administrative law section newsletter

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THE FLORIDA BAR

CHAIRMAN'S MESSAGE

The section should be proud of the recent Administrative Law Seminars held in Tallahassee and Miami. We had over 300 people attend these seminars. Special thanks should go to Boone Kuersteiner and his committee consisting of Jim Brindell, Buddy Blain, Pat Dore, Ken Hoffman, Wade Hopping, Ken Oertel and Jacob Varn for putting together a very successful program.

In addition, a special Administrative Law Section Committee on Florida Constitutional Revision has been functioning under the able chairmanship of Fred McMullen of Tallahassee. Fred has been working very closely with the Constitution Revision Commission, not as an advocate for a particular position, but attempting to make sure that any proposed changes the Commission adopts in an area affecting Administrative Law will not create more constitutional problems than it solves.

We are very hopeful of having a mid-winter meeting of the section in late January or early February. We hope to have this meeting in a spot where, in addition to business, the membership who chooses to attend will be able to enjoy themselves. Considerable sentiment has developed for a trip to Colorado. Some members have expressed an interest in going to a much warmer climate. If you have any thoughts on this matter, I would appreciate your comments.

At this time, all of the committees of the section should be functioning and if you

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EDITOR'S NOTES

Some section members have expressed a desire for the *Newsletter* to establish a systematic and frequent case summary service. As this issue illustrates, summarizing recent and important cases has always been one of the purposes of the *Newsletter.* In providing case summaries, your *Newsletter* Committee has been faced with an apparently intractable problem which predates section status considerably: contributions from the areas outside Tallahassee have simply not been forthcoming, whether on a voluntary or assigned basis. If a case summary service is to have any meaning, it must be both current *and* complete. Assuming we can take care of the coverage problem by finding willing and able reporting lawyers to summarize interesting cases from the Second, Third and Fourth Districts and from the several federal courts, there remain the questions of the considerably increased workload implied by putting out a larger volume of information on a more frequent basis, and the increased cost.

To help determine whether interest is widespread enough to make a frequent case summary service feasible, please supply the following information to *Newsletter* Committee Chairman Barrett Johnson by letter:

1. Are you interested in receiving a frequent case summary service? (Assume monthly distribution.)
2. If so, are you willing to cover opinions of the district court of appeal in your area as they are filed? (respond only if you practice in the Lakeland, Miami, or West Palm Beach areas.)
3. If costs are higher than the section can support, would you be willing to pay for the service? If so, how much?
4. Would the service be worthwhile to you if it covered only state courts?

Contributions to the *Newsletter* are solicited by your *Newsletter* Committee on a continuing basis. Please forward any contributions, comment, criticism and the information requested above to your *Newsletter* Editor: Barrett G. Johnson, 3105 Ortega Drive, Tallahassee, Florida 32303.

RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

The Administrative Law Section has continued to grow, although the rate of growth has slowed and as of October 14, section membership numbered 464.

Newsletter committee member David Cardwell has contributed the following checklist on rule filings. This article is obviously of interest to agency attorneys, and should be of interest to other section members since it provides a starting point for rule challenges as well as rule adoptions.

I. *Notice*

A notice of the proposed rule must be published in the Florida Administrative Weekly (FAW) at least 14 days prior to any public hearing and 21 days prior to adopting and filing the rule.

This notice must include:

1. name of the agency
2. rule title
3. rule number
4. purpose and effect of the rule
5. summary
6. citations to the specific legal authority authorizing the rule and to the law implemented
7. a summary of the estimate of the economic impact of the proposed rule.
8. how a hearing may be requested.
9. the hearing date, time, and place, if requested.
10. where a copy of the rule may be obtained.

The notice should be typed on letter-size paper, double-spaced. The rule does not have to be filed with the notice, but the economic impact statement required by § 20.54(2)(a) should be.

The original and two copies of the notice are sent to the Department of State. If an extra copy of the notice is enclosed, it will be returned with the stamped time and date of filing. It is helpful to include a cover letter with the phone number of the individual responsible for the rule. To ensure prompt delivery, send notice to:

Administrative Code
Department of State
The Capitol
Tallahassee, FL 32304

The notice must also be sent to the Joint Administrative Procedures Committee, any persons mentioned in the rule, and any persons who have previously requested the agency to send such notices. Notices are published in the FAW each Friday. The deadline is noon the preceding Wednesday.

II. *Committee Filing*

At least 21 days prior to the proposed *adoption* date, the following must be filed with the committee:

1. copy of the rule
2. detailed written statement of the facts and circumstances justifying the rule
3. the estimate of economic impact required by § 120.54(1), F.S.
4. a statement of the extent to which the proposed rule establishes standards more restrictive than any applicable federal standards; that the standards are no more restrictive; or, that there are no applicable federal standards
5. the notice filed with the Department of State.

This filing should be made at the same time as that with the department. Following the public hearing, or after the date for requesting a hearing has expired, any changes in the rule and reasons therefor, or a statement that there are no changes,

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

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must be filed with the committee. Send committee filings to:

Administrative Procedures Committee
120 Holland Building
Tallahassee, FL 32304

III. *Filing the Rule*

Not less than 21 nor more than 45 days following publication of the notice, the agency must file the rule with the Department of State, if no public hearing was held. Rules dealing solely with organization, practice or procedure are not subject to hearing, so they automatically fall into this category. If a hearing was held, the filing must be within 21 days of the receipt by the agency of all material authorized to be submitted at the hearing or receipt of the transcript, whichever is later.

The filing must include:

1. certification of the rule (see forms FAC 1 and FAC 2 in Rule 1-1.02(1), FAC, with original signatures by agency head
2. justification for the rule
3. summary of the rule
4. summary of the hearing, or statement that none was requested and held
5. the rule (including statutory authority and law implemented)

This material should be typed on legal-size paper, double spaced. Three copies must be filed. An original signature of the agency head must be on all three certification pages. Amendments to existing rules should be coded in the same manner as legislative amendments. The entire text of the rule should be typed with strike-throughs to indicate deletions and underlining to indicate additions. Rules are repealed by striking through the entire rule except the title and history note. Once a rule number has been used, it cannot be used again following repeal of the rule.

IV. *Emergency Rules*

Emergency rules are filed with the Department of State and noted in the next issue of the *Florida Administrative Weekly*. It is advisable to first call the department (488-8427) to determine the correct rule number.

The rule and a cover page must be filed. The rule must be typed on legal-size paper, double spaced. The cover page must be letter-sized, double spaced, and include the following:

1. name of agency
2. emergency rule number
3. reasons for finding immediate danger to public health, safety and welfare
4. reasons why the adoption procedure is fair under the circumstances
5. summary of the rule
6. date and time of effectiveness
7. where a copy of the rule may be obtained

A certification page and an economic impact statement are not required. The original and two copies of the emergency rule must be filed with the department. Emergency rules are effective for 90 days and cannot be renewed.

V. *Technical Amendments*

Substantive changes in existing rules must be made by the amendatory process, which is identical to the rulemaking procedures described above. Technical changes may be made informally by notifying the committee and the department by letter specifically noting the technical error or omission. Technical changes are limited to correcting errors in punctuation, spelling, tense, etc. Significant changes in wording cannot be technical amendments and will not be accepted by the department.

Questions should be directed to the committee (904) 488-9110 or the department (904) 488-8472.

Other resources now available include a survey, "1976 Developments in Florida Law," University of Miami *Law Review*, pp. 731-783, by Justice Arthur England which covers cases through 1976. Section members should also be aware that the CLE manual is being revised to reflect both 1977 amendments and recent developments in case law.

Among the 1977 amendments, that with the greatest potential impact is the amendment to § 11.60(2), which empowers the Administrative Procedures Committee to seek judicial review of rules to which it objected and which the agency concerned has refused to modify. The legislature also acted to exempt the Division of Parimutual

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Wagering from the notice and hearing requirements of § 120.57(1)(a) and (b) for certain cases relating to jai alai. The Department of Banking and Finance was exempted from §§ 120.57 and 120.58 for the period ending June 30, 1978 for procedures relating to licensing or mergers approved for banks, credit unions and savings and loan associations. Proceedings of PERC relating to certification of employee organizations are exempt from all licensing provisions of the APA.

Educational units and units of government having jurisdiction in only one county or less and which are not required to publish their rules in the Florida Administrative Code are no longer required to file their rules with the Department of State nor to submit them to the committee. Rules which are not required to be filed with the Department of State become effective when adopted by the agency head or on a later date specified by rule or statute. All educational units and single county governmental units are no longer required to give notice of emergency rules in the Florida Administrative Weekly nor to submit emergency rules to the committee. The preparation or modification of curricula by educational units is removed from the definition of "rule."

The 90-day period within which a license application must be granted or denied is tolled whenever a hearing under Section 120.57 is initiated and conducted by a hearing officer from the Division of Administrative Hearings. The running of the 90-day period resumes with the submission of the recommended order. The final deadline is extended to 45 days after the recommended order is submitted unless the regular deadline is later.

The 21 to 45-day period during which a proposed rule must be adopted or withdrawn is now set to begin with the receipt of the transcript or other material submitted at a public hearing when one is held on a rule, rather than on the date of the notice.

Under the 1977 amendments, each agency is required to file a statement with the committee of the extent to which each proposed rule imposes standards more restrictive than federal standards or to state that the proposed rule is not more restrictive or that there are no federal standards on the subject of the rule.

When a court reverses an agency decision, the discretionary award of attorney's fees is no longer limited to cases alleging bad faith or malice. The courts now have discretion to award attorney's fees in all cases.

Provision is made in the 1977 amendments for the termination of exemptions granted while the legislature is in session at the adjournment of the current session rather than allowing them to continue for a full year. Exemptions will also terminate on the effective date of legislation incorporating the exemption or any part of it.

Stuckeys of Eastern Georgia v. Dept. of Transportation,340 So.2d 119 (Fla. 1st DCA 1976) dealt with several questions, although stating it dealt with only one. Of course, the case is primarily cited for the following proposition:

> Stuckey's . . . petitioned for review of final agency action by the Department of Transportation, ordering removal of certain outdoor advertising signs. The order was entered on recommendation of a hearing officer... pursuant to §120.57(1) . . . The *only substantial question* presented is whether the hearing officer's recommended order, later adopted by the respondent department, *departed from statutory requirements by failing to include explicit rulings on each* proposed finding of fact submitted by Stuckey's pursuant to § 120.57(1)(b)4, F.S.1975.
>
> Section 120.59(2) is more reasonably to be regarded as requiring explicit agency rulings on *all* findings proposed by a party *and* on such other applications or requests in connection with the proceeding as are permitted by agency rule but not by statute.

However, the court also ruled on three other matters of great interest, which are probably of greater long-term importance, especially in view of *Parekh v. Career Service Commission* 346 So.2d 145 (Fla. 1st DCA 1977), analyzed hereafter. First the court addressed the issue of Stuckey's failure to accept the proposed order below:

> Stuckey's submitted to the hearing officer proposed factual findings supporting a conclusion that the respondent department was estopped to press objections to Stuckey's signs because, with knowledge of the alleged violations and after complaining of them, the department issued 1976 permits for the offending signs. The hearing officer's proposed order was entirely silent on that issue and on the facts pertaining to it, as was the department's order adopting the proposed order as its own.
>
> [1, 2] It is not an impediment to our review that Stuckey's did not except to the proposed order when the department considered it pursuant to § 120.57(1)(b)

continued . . .

and 9. Enforcement of statutory procedural guaranties remains a judicial function under the review procedures of § 120.68, and it would be inconsonant with the purposes of the Administrative Procedure Act to hold that an affected party must first debate procedural defects before a nonjudicial agency in order to complain to the appropriate reviewing court.

Second the court made express the concept that adoption of a recommendation necessarily includes adoption of any errors contained therein:

Our duty is to review the department's order, not the hearing officer's recommended order; and *by adopting the recommended order, the Department adopted as its own any error in the hearing officer's failure to rule explicitly on Stuckey's proposed findings pertaining to estoppel.*

Third, the court made clear that rights afforded by statute need not depend on adoption of an implementing rule for their existence. So much would appear obvious. The court went on to say that rights afforded by rule are in addition to those derived from statute:

hile the Department of Transportation has not provided ,y rule for submission of proposed findings of fact, see Fla.Admin.Code Rule 14-6, we do not consider that § 20.59(2), above quoted, compromises a party's ,atutory right by making it depend on the existence of agency rules repeating the statutory mandate. Section 120.59 (2) is more reasonably to be regarded as requiring explicit agency rulings on *all* findings proposed by a party *and* on such other applications or requests in connection with the proceeding as are permitted by agency rule but not by statute.

It may be of interest that the court did not address the effect of Rule 28-5.35 FAC, which would appear to be applicable to the department by operation of § 120.54(10) FS. The court's phrasing raises the implication that agencies are not required to adopt rules which parrot statutes since the statute will be in effect in any event and will obviously control any rule. Such a construction is fully consistent with the announced goals of the legislative sponsors of the APA to cut down on the repetition of statutory provisions in rules thereby cutting bulk and printing costs.

To return to the issue for which *Stuckey's* is normally cited, that an agency must specifically dispose of *each* proposed finding of fact, it has apparently escaped the ttention of a large part of the section ,nembership that the court appears to have clarified its holding in *Stuckey's*. In the case of *Parekh v. Career Service Commission*, the court said:

Although the Commission's failure to rule explicitly on petitioner's proposed findings of fact was not in accord with Section 120.59(2), Florida Statutes (1975), *Stuckey's of Eastman, Georgia v. Department of Transportation*, 340 So.2d 119 (Fla. 1st DCA 1976), that error did not in these circumstances impair the fairness of the proceedings or the correctness of the action. Section 120.68(8), Florida Statutes (Supp. 1976)

Thus, the court appears to place at least one type of procedural infirmity in the category of matters that will be examined on a case-by-case basis.

Another recent First District case with procedural implications is *Anson v. Florida State Board of Architecture*, case no. CC-421, opinion filed October 19, 1977. In a footnote to its opinion by Judge Rawls, the court said:

Anson, the holder of a certificate of registration to practice architecture in Florida, seeks review of an order of the State Board of Architecture denying his second amended motion to dismiss the board's administrative complaint seeking to revoke his certificate of registration.

Anson's pleading is entitled: "Petition for Review of Final Agency Action . . . and in the Alternative, Petition for Writ of Prohibition." A denial of a motion to dismiss does not constitute final agency action. However, we determine that the record in his cause mandates an interloctutory review as contemplated by the provisions of Section 120.68(1), Florida statutes, viz: ". . . A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy."

Anson may also be of interest to administrative lawyers in that it is the most recent opinion proscribing administrative penalties for persons immunized in criminal proceedings. The court said:

Anson appeared involuntarily before an assistant state attorney in the Eleventh Judicial Circuit and, in exchange for immunity from prosecution, penalty or forfeiture, gave testimony concerning the same transaction, matter or thing as that upon which the board's administrative complaint is based . . . Anson gave testimony concerning his involvement in a fradulent scheme to help cover up illegal payments to another architect...Anson, in exchange for immunity ...gave compelled testimony at the trial of other individuals . . . In the administrative proceedings, the hearing officer, after reviewing the record and Supreme Court decisions hereinafter considered, recommended that the board's complaint against Anson be dismissed with prejudice. The board rejected the recommended

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RECENT DEVELOPMENTS, cont'd.

order... [Citing a line of cases in which the Supreme Court held that a proceeding to revoke an architect's certificate amounts to a prosecution to effect a penalty or forfeiture contemplated by the immunity statutes, the Court went on to instruct the board to dismiss its proceedings with prejudice.]

In the very recent First District case of *Hill v. Leon County Board of Public Instruction*, Cases No. HH-222 and HH-223, opinion filed October 28, 1977, the court dealt with the general question earlier visited in *Price Wise Buying Group v. Nuzum*, 343 So.2d 115 (Fla. 1st DCA 1977). In *Hill*,

The petition for review asserts that the school board engaged in illicit rulemaking, without complying with Section 120.54, by discontinuing its prior practice of affording county-paid transportation on dangerous routes to school children whose transportation costs are not payable from state funds because their homes are within two miles from school. . . . While county school transportation policy may be a proper one for rulemaking, . . . not every statement by the board on those subjects is a rule . . . The board's announcement that an optional service previously provided will be discontinued is not necessarily a rule because it is not a statement "which [is] intended by [its] own effect to create rights or to require compliance, or otherwise to have the direct and consistent effect of law." *McDonald v. Dep't. of Banking and Finance*, 346 So.2d 569, 581 (Fla. 1st DCA 1977).

We recognized in *McDonald* that APA rulemaking requirements are and must be to some extent self-enforcing. Affected agencies will be pressed toward rulemaking by the necessity otherwise to explicate [*sic*] and defend policy repeatedly in Section 120.57 proceedings . . . our duty in doubtful cases is to withhold judicial imperatives and leave affected parties to initiate rulemaking under Section 120.54(5) or to request proceedings under Section 120.57. Petitioners here have not attempted to invoke either remedy before the board. *Price Wise Buying Group v. Nuzum*, 343 So.2d 115 (Fla. 1st DCA 1977), in which a regulatory agency rescinded official interpretation of its undoubted rule, is distinguished on its facts, as is *Straughn v. O'Riordan*, 338 So.2d 832, 834n. 3 (Fla. 1976) (dictum).

Thus, this area of administrative law remains an evolving one.

FROM THE CHAIRMAN, cont'd.

have not heard from your committee chairman, I would appreciate hearing from you. If you have heard from your committee chairman, it is hopeful that you will be as active on your committee as your schedule dictates.

Again, this is the first year of our section and we are feeling our way along and all ideas from the membership of the section will help insure that we have a very successful year. If you have any thoughts or suggestions for the general direction of the section, please let me know at your earliest convenience.

A second seminar is being planned for May 11, 1978, and I hope as many of you as possible will plan to attend.

Finally, Joe Fleming of Miami is making plans for our section activities at the Bar convention and would welcome suggestions - and help - from section members.

Ron Laface
Chairman