ADMINISTRATIVE LAW SECTION

NEWSLETTER

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Recent Cases

APA Appeals—Venue

Pierce v. Division of Retirement, etc., ___ So.2d ___ Fla. 2d DCA 1982; 7 FLW 597:

Under F.S. 120.68(2), as read in pari materia with F.S. 120.72(1), appeals from agency orders under the APA may be filed and reviewed by the DCA in the appellate district where the agency whose order is being reviewed maintains its headquarters or where the party resides. The APA supersedes all other general laws on the same subject matter that were a part of the Florida Statutes, 1977, except those that were enacted after January 1, 1975, and that by specific reference contained an exclusion from the provisions of Chapter 120.

Exhaustion of Administrative Remedies—Circuit Court Jurisdiction Over Agency Exercise of Authority.

State of Florida Department of Environmental Regulation v. Falls Chase Special Taxing District, Elba, Inc. et al., ___So.2d___(Fla. 1st DCA 1982); 7 FLW 1567:

Oversimplified, the complicated facts of this case can be generally summarized as follows: DER sought to exert dredge and fill jurisdiction over land developed by Falls Chase Special Taxing District. Falls Chase asserted that the land over which DER claimed jurisdiction had been dry for a number of years and constituted "uplands" outside of DER's jurisdiction as defined by rule and statute. Falls Chase then filed a petition for writ of prohibition in the First DCA against DER which was denied by unpublished opinion which did not address the merits of the case. Falls Chase then filed a complaint in Circuit Court for declaratory and injunctive relief against DER. The Circuit Court granted Falls Chase's motion for judgment on the pleadings holding that DER had exceeded its statutory grant of

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Chairman's Message

I personally look forward to an extremely busy and productive year for the administrative law section. In keeping with my commitment of last year as chairman-elect, we have various carry over projects that hopefully will come to fruition this bar year. Most notably is the establishment of the first Florida Administrative Conference modeled somewhat after the Federal Administrative Conference which has enjoyed success in airing and defining critical issues in administrative law and ultimately developing better legislation by which the administrative and governmental lawyer can function and by which substantially interested people can participate within the system.

The Executive Council of the section held its organizational meeting on August 24, 1982. Project goals have now been defined and committee chairpersons are readily moving forward in their assigned tasks.

The next Executive Council meeting is scheduled for November 15, in the multi-purpose room at The Florida Bar. Please consider this an open invitation to any section members who will be in the Tallahassee area between 10 a.m. and 12 noon to attend and participate.

Michael I. Schwartz

IN THIS ISSUE:

authority and was without jurisdiction to regulate Falls Chase's dredge and fill activities; the Court enjoined DER from attempting to extend its jurisdiction beyond that defined by the statute and rule in question. DER appealed to the First DCA contending that the Circuit Court is without jurisdiction because Falls Chase failed to exhaust administrative remedies and that DER has dredge and fill jurisdiction as claimed over the property of Falls Chase.

The First DCA in a lengthy opinion [and lengthier dissent by Chief Judge Robert Smith] set forth the criteria for exercise of jurisdiction by a circuit court over matters involving agency exercise of claimed jurisdiction in light of the doctrine of exhaustion of administrative remedies. The Court found that DER's claim of jurisdiction was totally unsupported by statute or rule and without credible basis. The Court explained that an agency only has such power as expressly or by necessary implication is granted by legislative enactment and that an agency may not increase its own jurisdiction and has no common law jurisdiction or inherent power such as might reside in, for example, a court of general jurisdiction. When acting outside the scope of its delegated authority, an agency acts illegally and is subject to the jurisdiction of the courts when necessary to prevent encroachment on the rights of individuals.

The Court went on to elucidate upon the jurisdiction of circuit courts to entertain questions involving agency action, in light of the doctrine of exhaustion of administrative remedies. Only in exceptional cases may the courts assume jurisdiction to render declaratory and/or injunctive relief without requiring exhaustion of administrative remedies. A challenge to agency jurisdiction on persuasive grounds is a widely recognized exception to the exhaustion doctrine. In referring to the previous precedental case on point, *Willis v. Department of General Services,* 344 So.2d 580 (Fla. 1st DCA 1977), it is explained that the Court referred specifically in *Willis* to Circuit Court jurisdiction to enjoin enforcement of facially unconstitutional rules. However more egregious its situation represented by the *Falls Chase* case where DER has undertaken to act without a rule and in a manner clearly contrary to its statutory authorization. When an agency acts without colorable statutory authority that is clearly in excess of its delegated powers, a party is not required to exhaust administrative remedies before seeking judicial relief. A finding of lack of colorable statutory authority provides the necessary limitation on this exception to the requirement of exhaustion of administrative remedies.

Though addressed in the dissent, the majority opinion did not address the question of res judicata pertaining to the denial of Falls Chase's petition for writ of prohibition against DER which was denied and Falls Chase's subsequent petition for declaratory relief in circuit court.

This case should be carefully studied.

HEARINGS

Third Party Standing to Request 120.57(1) Proceeding.

Farm Workers Rights Organization, Inc. v. Department of Health and Rehabilitative Services and Lehigh Acres Hospital, ___ So.2d ___ (Fla. 1st DCA 1982); 7 FLW 1548:

The Court reversed an HRS denial of a third party request for a 120.57(1) hearing where HRS awarded a certificate of need to Lehigh Acres Hospital. Farm Workers Rights Organization, Inc., requested a formal hearing on the granting of the certificate of need but was denied by HRS for lack of standing.

The First DCA extended the standing requirements for associations as set forth in *Florida Home Builders Association, et al. v. Department of Labor and Employment Security,* 412 So.2d 351 (Fla. 1982), to 120.57(1) proceedings. The Court stated that for purposes of standing, there is no significant difference between a §120.56(1) and a §120.57(1) proceeding.

Final Agency Action Definition—Right to Hearing.

General Development Utilities Inc. v. Department of Environmental Regulation, ___ So.2d ___ (Fla. 1st DCA 1982); 7 FLW 1619:

General Development appealed from an order of DER denying General Development's petition for hearing under §120.57 pertaining to a DER letter expressing agency intent.

General Development had a permit allowing discharge from a sewage treatment plant into Turkey Creek. Prior to the expiration of

the permit and prior to the time for renewal of the permit, DER sent General Development a letter stating that the effluent limits for General Development were to be changed (made stricter) and advising General Development to review its options for meeting the new limits prior to expiration of its operating permits. The DER letter was based upon an already completed water study performed by DER. General Development petitioned for a §120.57 hearing alleging that the letter was final agency action and was capricious and arbitrary. DER considered the petition without a hearing and entered its order denying a 120.57 hearing on the grounds that the letter was informational in nature and applicable to General Development only perspectively in relation to an application for a permit or renewal of a permit which was then not pending before DER and consequently the DER letter had no legal or practical effect apart from prospective licensing.

On appeal, the Court disagreed with DER and characterized the DER letter as final agency decision affecting the substantial interests of General Development placing General Development in the position of either immediately challenging the lower affluent standards described in the letter or finding optional methods of treating its affluent. The essential ingredients of a 120.57 hearing were found to be present, i.e., final agency action affecting the petitioner's substantial interests coupled with a disputed issue of material fact. The Court reversed the DER order and remanded for a 120.57 hearing explaining that an agency must grant affected parties a clear point of entry within a specified time after some recognizable event in investigatory or other free-form proceedings to formal or informal proceedings under §120.57, but simply providing a point of entry is not enough if the point of entry is so remote from the agency action as to be ineffectual as a vehicle for affording a party whose substantial interests are or will be affected by agency action a prompt opportunity to challenge disputed issues of material fact in the 120.57 hearing.

Use of Discovery Deposition in Lieu of Live Testimony in Administrative Hearings.

State of Florida, Department of Health and Rehabilitative Services v. Bennett, ___ So.2d ___ (Fla. 3d DCA 1982); 7 FLW 1556:

This case addresses a question of first impression in administrative law.

A party had taken a discovery deposition of a witness who, apparently without prior indication, asserted the privilege of self-incrimination when called to the witness stand for live testimony at the hearing. The party calling the witness offered the discovery deposition in lieu of live testimony under FRCP 1.330(a)(3)(e) arguing that under the rule the unannounced refusal to testify constituted "such exceptional circumstances . . . as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court," as to use the deposition in lieu of live testimony. The hearing officer denied use of the deposition.

The Court on judicial review found that the hearing officer erred in denying the use of the deposition holding that the witness should be considered unavailable under FRCP 1.330 (a)(3)(e) under the exceptional circumstance in the case. The Court remanded the case for a new hearing.

DOAH Sanction Authority For Failure to Make Discovery—

Great American Bank Inc. et al. v. Division of Administrative Hearings, etc., et al., ___ So.2d ___ (Fla. 1st DCA 1982); 7 FLW 612

On motion for clarification, the court explained its original opinion reported at 6 FLW 2514. Whereas, F.S. 120.58(1)(b) provides for the swearing of witnesses and the taking of their testimony under oath, the

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Administrative Code/ Weekly Notes

Dean Bunch has persuaded Harrison Publishing Company to print citations of rule challenges from the FALR in the upcoming editions of the FAC.

Dean has also arranged for the FAW to contain quarterly lists of sections affected so that the Code and Weekly can be used in combination to determine the current status of any rule on any date.

Ben Girtman convinced Liz Cloud that the Administrative Weekly should contain Notices of the withdrawal of proposed rules. A new section has been created called: "Section III - Notices of Changes, Corrections and Withdrawals of Proposed Rules."

issuance of subpoenas and the effecting of discovery in the manner provided under the Florida Rules of Civil Procedure, only F.S. 120.58(3) relates to the enforcement of orders of process [discovery or compelling testimony of witnesses]. A party to an APA proceeding before DOAH is not required until the Hearing Officer's recommended order is received before proceeding to Circuit Court to enforce a hearing officer's ruling on an evidentiary matter, such as compelling an order of discovery or testimony of a witness. Model Rules of Procedure 28-5.208 and 28-5.211 relating to the issuance of orders and the enforcement of discovery are invalid to the extent that the rules conflict with F.S. 120.58(3). The rulemaking process cannot be used to make legal that which there was no authority to do in the first place.

Recommended Order—Rejection

Lewis v. Department of Professional Regulation, ___/___ (Fla. 2d DCA 82); 7 FLW 498:

Second DCA reversed Board of Real Estate Order rejecting a DOAH recommended order recommending dismissal of an administrative complaint seeking to discipline Lewis' real estate broker's license, on the basis that the Board did not state with particularity in its final order which of the Hearing Officer's recommended findings of facts are rejected and why. The Court refused to reverse the Board's Final Order on the argument that the agency violated the 90-day requirement of issuing the Final Order after receipt of the Hearing Officer's recommended order in that appellant did not demonstrate that the time violation resulted in severe prejudice.

Agency Reconsideration of Final Order.

Reedy Creek Utilities Co. v. Florida Public Service Commission, ___So.2d___ (Fla. 1982); 7 FLW 357:

This case involves a somewhat complicated factual situation pertaining to the PSC enforcing a refund to utilities consumers resulting from a savings to utilities companies deriving from a reduction in federal tax rates in 1979. To avoid extensive litigation over the PSC enforcement of a refund, Reedy Creek Utilities Company and other companies entered into a stipulation with the PSC generally setting forth a formula for calculating the amount of money to be refunded to customers. Reedy Creek arrived at a figure which was submitted to the PSC and approved by a PSC order. Two and one-half months later, before Reedy Creek distributed the refund to its customers, the PSC issued a supplementary order clarifying the first order recalculating the amount of refund resulting in an almost double amount to be refunded by Reedy Creek.

Reedy Creek filed a petition for reconsideration of the second PSC order and a full evidentiary hearing was held. The PSC denied the petition for reconsideration and Reedy Creek appealed to the Supreme Court asserting that the second PSC order was not based upon competent substantial evidence and that the second order was not issued until two and one-half months later, too late to change the first order under the doctrine of administrative finality of administrative orders.

The Court found that the PSC recalculation of the refund was based upon competent substantial evidence and addressed the PSC authority to reconsider its order.

The Court found that even though PSC had a rule providing for reconsideration of orders within 15 days of issuance, the 15 day rule did not apply to the PSC itself but to those who appear before it since the PSC is not a party at that level to the proceedings even though its stance is almost adversarial. The Court explained that the PSC, as a regulatory agency, has inherent authority to modify its orders in exercising the agency's duty to act on behalf of the public who derives benefit from the regulation of the utility. The Court referred to *People's Gas System v. Mason*, 187 So.2d 335 (Fla. 1966) and *Austin Tupler Trucking, Inc. v. Hawkins*, 377 So.2d 679 (Fla. 1979) to explain that the agency inherent authority to modify is not without limitation; one limitation appears to be the length of time in between the first and second agency orders. The longer the time the greater finality attaches to the first order. In this case, only two and one-half months passed between the first and second PSC orders and Reedy Creek did not change its position during the lapse of time between orders and suffered no prejudice as a consequence.

We can derive the following from this case: at least as to regulatory agencies, or agencies sitting in a regulatory capacity, agencies have inherent authority to modify their orders where there has not been a change in position during the lapse of time between orders and

where the parties have suffered no prejudice as a consequence. The agency may apparently modify its order without formal motion or notice to affected parties if full evidentiary hearings are granted on the second modifying order.

License Discipline—Probation Violation—Right to a Hearing

Gonzalez d/b/a/ Nationwide Professional Enterprises, Inc. v. Department of Health and Rehabilitative Services, ___ So.2d ___ (Fla. 1st DCA 1982); 7 FLW 1754

HRS charged Gonzalez (who holds a pest control certificate) with violation of statute justifying discipline of his pest control license. Gonzalez entered into a stipulation with HRS waiving the right to a hearing on the charges and providing for disposition of the allegations by placing Gonzalez on a probationary period. Subsequently, HRS issued a second final order revoking the license of Gonzalez for violation of the terms of probation arguing that Gonzalez had waived the right to a hearing and the revocation could be issued without the hearing process.

The First DCA held that the waiver to the right of hearing was on the original charge and did not waive the right to a hearing on future charges of violating the probationary terms. The Court reversed and remanded for holding of a hearing on the allegation of violation of the probationary terms.

Probable Cause Consideration—Rejection or Modification of Recommended Order.

Kibler, etc. v. Department of Professional Regulation, ___ So.2d ___ (Fla. 4th DCA 1982); 7 FLW 1708:

The Fourth DCA reversed a Final Order of the Board of Real Estate rejecting a DOAH recommended order recommending dismissal of charges against real estate licensees and imposing a penalty of suspension of the licensees. The Court remanded the case for entry of a Final Order approving the findings of the Hearing Officer.

Rejection or Modification of Recommended Order:

The hearing officer recommended dismissal of the charges as not having been proven. The Department prosecutor filed exceptions to the Recommended Order and the Board of Real Estate issued a Final Order rejecting the Hearing Officer's findings of fact and accepting the Findings of Fact set forth in the prosecutor's exceptions and the Administrative Complaint. The licensees, on judicial review, successfully argued that the Board failed to state with particularity those findings of fact it rejected pursuant to F.S. 120.57(1)(b)(9). The reference in the Final Order as accepting the Findings of Fact set forth in the Administrative Complaint and the prosecutor's exceptions was found to be erroneous by the Court in that the Administrative Complaint was nothing more than the prosecutor's view of what the Hearing Officer should have done. The Court stated that the Board failed to accord the Recommended Order of the Hearing Officer the dignity it deserves. In essence, the Court said that the Final Order is nothing more than a substitution of one set of findings for another. The Board is not authorized to substitute its interpretation for the facts for that of the Hearing Officer who was personally able to weigh the evidence and evaluate the testimony and demeanor of the witnesses. The Board argued that there was competent substantial evidence to justify its substituted findings of fact, but the Court explains that this turns the competent substantial rule on its head. The proper question is whether there is evidence to sustain the Hearing Officer's findings. If there is, then the Board cannot reject such findings and adopt its own.

Probable Cause Finding:

The Court explained that the case could also be reversed on the failure to properly find probable cause to issue the administrative complaint. The applicable statute for this agency and the rules of the agency require a probable cause panel to be consisted of not less than two members of the Board, one of which shall be a lay member. The Court found that the composition requirements of the Probable Cause Panel were violated.

Additionally, the Court found that the consideration of whether probable cause existed to issue the administrative complaint was insufficient in that it was not a true consideration of evidence to support a finding of probable cause of violation of a statute justifying the issuance of an administrative complaint.

The Court reviewed the transcript of the probable cause proceeding and found that it was more of a rubber stamp of its staff's recommendations rather than a determination of probable cause.

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The Court found that the agency probable cause proceedings did not adhere with the applicable rules and statutes and stated that adherence to rules and statutes by the very agency charged with their enforcement is especially necessary if the public and the parties regulated are to maintain respect and confidence in the decisions rendered by the agency. To ignore such rules while they remain in force is to invite disrespect and will ultimately result in a break down of the system.

License Revocation—Disqualification of Agency Head—Severity of Penalty—Increase of Recommended Penalty.

Lash, Inc. v. State of Florida, Department of Business Regulation, Division of Alcoholic Beverages & Tobacco, ___ So.2d ___ (Fla. 3d DCA 1982); 7 FLW 617:

Disqualification of Agency Head:

The court refused to find that the agency head erred in failing to disqualify himself on the basis that the agency head had issued an emergency suspension order which later matured into a formal administrative complaint requiring consideration of a DOAH recommended order and issuance of a final order by the agency head. The court analogized the agency head's action to that of a circuit court judge who issues a temporary restraining order and who thereafter does not have to be disqualified from ruling upon the final order on the basis that he is unable to fairly evaluate the case after having made a preliminary ruling. Apparently, there was insufficient demonstration of bias on the part of the agency head.

Severity of Penalty:

Apparently, the court upheld the severe penalty of license revocation on the basis that the violations were committed in a persistent and recurring manner consisting of more than one isolated incident.

Increase of Recommended Penalty:

The DOAH recommended order recommended a penalty of a thirty day license suspension which was increased by the agency head to revocation. Citing *Florida Real Estate v. Webb,* 367 So.2d 201 (Fla. 1978), the court refused to substitute its judgment for that of the agency on the issue of discretion in imposing a penalty, there being a finding that the final order of the agency was supported by competent substantial evidence. F.S. 120.57(1)(b)9, requires the agency to review the entire record prior to increasing the recommended penalty, but does not require the agency to explain its rationale for so doing. Even though the final order in this case did not recite that a review of the complete record was made, the final order made several references to the record, indicating that the transcript of the proceedings and all documents contained in the record on appeal were before the agency head and demonstrating that he made the requisite review.

Emergency License Suspension—

Ampuero v. Department of Professional Regulation, Board of Medical Examiners, ___ So.2d ___ (Fla. 3d DCA 1982); 7 FLW 574:

Third DCA found that a six month lapse from a Board of Medical Examiners emergency order restricting the appellant in proscribing authority of certain controlled substances to be egregious and the emergency order of restriction was quashed without allowing any further motions for rehearing. The Court found that the almost 6 month delay was more egregious than the 50-day delay between the day of the temporary suspension of the license and a hearing on a complaint for revocation of a license in a case of *Aurora Enterprises v. State, Dept. of Professional Regulation,* 395 So.2d 604 (Fla. 3d DCA 1981).

Emergency License Suspension—Judicial Review—

2829 Corporation, d/b/a/ Kit Kat Lounge v. Division of Alcoholic Beverage & Tobacco of Department of Business Regulation, State of Florida, ___ So.2d ___ (Fla. 4th DCA 1982); 7 FLW 353:

Licensee filed notice of appeal for review under APA and petitioned for automatic stay one day following the agency order of emergency license suspension. Court treated notice of appeal as petition for review under 120.68, granted stay of agency order and ordered administrative hearing to be held. Licensee then filed a petition for declaratory judgment in circuit court attacking the constitutionality of F.S. 120.68 and the validity of the administrative proceedings. Circuit Court

granted a stay of the administrative proceedings ordered by the appeals court.

Appeals court reversed circuit court stay of administrative proceeding since the appeals court had already obtained jurisdiction over the matter by the initial appeals petition filed with the Fourth DCA. The Court explained that ordinarily, when a constitutional attack is made upon administrative proceedings, they should be stayed pending resolution of the validity of those proceedings; however, the Fourth DCA had already accepted jurisdiction of the administrative proceedings and the Circuit Court was without jurisdiction. The Court further explained that the constitutionality of a statute can be raised forthe first time in the District Court of Appeal and directed the matter to proceed to an administrative proceeding wherein the licensee could raise or preserve the questions of constitutionality of the statute and the proceedings.

19838 N.W. Inc., d/b/a/ Sportsmen's Lounge v. Div. of Alcoholic Beverage, etc. . . . / ___ (4th 82) 7 FLW 532: This case is almost identical and has the same outcome as *2829 Corp.* case cited immediately above.

NON-RULE POLICY

Retroactive Application of New Non-Rule Policy—Reversal of Hearing Officer's Conclusion of Law.

Department of Education v. Atwater etc., ___ So.2d ___ (Fla. 1st DCA 1982); 7 FLW 1539:

On appeal from an order of the Unemployment Appeals Commission, accepting the findings of fact of an appeals referee but substituting a different conclusion, the First DCA reversed the agency final order because the agency substituted its own different conclusion than that of the appeals referee and instituted, without explanation or record foundation, a heretofore unnanounced non-rule policy.

Standing to Request Hearing on Agency Deviation from Non-Rule Policy

International Medical Centers, HMO v. Department of Health and Rehabilitative Services; Association Cubana, Inc., HMO, d/b/a/ C.A.C. Health Plan v. Department of Health and Rehabilitative Services, . . . So.2d ___ (Fla. 1st DCA 1981); 7 FLW 1491:

This decision is a consolidation of two appeals from an HRS agency action rejecting appellant's bids to provide health services, under the HMO concept, to refugees in the Dade County area. HRS had requested bids from HMOs to provide health services on behalf of HRS, as opposed to HRS paying individual health care providers providing health services to refugees. The bid specifications could be interpreted in at least two ways; each appellant could be interpreted as the successful bidder under respective bid specification interpretations. After reviewing the bid specifications, HRS decided to reject the bids and withdraw the request for bid proposals. HRS decided to continue providing health services on a fee for service basis with individual health care providers in contradiction to its non-rule policy to encourage health care services to the HMO system. The unsuccessful bidders requested a §120.57 hearing on the bid rejections which HRS denied. The unsuccessful bidders appealed the hearing denial.

Standing for Hearing:

The first question the Court addressed was whether the unsuccessful bidders had standing to request a §120.57 hearing. The Court had no difficulty in deciding that the bidders were parties whose substantial interests were determined by HRS's bid rejection decision, and, therefore, had standing to request a hearing.

Right to a Hearing on Agency Deviation from Non-Rule Policy:

The second question addressed by the Court was whether the unsuccessful bidders were entitled to an administrative hearing concerning HRS's decision to reject all bids and withdraw the bid request proposal. The Court held that the bidders were entitled to an

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This newsletter is prepared and published by the Administrative Law Section of The Florida Bar.
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administrative hearing to require HRS to present evidence and argument to expose and elucidate its reasons for discretionary action and defend its non-rule policies. HRS established two incipient (non-rule) policies by its actions here. The first is that HRS may reject all bids and cancel its bid proposal even though the bid proposal fails to explicitly reserve the right for HRS to do so. The Court noted that HRS, in contrast with some other agencies, has not adopted a rule concerning the right to reject all bids. The second non-rule policy (HRS's decision to continue providing health services through individual health care practitioners) contradicted its announced commitment to encouraging the HMO system by providing services to the refugees under an HMO contract. Thus, HRS's action constituted a deviation from its non-rule policy requiring defense and explanation by HRS.

The Court reversed HRS's denial of the §120.57 hearing request and remanded for further proceedings.

RULE CHALLENGE

Third Party Standing to Challenge Agency Rule Interpretation—Permit Denial Under New, More Stringent Requirement —Agency Rejection of Hearing Officer's Conclusion of Law:

Grove Isle Limited v. Bayshore Homeowners' Association, Inc., et al. and Department of Environmental Regulation; and *Bayshore Homeowners' Association, et al. v. Department of Natural Resources and Grove Isle Limited,* ___ So.2d ___ (Fla. 1st DCA 1981); 7 FLW 1504:

These cases are consolidated appeals and cross-appeals from final orders of two different agency actions by Department of Natural Resources (DNR) and the Department of Environmental Regulation (DER) concerning construction of a proposed marina.

DER Appeal:

In one case, Grove Isle applied to DER for a permit to construct a marina. DER issued an intent to issue a permit and Bayshore Homeowners' Association filed for an administrative hearing on whether the permit should issue. An initial hearing was held before DOAH resulting in a recommended order that the permit be issued. The recommended order also found that the Bayshore Homeowners' Association, except for two individuals, were found to lack standing based upon a lack of evidence in the record upon which a legal conclusion regarding standing could be made.

Upon consideration of the hearing officer's recommended order, DER accepted the hearing officer's findings of fact and conclusions of law but denied the permit because the hearing had been conducted under the wrong rule proposing criteria for the issuance of the permit. DER remanded the matter to the hearing officer for taking of additional evidence as to whether the permit application complied with a different rule which was adopted subsequent to the filing of the permit application. The new rule imposed a greater burden on Grove Isle to show entitlement to the permit.

After the second hearing, the hearing officer issued a second recommended order recommending denial of the permit and recommending two conclusions of law, one of which concluded that Grove Isle had met a particular permit criterion and a second conclusion of law that Grove Isle had not met another criterion.

DER, in considering the second recommended order, accepted the hearing officer's conclusion that Grove Isle had not met one criterion but rejected the hearing officer's conclusion of law that Grove Isle had met another criterion. Grove Isle appealed.

The Court upheld the DER final order of denial but rejected DER's reversal of the hearing officer's conclusion of law that Grove Isle had met one of the criterion since DER's rejection was not based upon any expert testimony or evidence, other than conclusory allegations, found in the record—in other words, DER failed to present expert testimony for evidence to support its conclusion which was different than the hearing officer's.

The Court upheld the hearing officer's earlier conclusion that there was insufficient evidence upon which to base a conclusion regarding standing for the homeowners' association and held that DER was not estopped from applying the new, more stringent permit criteria in denying Grove Isle's permit.

DNR Appeal:

In a separate case, Grove Isle in preparing to develop the proposed marina, applied to the Department of Natural Resources (DNR) for lease of sovereignty submerged lands under DNR rules. DNR interpreted its rules to mean

that Grove Isle did not need to lease the submerged lands and, therefore, decided to take no agency action. The Bayshore Homeowners' Association administratively challenged the DNR determination and interpretation of its rules.

A hearing was held before a hearing officer on Bayshore's petition and the hearing officer held that the petitioners lacked standing based upon a finding that the Bayshore petitioners failed to demonstrate how they are substantially affected any more than the general public by DNR's decision not to require Grove Isle to pay rent for the submerged land in question.

The Court upheld the hearing officer's findings and conclusions as to Bayshore's standing which can be interpreted to mean that a third party challenging an agency decision affecting a primary party must show how the agency action substantially affects the third party more than the general public.

Proposed Rule Challenge—Standing

All Risk Corporation of Florida, et al. v. State, Department of Labor & Employment Security, Division of Workers' Compensation, ___ So.2d ___ (Fla. 1st DCA 1982); 7 FLW 668:

A DOAH hearing officer dismissed an amended petition, challenging the validity of a proposed agency rule, on the basis of lack of standing, without leave to amend.

Petitioners had originally filed a timely petition questioning the validity of the proposed rules and requesting a drawout hearing pursuant to F.S. 120.54(16), followed by an amended petition questioning the invalidity of the proposed rules. The proposed rules address regulation involving self-insurers in workers' compensation law. The rule challenge petitioners alleged that they were individual service companies for individual self-insurers and self-insurer funds and were affected by the proposed rules. The agency proposing the rule moved to dismiss the initial petition on the ground that the petitioners had not shown with particularity facts sufficient to show that they would be substantially affected by any of the proposed rules and therefore do not have standing to challenge the proposed rules.

Two days before the scheduled hearing on the proposed rule challenge, petitioners filed a motion to amend the amended petition by adding a party which was an individual self-insurer. The agency countered with a motion to dismiss the amended petition on the grounds that the petitioners lacked standing to challenge the proposed rule in that they were not substantially affected persons. The hearing officer allowed the motion joining the individual self-insurer as a party-petitioner but granted the agency's motion to dismiss for lack of standing to all parties except the individual self-insurer.

The hearing officer's final order determined that the amended petition challenging the proposed rules was insufficient as a matter of law and that since the remaining petitioner, the self-insurer, joined the proceeding beyond the 14-day period allowed under the APA to challenge rules, the individual self-insurer had accepted the invalid status of the proceeding and could not breathe new life into it. The hearing officer concluded that dismissal without leave to amend was appropriate because petitioners had already had two opportunities to file a petition which did conform with the statute and the pendency of a petition challenging the validity of a proposed rule prohibited the adoption of the rule and allowing another opportunity to amend the petition would unduly delay the rulemaking process.

The court on judicial review agreed with the ruling of the hearing officer that the allegations of fact in the petition and amended petition failed to state with particularity facts sufficient to show that the petitioners [service companies] would be substantially affected by the challenged rules and therefore lack standing based on the allegations. The court, however, found that the denial of leave to amend was an abuse of discretion by the hearing officer in that the record shows that all prior challenges to the service companies' standing had been rebuffed and that, although it is true, as the hearing officer's order states, the service companies had two opportunities to file amended petitions, neither of these amendments had dealt with the question of standing. This may well have been because the prior rulings indicated no need to do so. Evidence presented at the rules challenge hearing included references to portions of the rules which affect the service companies' ability to obtain or retain certification as service companies from the agency; under these circumstances, the court thought that petitioners should have been given another opportunity to amend the petition.

In addressing the propriety of the individual self-insurer joining the rule challenge after the 14-day period to challenge rules, the court

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concluded that the dismissal of the self-insurer in the final ruling by the hearing officer was proper. However, under the circumstances of the court's ruling concerning giving the service companies an opportunity to amend, it follows that if a service company fails to establish that they have standing, the individual self-insurer will likewise have no standing. However, if the service companies succeed in establishing standing, then the motion to add the individual self-insurer as a party should be reconsidered on the merits at that time.

Accordingly, the court affirmed the hearing officer's ruling in part and reversed in part and remanded for further proceedings consistent with the court's opinion.

Rule Invalidity Grounds—Absence of Economic Impact Statement.

Division of Workers' Compensation, Department of Labor & Employment Security v. McKee, etc., ___ So.d ___ (Fla. 1st DCA 1982); 7 FLW 921:

The Court upheld the invalidation of a rule by DOAH for failure to have an economic impact statement as rquired by F.S. 120.54(2)(a). The court explained that the absence of such an economic impact statement may be harmless error if it is established that the proposed action will have no economic impact, or that the agency fully considered the asserted economic factors and impact.

[Editor's Note: F.S. 120.54(2)(a) appears to mandate the preparation of economic impact statements for all rules and does not provide for "harmless error" if a statement is not prepared.]

Standing to Challenge Agency Rules—

Florida Home Builders Association, et al. v. Department of Labor & Employment Security, ___/___ (Fla. 1982); 7 FLW 143:

Trade associations have standing under F.S. 120.56(1) to challenge the validity of an agency rule on behalf of its members when that association fairly represents members who have been substantially affected by the rule. To meet the requirements of §120.56(1), an association must demonstrate that a substantial number of its members, although not necessarily a majority, are substantially affected by the challenged rule. Further, the subject matter of the rule must be within the association's general scope of interest and activity, and the relief requested must be of the type appropriate for a trade association to receive on behalf of its members. The court noted that the only issue to be resolved in an F.S. 120.56(1) proceeding is whether an agency rule is valid, and this type of proceeding does not involve association or individual claims for money damages.

The Supreme Court reversed the holding of the First DCA in *Department of Labor & Employment Security v. Florida Home Builders Association*, 392 So.2d 21 (Fla. 1st DCA 1980), and disapproved, to the extent that they conflict with the views expressed in the opinion, the holdings of the First DCA in *Florida Department of Offender Rehabilitation v. Jerry*, 353 So.2d 1230 (Fla. 1st DCA 1978) and *Florida Department of Education v. Florida Education Association/United, AFT-AFL-CIO*, 378 So.2d 893 (Fla. 1st DCA 1979).

Intervention on Behalf of Agency In 120.56 Rule Challenge Proceedings

Florida Electric Power Coordinating Group, Inc., etc. v. Department of Environmental Regulation, etc., ___ So.2d ___ (Fla. 1st DCA 1982); 7 FLW 1541:

On a petition for judicial review from nonfinal agency action by a hearing officer denying motions to intervene by nonagency petitioners in a 120.56 rule challenge proceeding, which petitioners wished to intervene on behalf of the agency in support of the challenged rule, the court reversed and remanded the case to the hearing officer to allow the nonagency parties to intervene. The court reasoned that 120.56 does not limit intervention in a rule challenge proceeding to intervene on behalf of petitioners challenging the validity of the rule.

APA Requires Ruler's Name

A new subsection was added to Section 120.55, which requires that any rule promulgated by an agency include in the notice of rulemaking the name of the person or persons originating such rule, the name of the supervisor or person who approved the rule, and the date upon which the rule was approved. This took effect July 1, 1982, and these categories have been added to the forms in Rule 1S-1.003(4), FAC.

Minutes of Administrative Law Section Executive Council Meeting

August 24, 1982
The Florida Bar
Tallahassee

A meeting of the Administrative Law Section Executive Council was held on Tuesday, August 24, 1982, at The Florida Bar Headquarters in Tallahassee. Present were the following members: Michael I. Schwartz, Paul W. Lambert, William B. Barfield, Edward S. Jaffry, Leonard A. Carson, James W. Linn, Judge Winifred Wentworth, David E. Cardwell, Ben E. Girtman and Jonathan L. Alpert. Members absent were: Steven Marc Slepin, George L. Waas, Chris H. Bentley, Judy Brechner and J. Michael Huey. Also present were David V. Kerns, Board Liaison, Leslie R. Stein, Cynthia S. Tunnicliff, Charles F. Tunnicliff, Morton Morris, Patrick F. Maroney, all Committee Co-chairpersons, and Betty Ereckson, Section Coordinator.

OLD BUSINESS

Standing Committee Reports

A. Regulated Utilities Committee. Co-chairpersons Leslie Stein and William Barfield reported the committee desires to undertake as a project the publication of an annual report on developments in the substantive areas of regulated utility law, comparable to that published by the Public Utility Section of the American Bar Association. Members will be solicited for contributing segments. The creation of a Communications Law Committee independent of the Section was reported. Since the substantive area of law embraced by that committee substantially overlaps that long encompassed within the Section, discussion of the Section's role in substantive areas of law ensued. It was determined that: (1) The Bylaws of the Section should be reviewed for affirmation of the purposes served by the Section in substantive law areas; (2) A letter would be sent to Bar President James Rinaman from Michael Schwartz expressing the concern of the section for fragmentation of responsibility within the Bar for this area of substantive law; and (3) Notice should be published in the Florida Bar News regarding the scope of substantive law interests represented within the Administrative Law Section. Interest was expressed in the creation of a Health Law Committee of the Section.

B. Federal Agency Practice Committee. Co-chairperson James Linn expressed the intent of the Committee to publish a directory of federal officials in policy making positions within the southeastern United States.

C. Publications and Newsletter Committee. Co-chairpersons Drucilla Bell and Frank Vickory were unable to attend. However, the Chairman noted that the Florida Bar *Journal* will now limit each Section to four articles per year. Discussion followed regarding the publication of short articles which merit circulation but would not alone warrant publication in the *Journal*. Sentiment for publication of such material in the Bar *News* was expressed, following consideration of consolidating short articles under a single rubric for publication in the *Journal*.

D. Legislation Committee. Co-chairperson Leonard Carson reported that he has sent a letter to all Committee members soliciting their comments and suggestions. Co-chairperson Paul Lambert observed that in past years the Section has deferred taking a position in its legislative package on many substantive issues. Unless the Executive Council reassesses that approach the Committee will procede to develop a legislative program as it has in the past. Mike Schwartz advised that he received a letter from Jack Overstreet, Staff Director of the Senate Governmental Operations Committee, seeking section comment on: (1) possible legislation defining when agency incipient policy must be reduced to rule; (2) use of telephone conference calls to conduct agency business; and (3) the dates for proposed legislation.

E. Environmental Law Liaison Committee. No report.

F. Annual Meeting Committee. Co-chairpersons Cynthia Tunnicliff and Charles Tunnicliff reported the Committee is again considering a joint luncheon program at the Annual Meeting with one or more other Sections. There was general agreement among the members that such had proved effective in the past. Cynthia Tunnicliff raised the possibility of holding a CLE program in conjunction with or immediately following the luncheon. Coordination with the CLE Committee will be effected.

continued . . .

G. Continuing Legal Education Committee. Co-chairperson Ben Girtman reported that three seminars have been scheduled for the year. The first comprises a dual seminar November 4 and 5, 1982 in Tallahassee on Practice and Procedure before the Division of Administrative Hearings and the Public Service Commission. One day will be devoted to each agency. Registrants may attend either day or attend both days at a discount from the single day fees. Among other media, the seminar will be noticed in the *Florida Administrative Weekly*.

Co-chairperson Morton Morris stated that the second seminar would be held in conjunction with the mid-year meeting in Miami, Friday afternoon, January 28, 1983. This seminar on basic administrative practice would be geared to attract those lawyers not presently members of the Section, as well as offer an administrative law update. Finally, the Committee is looking at dates after April 15, 1983 for a third seminar, possibly in a joint program with the Local Government Law Section. The likelihood of setting that seminar in Orlando for the June 15-19 Annual Meeting was discussed further.

H. Committee on Insurance. Co-chairperson Patrick Maroney advised the Committee has held one meeting. Numerous lawyers representing both the industry and state agencies have expressed interest. While literature and seminars abound regarding the recent wholesale revision of the insurance code, new rules to implement the changes are being promulgated and should be worthy of an article for publication, a seminar, or both. In addition, a practical "how to" program on the Department of Insurance is contemplated.

Special Committee Projects

1. David Cardwell, Chairperson, reported progress on the Administrative Conference. The combination of need for adequate facilities, preferably the Capitol, and the extension and special sessions of the Legislature forced postponement of the first session. However, letters have been received suggesting candidates for membership and topics for deliberation. A fall date is now anticipated.

NEW BUSINESS

Communication Law Committee - Previously addressed.

Executive Council meetings - The next meeting of the Executive Council will be convened in Tallahassee, November 15, 1982 at 10:00 a.m. A subsequent meeting is scheduled for January 28, 1983 in Miami at the mid-year meeting. A reception for all Section members will also be held that date.

The meeting was adjourned at approximately noon.

Administrative Law Committee Chairmen

Environmental Law Liaison Committee
Edward P. de la Parte, Jr., Cochairperson
Douglas L. Stowell, Cochairperson

Federal Agency Practice Committee
James W. Linn, Chairman

Regulated Utilities Committee
William B. Barfield, Cochairperson
Leslie R. Stein, Cochairperson

Continuing Legal Education Committee
Morton Morris, Cochairperson
Ben E. Girtman, Cochairperson

State Agency Practice Committee
Deborah J. Miller, Cochairperson
Michael Parrish, Cochairperson

Legislation Committee
Leonard Carson, Cochairperson
Paul W. Lambert, Cochairperson

Publications & Newsletter Committee
Drucilla Bell, Cochairperson
Frank Vickory, Cochairperson

Committee on Insurance
Patrick F. Maroney, Cochairperson
Mitchell B. Haigler, Cochairperson

Annual Meeting Committee
Cynthia S. Tunnicliff, Cochairperson
Charles Tunnicliff, Cochairperson

Upcoming CLE Courses

Ben Girtman and Morton Morris, co-chairmen of the CLE Committee of the Administrative Law Section, announce that three seminars will be sponsored by the Administrative Law Section during the coming year.

On November 4 and 5, 1982, a two-part seminar will be held in Tallahassee covering the practice and procedure before the Division of Administrative Hearings and before the Florida Public Service Commission. Many changes have occurred in PSC practice and procedure since January, 1978, and the practitioner who is involved in utility regulation will benefit greatly from attending the seminar. The portion of the seminar covering practice and procedure before DOAH will be of interest to *all* practitioners of administrative law and will cover all administrative practice involving DOAH. The seminar participant may attend either part of this seminar, or may attend both parts for a reduced registration fee.

The second seminar is scheduled to be presented at the midyear meeting to be held in Miami on January 26-29, 1983. The seminar will cover recent developments in administrative law and will be given in conjunction with approximately 20 other seminars to be given during the midyear meeting by other Sections of the Bar. This will enable the practitioner to select from many seminars that are given concurrently during the four-day period.

The third seminar will be given jointly by the Administrative Law Section and by the Local Government Law Section and is scheduled for April or May, 1983. A tentative topic for the seminar is the administrative practice before local boards and agencies.

Inquiries or comments should be forwarded to Mrs. Betty Ereckson, Administrative Law Section Coordinator, The Florida Bar, Apalachee Parkway, Tallahassee, Florida, 32301.

Administrative Conference Rescheduled

The Administrative Law Section Executive Council, acting on the recommendation of David Cardwell, Chairman of the Administrative Conference Committee, has decided to delay the Florida Administrative Law Conference until possibly the winter or spring of 1983.

STATE AGENCY DIRECTORY INFORMATION

If you have not completed the state agency information request form or can provide the requested information on another state agency, please do so below.

YOUR NAME _____

AGENCY NAME _____

Service: Name Title Phone No.

Meetings: _____
Hearings: _____
Public Information: _____
Rulemaking: _____
Complaints: _____
Investigation: _____
Licensing & Certification: _____
Rate Approval: _____
Examination: _____

Return to:

Administrative Law Section
Attention: Betty Ereckson
The Florida Bar
Tallahassee, Florida 32301

Midyear Meeting Activities

Administrative Law Section

Thursday, January 27, 1982

2:00 p.m. - 5:00 p.m. EXECUTIVE COUNCIL MEETING

5:30 p.m. - 6:30 p.m. Local Government, Environmental and Land Use Law and Administrative Law Sections Joint Reception

Friday, January 28

2:00 p.m. - 5:00 p.m. **ADMINISTRATIVE LAW FOR THE GENERAL PRACTITIONER SEMINAR**

2:00 - 3:00 OVERVIEW OF A CHAPTER 120 HEARING
Kenneth F. Hoffman, Tallahassee
This segment will cover the techniques of dealing with the Administrative Procedures Act, including pre-trial considerations, formal and informal hearing procedures and appeals of administrative orders.

3:00 - 4:00 NUTS AND BOLTS OF A SOCIAL SECURITY DISABILITY CASE
Ira Druckman, Miami

This presentation will cover the process which an attorney needs to know to adequately represent a claimant in a social security disability case. This will include pre-hearing considerations, how-to-do a medical evaluation, the facts to be considered in case evaluations and attorney's fees.

4:00 - 5:00 HOW TO HANDLE LABOR CASES RELATING TO WAGE AND HOUR, EQUAL EMPLOYMENT OPPORTUNITY AND DISCRIMINATION
Irving M. Miller, Miami
This presentation will provide the practitioner with insight on the problems of representing a client in equal employment opportunity cases, wage and hour cases, and discrimination cases.

DESIGNATION CREDIT AVAILABLE:

Administrative & Governmental Law ..... 2 hours
Corporation and Business Law ..... 1 hour
Civil Rights ..... 1 hour
General Practice ..... 3 hours
Labor Law ..... 1 hour
Trial Practice - General ..... 3 hours

Any combination of the above may be used providing the total does not equal more than three (3) hours.

THIRD ANNUAL MIDYEAR MEETING

Registration and Tickets

INSTRUCTIONS: Please print or type information requested below and mail with your check, payable to The Florida Bar, to: Midyear Meeting, The Florida Bar, Tallahassee, FL 32301.

MEMBER'S NAME (First, Middle Initial, Last)	SPOUSE OR GUEST NAME, if attending
NICKNAME (as it is to appear on convention badge)	OFFICE PHONE
OFFICE ADDRESS (Street, City, State, Zip Code)	ATTORNEY NUMBER

ACTIVITY	Code	No. of Persons	Fee Per Person	Amount
Thursday, January 27				
Landlord/Tenant Seminar, sponsored by Real Property, Probate and Trust Law Section	101			
Civilian Practice with Military Clients Seminar, sponsored by Military Law Committee	102			
Communications Law Seminar, sponsored by Communications Law Committee	103			
Economic Survival in the Private Practice of Criminal Law Seminar, sponsored by Criminal Law Section	104			
Trust Accounting Seminar, sponsored by Professional Ethics Committee	105			
ALL MEMBER RECEPTION	106			
DAILY REGISTRATION FEE (entitles registrant to attend any of the above seminars and the All Member Reception. Please indicate the seminar(s) you prefer to attend.)	107		$65.00	
Luncheon sponsored by Florida Council of Bar Association Presidents for All Midyear Meeting Participants	108		$12.00	
Economics & Management of Law Practice Section Luncheon	109		$12.00	
Bar Leaders Workshop	110		No Charge	
Friday, January 28				
Real Property Problems in Probate Seminar, sponsored by Real Property, Probate & Trust Law Section	201			
Accident Reconstruction and Use of Experts Seminar, sponsored by Trial Lawyers Section	202			
Adultery and Marital Misconduct Seminar, sponsored by the Family Law Section	203			
Law of Export Trade Seminar, sponsored by International Law Section	204			
Dissolution-Tax Aspects of the Division of Jointly-Held Property Seminar, sponsored by Tax Section	205			
Administrative Law for the General Practitioner Seminar, sponsored by Administrative Law Section	206			
Economics & Management of Law Practice Section Exhibition and Exchange	207			
Introduction to Environmental & Land Use Law Workshop, sponsored by Environmental & Land Use Law Section	208			
Highlights of the TEFRA Seminar, sponsored by Tax Section	209			
DAILY REGISTRATION FEE (entitles registrant to attend any of the above seminars. Please indicate the seminar(s) you plan to attend.)	210		$65.00	
ALL MEMBER LUNCHEON	211		$12.00	
Saturday, January 29				
Dealing with Governmental Agencies Seminar, sponsored by Government Lawyers Subcommittee, Members Relations Committee	301			
Health Law Seminar, sponsored by Health Law Committee	302			
DAILY REGISTRATION FEE (entitles registrant to attend any of the above seminars. Please indicate the seminar(s) you plan to attend.)	303		$35.00	
Florida Association for Women Lawyers Luncheon	304		$12.00	

TOTAL $_____

Use this form to register for Midyear Meeting. For more extensive information on all section and committee seminars and activities, consult your November 1st issue of The Florida Bar *News*.

THE FLORIDA BAR
TALLAHASSEE, FL. 32301-8226

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