. Let's give them something to do.

If you have an idea for a CLE program or would like to help organize a program, please contact Andy Bertron, our CLE Chair. Last spring, the Section put on a very successful Practice Before DOAH seminar. Did you attend? If so, what did you think? How could we improve it?

Administrative Law Judge Charles Stampelos is our membership committee chair this year. His mission is to explore ideas to get more people excited about joining the Section. Do you have any thoughts on this? Heard anyone say "I'd join the Section if only . . . ." Charlie will be working closely with Rick Ellis who is our law school project liaison. Know a good way to get students interested in Administrative Law? Let Rick know.

Another issue that involves a potential change for the Section, and that may spark some discussion among the membership, is Legal Certification. The Government Lawyers Section has approached us about jointly developing a certification program for Government and Administrative Law. At the Annual Meeting, our Executive Council voted to ask for and evaluate a more detailed proposal from the Government Lawyers Section, so by no means is the die cast. If the decision is made to move forward, the next phase would be working on the parameters of what practice areas the program would cover, what would qualify lawyers to sit for certification, and the general contents of the exam. All of this would ultimately be presented to the Board of Governors in the form of a proposed rule. At this point, the Section has only committed to consider additional information from the Government Lawyers Section. There will need to be future Executive Council action in the event the Section wants to participate in moving the process forward.

In short, this is your Section. The message here is that if you like the current direction of the Section, great, but if you see room for improvement and want to participate, let me or other Executive Council members know. Help us move some cheese.

Robert C. Downie, II, *is Chair of the Administrative Law Section. He graduated from the Florida State University College of Law and practices as an assistant general counsel with the Florida Department of Transportation.*

MINUTES

from page 3

of the proposed changes prior to the long-range planning retreat. It would be helpful if council members would assist in preparing short explanations for the changes. Ultimately, before presenting the product to the Governor and Cabinet, we will develop a longer narrative describing each of the changes.

Long-Range Planning Retreat: The retreat is planned for Thursday, September 30 through Friday, October 1 at the WaterColor Resort in South Walton County. Bar staff is currently negotiating with the facility and will provide detailed information as soon as possible.

NEW BUSINESS:

Officer/Executive Council Election: The slate of candidates nominated and elected to hold offices in the Section is as follows:

Chair: Bobby Downie
Chair-Elect: Debby Kearney
Secretary: Booter Imhof
Treasurer: Andy Bertron

The slate of candidates nominated and elected to the Executive Council are:

Rick Ellis (2006)
Seann Frazier (2006)
Clark Jennings (2006)
Cathy Lannon (2006)
Chris Moore (2006)
Cathy Sellers (2006)
Natalie Futch Smith (2005)
Bill Williams (2006)

Governmental Practice and Administrative Law Certification: Keith Rizzardi, Chair of the Government Lawyers Section asked to speak to the Executive Council with respect to the Government Lawyers Section's proposal to create a certification program in governmental practice and administrative law. The Government Lawyers Section is requesting that the Administrative Law Section join in the certification program. A motion was made and approved to ask the Government Lawyers Section to develop a package detailing the proposal so that our section can better evaluate what is intended. Mr. Rizzardi pledged to do so.

Section Legislative Positions: As reflected above in the Legislative Committee report, the Executive Council voted to roll over the currently-adopted legislative positions for the coming year.

FINAL REMARKS AND PRESENTATION OF AWARDS: Chair Donna Blanton made closing remarks and thanked members of the Executive Council for their work throughout the past year. On behalf of the Section, Bobby Downie presented Donna with a crystal gavel in appreciation of Donna's hard work and successes throughout her year as Section Chair

PROGRAM OUTLINE & CLOSING COMMENTS: Bobby Downie announced the following committee assignments for the coming year:

CLE Committee – Andy Bertron (Chair), Li Nelson, Cathy Sellers, Dave Watkins
Bar CLE Committee – Cathy Lannon, Mary Ellen Clark
Newsletter – Elizabeth McArthur
Bar Journal Coordinator – Seann Frazier
Agency Reports – Mary Ellen Clark
Public Utilities Law Committee – Natalie Smith
Membership – Charlie Stampelos
Council of Sections – Bobby Downie, Clark Jennings, Cathy Sellers
Casenotes – Mary Smallwood
Uniform Rules – Chris Moore
Legislation – Linda Rigot, Bill Williams, Allen Grossman
Law School Liaison – Rick Ellis, Cathy Sellers
Website – Paul Flounlacker
Long Range Planning Retreat – Debby Kearney

TIME AND PLACE OF NEXT MEETING: September 30 – October 1, Long Range Planning Retreat, WaterColor Inn, Grayton Beach, FL

ADJOURNMENT at 12:30 pm

Respectfully submitted,
Debby Kearney, Secretary

Section Budget/Financial Operations

	2003-2004 Budget	2003-2004 Actual	2004-2005 Budget
REVENUES			
Dues	21500	22585	22500
Affiliate Dues	200	95	100
Dues Retained by Bar	(10910)	(11371)	(11330)
CLE Courses	1000	0	1000
Audiotape Sales	1500	4999	2000
Course Material Sales	75	4	75
Section Service Programs	5000	12805	2000
Credit Card Fees	0	(203)	0
Interest	4034	9288	4943
Miscellaneous	50	0	100
TOTAL REVENUE	**22449**	**38202**	**21388**
EXPENSES			
Staff Travel	450	266	422
Postage	500	128	500
Printing	300	26	300
Officer Expense	500	0	500
Newsletter	2500	1904	2500
Membership	500	0	500
Supplies	50	0	50
Photocopying	275	41	275
Officer Travel	2500	256	2500
Meeting Travel	500	265	500
CLE Speaker Expense	100	0	100
Committees	500	0	500
Council Meetings	500	214	500
Bar Annual Meeting	1700	1329	1700
Section Service Programs	20000	16062	5000
Retreat	4500	1499	4500
Public Utilities	500	0	500
Awards	500	500	500
Writing Contest	2400	0	2400
Website	4000	1730	5000
Legislative Consultant	10000	7500	10000
Council of Sections	300	0	300
Misc.	500	0	500
Operating Reserve	0	0	3955
TOTAL EXPENSES	**53575**	**31720**	**43502**
BEGINNING FUND BALANCE	**120885**	**132794**	**98853**
PLUS REVENUES	**22449**	**38202**	**21388**
LESS EXPENSES	**(53575)**	**(31720)**	**(43502)**
OTHER COST CENTER	**2800**	**(256)**	**2150**
ENDING FUND BALANCE	**92559**	**139020**	**78889**

SECTION REIMBURSEMENT POLICIES:

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

Agency Snapshots

Department of Financial Services

by Donna E. Blanton

Voters in 1998 approved a constitutional amendment combining the offices of the Treasurer and Comptroller of the State of Florida into the Office of the Chief Financial Officer. The Legislature implemented this constitutional change by, either directly or indirectly, consolidating the regulatory activities of the former Department of Insurance and former Department of Banking and Finance into the Department of Financial Services.

The result is an entity with approximately 2,700 employees that in some ways can be considered three agencies in one. Consider:

• Tom Gallagher, as the elected Chief Financial Officer (CFO), is the agency head of the Department of Financial Services (DFS). The Financial Services Commission, which consists of the Governor; the Chief Financial Officer; the Attorney General; and the Commissioner of Agriculture, was established within the Department of Financial Services.

• The Financial Services Commission itself has two offices: the Office of Insurance Regulation (OIR) and the Office of Financial Regulation (OFR).

• The Commissioner of OIR is Kevin McCarty, and the Commissioner of OFR is Don Saxon. Each Commissioner is the agency head for purposes of the entry of Final Orders and other regulatory actions. The collegial Financial Services Commission is the agency head for purposes of rulemaking by both offices.

• OIR is responsible for the regulation of risk bearing entities (insurance companies, HMOs, warranty companies, etc.), viatical providers, insurance administrators, and premium finance companies. The General Counsel of the OIR is Steve Parton. OIR has 19 attorneys on staff.

• OFR is responsible for the regulation of financial institutions, securities dealers, consumer lenders, and mortgage brokers and lenders. The General Counsel of the OFR is Robert Beitler. OFR has 26 attorneys on staff.

• With the exception of those activities now regulated by OIR, DFS is responsible for all regulatory activities previously performed by the Department of Insurance. DFS includes the Division of Agent and Agency Services, the Division of Consumer Services (which includes the Bureau of Funeral and Cemetery Services), the Division of Insurance Fraud, the Division of Rehabilitation and Liquidation, the Division of Risk Management, the Division of State Treasury, the Division of State Fire Marshal, the Division of Workers' Compensation and the Division of Accounting and Auditing (formerly in the Department of Banking and Finance). The General Counsel of DFS is Pete Dunbar. DFS has 45 attorneys on staff.

WHERE TO FILE PLEADINGS AND PUBLIC RECORDS REQUESTS

DFS

• The General Counsel of DFS, Peter Dunbar, serves as the Agency Clerk for DFS. Physical address for filing documents with Agency Clerk is Larson Building, Room 612, 200 East Gaines Street, Tallahassee, Florida 32399-0333.

• Legal process naming DFS should be served at the Service of Process Section, Larson Building Room 131, 200 East Gaines Street, Tallahassee, Florida 32399-0333 (phone 850/413-4102). Requests for public records held by DFS should be directed to Cornelia Collins, Document Processing Section, Larson Building Room 146, 200 East Gaines Street, Tallahassee, Florida 32399-0333 (phone 850/413-2622).

• Approximately 80 percent of cases handled by DFS involve the APA.

OIR

• The General Counsel of OIR, Steve Parton, serves as the Agency Clerk for OIR. Physical address for filing documents with Agency Clerk is Larson Building, Room 612, 200 East Gaines Street, Tallahassee, Florida 32399-0333

• Legal process naming OIR should be served at the Service of Process Section, Larson Building Room 131, 200 East Gaines Street, Tallahassee, Florida 32399-0333 (phone 850/413-4102). Requests for public records held by OIR should be directed to Cornelia Collins, Document Processing Section, Larson Building Room 146, 200 East Gaines Street, Tallahassee, Florida 32399-0333 (phone 850/413-2622).

• Approximately 80 percent of cases handled by OIR involve the APA.

OFR

• All filings made with the OFR should be submitted to Mary Howell, Agency Clerk, Room 526 Fletcher Building, 101 East Gaines Street, Tallahassee, Florida 32399-0350. All public records requests should be directed to David Knoll, Bureau of Regulatory Review, Fletcher Building, 101 E. Gaines Street, Tallahassee, Florida 32399-0350 (phone 850/410-9862).

• Legal process naming OFR should be directed to Robert Beitler, Esq., General Counsel, 526 Fletcher Building, 101 East Gaines Street, Tallahassee, Florida, 32399-0350, (phone 850/410-9896).

• Between 80 percent and 90 percent of OFR's cases involve the APA.

If you could change the APA...

We asked if the general counsels of DFS or OIR would like to see any changes to the APA. Don Dowdell, a veteran attorney with the former Department of Insurance who now is housed within DFS responded as follows:

> *The DFS feels that the language in 120.57(1)(l), which provides that the agency final order may only reject or modify conclusions of law or interpretations of administrative rules over which it has substantive jurisdiction, should be amended.*

For example, if an ALJ makes a clearly erroneous conclusion of law regarding a provision of the Evidence Code, the agency should be able to reject the conclusion. I don't think the agency's authority to appeal its own order adopting an erroneous conclusion of the law has been completely resolved.

While not involving any provision in Chapter 120, we feel it would be beneficial for the courts to clarify whether agencies can, in administrative proceedings, address constitutional issues not involving the constitutional validity of statutes, as appears to be suggested in the case of Communications Workers of America v. City of Gainesville, 697 So. 2d 167 (Fla. 1st DCA 1997).

We asked Robert Beitler what changes he would like to see to the APA, and he responded as follows:

[T]he one area that I believe needs clarification and refinement are the laws regarding rulemaking. In order to afford equal protection of the law, an agency must have generally applicable policies that afford similar treatment to similarly situated individuals. Another general principle is that an agency cannot have a policy that is not reduced to a rule. But one cannot promulgate a rule without specific rulemaking authority. Complicating matters is the definition of a "rule," which includes any form that "solicits any information not specifically required by statute or by an existing rule." This has all become a hyper-technical minefield. Here is one example: OFR has clear authority to conduct investigations. But in 2002 we were determined to have engaged in "nonrule policy" because we used the same form letter to make inquiries of four license applicants. This cost us $50,000 in attorney fees, but does not seem to have provided any real benefit to the public, the applicants (one of whom challenged our actions), or the party who did challenge our action.

DFS General Counsel Bio

Peter Dunbar is the General Counsel for CFO Tom Gallagher at DFS. He is a former member and past Chairman of the Ethics Commission. He holds both a bachelor's and law degree, with honors, from Florida State University. Mr. Dunbar served as General Counsel and Director of Legislative Affairs for Governor Bob Martinez and as Chief of Staff during the transition between the Martinez and Chiles administrations in 1990. He served 10 years in the Florida House of Representatives, and he is the former Pasco County Attorney and former General Counsel for Tampa Bay Water. He was a partner in the Pennington, Moore, Wilkinson, Bell & Dunbar firm in Tallahassee prior to joining DFS, and served as legislative counsel for the Real Property, Probate and Trust Law Section of The Florida Bar.

OIR General Counsel Bio

Steve Parton is the General Counsel of OIR. He has been in the legal department of OIR, and its predecessor, the Department of Insurance for many years. He earned his law degree from FSU College of Law in 1974.

OFR General Counsel Bio

Robert Beitler, OFR's general counsel, has worked as an attorney in state government since 1986. Before his appointment as OFR's General Counsel in January 2003, he served as General Counsel to the Department of Banking and Finance, and previously in several other legal positions with that agency. Mr. Beitler earned his law degree from Florida State University in 1981 and his bachelor's degree from Rutgers University in 1978.

Special thanks to DFS attorney Don Dowdell for gathering the information for this snapshot.


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The Florida Bar Administrative Law Section presents the

2004 Pat Dore Administrative Law Conference

The APA Yesterday, Today and Tomorrow: Thirty Years of Administrative Practice

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

November 18-19, 2004 • Turnbull Conference Center • Tallahassee, FL

Course No. 0147R

Schedule of Events

Thursday, November 18

1:30 p.m. – 2:00 p.m.
Late Registration

2:00 p.m. – 2:10 p.m.
Welcome
Robert C. Downie III, Tallahassee

2:10 p.m. – 3:00 p.m.
Standing and the APA
Yesterday
Today
Tomorrow
William E. Williams, Tallahassee

3:00 p.m. – 3:50 p.m.
Points of Entry
Yesterday: The Days of Excusable Neglect
Today: Deadlines are Jurisdictional?
Tomorrow: Invitation to Change
Panel: Lawrence E. Sellers, Jr., Tallahassee
David Gluckman, Crawfordville
Wings S. Benton, Tallahassee

3:50 p.m. – 4:00 p.m.
Break

4:00 p.m. – 4:50 p.m.
The Court and the APA (pet peeves from the Bench)
Panel: Moderator: Lisa S. Nelson, Tallahassee
Honorable Robert T. Benton, II, 1st DCA, Tallahassee
Honorable Gerald B. Cope, Jr., 3d DCA, Miami
Honorable Stevan T. Northcutt, 2nd DCA, Tampa

5:00 p.m. – 6:00 p.m.
Reception

Friday, November 19

8:30 a.m. – 9:20 a.m.
Caselaw Update
Mary F. Smallwood, Tallahassee

9:20 a.m. – 10:10 a.m.
Hearings Before the Agency: The Agency as Presiding Officer
Panel: M. Catherine Lannon, Tallahassee
Wellington H. Meffert, Tallahassee
Richard D. Melson, Tallahassee

10:10 a.m. – 10:20 a.m.
Break

10:20 a.m. – 11:10 a.m.
Privatization and the APA:
Panel: F. Scott Boyd, Tallahassee
Steve T. Maher, Miami
Alberto L. Dominguqz, Tallahassee

11:10 a.m. – 12:00 noon
The Reach of Rules
Yesterday
Today
Tomorrow
Panel: Dan R. Stengle, Tallahassee
Lee Ann Gustafson, Tallahassee
John J. Rimes, III, Tallahassee

12:00 noon – 1:30 p.m.
Lunch (included in registration fee)
Ethics and the APA
Honorable Harry Lee Anstead, Tallahassee

1:30 p.m. – 2:20 p.m.
Commission on Ethics
Panel: Virlindia A. Doss, Tallahassee
Mark Herron, Tallahassee
James H. "Pete" Peterson, Tallahassee

2:20 p.m. – 3:10 p.m.
Uniform Rules
Panel: Donna E. Blanton, Tallahassee
G. Steven Pfeiffer, Tallahassee
Christiana T. Moore, Tallahassee
Elizabeth W. McArthur, Tallahassee

3:10 p.m. – 3:20 p.m.
Break

3:20 p.m. – 4:10 p.m.
Contracting with the Government: The Changing Face of Bid Protests
Panel: Frederick J. Springer, Tallahassee
Karen D. Walker, Tallahassee

4:10 p.m. – 5:00 p.m.
DOAH and the APA:
Yesterday
Today
Tomorrow
Panel: Honorable Robert S. Cohen, Tallahassee
Honorable Sharyn L. Smith, Tallahassee
Kenneth G. Oertel, Tallahassee

continued...

Registration

Register me for "2004 Pat Dore Administrative Law Conference - The APA Yesterday, Today and Tomorrow: Thirty Years of Administrative Practice"

(053) CENTER FOR PROFESSIONAL DEVELOPMENT, TALLAHASSEE, (11/18-19/04)

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❑ Non-section member: $100
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