ADMINISTRATIVE LAW SECTION NEWSLETTER

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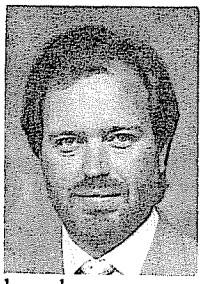
Chairman's Column

A Modest Proposal

by William L. Hyde



It should be evident to all students of Florida's Administrative Procedure Act that the APA has grown and evolved in a great many ways since its inception in the 1974 legislative session. Surely, some of the ways in which the APA has grown or evolved since 1974 have been unexpected and perhaps even contradictory. For example, the primacy accorded rule-making in the APA's early days by such decisions as *McDonald v. Department of Banking and Finance*, 346 So. 2d 569 (Fla. 1st DCA 1977) has now seemingly given way to the ascendancy of procedural due process, as I opined in my last column. Perhaps the most fascinating change or evolution, however, is found in the APA's recent embrace, albeit limited, of constitutional issues.

It once seemed that decisions such as *Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund*, 427 So.2d 153 (Fla. 1982), provided students of the APA with a comprehensive solution as to how, and by whom, constitutional issues were to be resolved in the administrative process. *Key Haven* noted that three types of constitutional challenges may be raised in the context of the administrative decision-making process of executive agencies: An affected party may seek to challenge the facial constitutionality of the statute authorizing agency action, the facial constitutionality of the agency rule adopted to implement a constitutional statute, and the constitutionality of the agency's action in implementing a constitutional statute or rule.

In the first instance, the *Key Haven* court opined that a challenge to the facial constitutionality of a statute may be entertained by the circuit court or by the district court of appeal on direct review. As to the latter two categories of constitutional challenges, however, administrative proceedings must first be exhausted and the claim then presented to the district court of appeal. Of course, the Florida legislature, the Florida Supreme Court, and the various district courts of appeal have crafted some limited exceptions to the principles set forth in *Key Haven*; however, the general principles enunciated in *Key Haven* have largely remained intact.

One of the implicit, if not explicit, foundations of *Key Haven* and other like-minded decisions is that constitutional issues of whatever type were not really appropriate for resolution in a Section 120.57, Florida Statutes proceeding. That administrative proceeding might furnish the factual predicate for later appellate review of constitutional issues; however, those same constitutional issues were

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generally regarded as being beyond the purview of a DOAH hearing officer to resolve.

A recent decision of the Florida Supreme Court, however, reminds us that this general principle is not necessarily immutable. In *Department of Agriculture and Consumer Services v. Bonanno*, _____ So.2d _____, Case No. 74,373 (Fla. September 27, 1990) [15 FLW S485], the Florida Supreme Court gave its sanction to Chapter 89-91, Section 6, Laws of Florida, which specifically delegated to the Division of Administrative Hearings the responsibility for resolving takings claims under the citrus canker eradication program. A takings claim, otherwise known as inverse condemnation, is quintessentially a constitutional issue which, it was formerly held, could only be entertained by a circuit court or district court of appeal (in appropriate circumstances) and not in a Section 120.57 administrative hearing.

The Supreme Court found that this Act, which provided for an administrative hearing process with appellate review as the sole remedy to establish full and fair compensation under the act, was not unconstitutional in any respect. Of particular note was the court's rejection of the plaintiff's argument that the Act violated the requirement of separation of powers as set forth in Article II, Section 3, and Article V, Section 1, of the Florida Constitution. They contended that the determination of what constitutes just or full compensation for property taken by the government is a judicial function which may not be constitutionally performed by either the legislative or executive branches and that, by mandating that the Division of Administrative Hearings determine just compensation for citrus canker cases, the legislature has essentially constituted that agency as a court for that purpose.

In rejecting this argument, the Florida Supreme Court disagreed with the proposition that the legislature had effectively created a court when it provided that the initial determination of compensation be made by an administrative hearing officer. The Court also found precedent for investing an administrative agency with such a judicial function, especially given the right of review for the final determination to a court of competent jurisdiction.

I believe this decision to be important in several respects. First, it is compelling evidence of the APA's continuing evolution and growth. Second, it reflects a legislative determination that the APA process can be used in new ways to resolve problems once thought resolvable only by the judiciary.

Third, and in my opinion most importantly, this decision appears to fundamentally undermine the implicit foundation of *Key Haven* and other such cases. Contrary to their teachings, this decision teaches us that constitutional issues can be resolved in an administrative forum. True, pursuant to the act this administrative forum has a very limited province; however, that limited province is the legislature's creation, and there appears to be no doctrinal policy or principle in this decision which would rule out a delegation of constitutional issues of whatever sort to the APA process.

If that is indeed the case, should we students of theAPA continue to cling to such hoary principles that constitutional issues are ultimately and only within the judicial province? Should we continue to argue that a DOAH hearing officer is doctrinally incapable of determining the facial constitutionality of a statute or rule or of determining whether an agency action is constitutional as applied? In my opinion and experience, DOAH hearing officers are more than qualified to make such determinations, and I see precious little justification for clinging to some antiquated principles that the judiciary must always be the first, only and final arbiter of a constitutional issue.

Adherence to such antiquated principles, moreover, is neither efficient nor practical. It only ensures that administrative cases with constitutional dimensions must be litigated in multiple forums, thereby driving up the litigants' costs, delaying a final resolution of the case, and further clogging our already overburdened court system. What is the justification for this additional expense and time for the litigants and congestion for the courts? Frankly, I can see none.

Accordingly, my modest proposal is that Florida, either through legislative action or judicial fiat, rid itself of the artificial distinction set forth in *Key Haven* and other such cases. Let's recognize the obvious: DOAH hearing officers are perfectly capable of resolving constitutional issues. They are at least as capable as county court judges and circuit court judges. Indeed, why don't we just call DOAH hearing officers what they really are, administrative law *judges*?

Just some food for thought for you, the administrative law practitioner, when you try to decide when, where, and under what circumstances you should raise the constitutional issues that so often inhere in your administrative cases.

Physician: Complete Thy Medical Records

by Charles A. Stampelos

An increasing number of medical doctors have become painfully aware of the requirements of keeping thorough patient medical records. Some have been disciplined for failure to keep appropriate records or altering records.

We administrative lawyers would do well to advise our existing physician clients of the rules of the road with respect to keeping and maintaining appropriate medical records.

The Board of Medicine takes the position that "[g]ood medical records are the foundation of the practice of medicine." *Department of Professional Regulation v. Roehm*, 11 F.A.L.R. 860, 861 (DPR Oct. 26, 1988).

Physicians licensed pursuant to Chapter 458, Florida Statutes, may be disciplined for:

> [f]ailing to keep written medical records justifying the course of treatment of the patient, including, but not limited to, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; and reports of consultations and hospitalizations.

§458.331(1)(m), Fla. Stat. (1989). In fact, a physician who fails to keep written medical records may face a reprimand or two (2) years suspension of his license followed by probation and an administrative fine from $250 to $5,000. Fla. Admin. Rule 21M-20.001(2)(m) (disciplinary guidelines).

"The legislature's intention to require that written medical records include, at the very minimum, patient histories, examination and test results is clearly indicated by the use of the phrase, 'including, but not limited to' in this provision." *Rizzo v. Board of Medical Examiners*, 519 So.2d 1019 (Fla. 4th DCA 1987) (Anstead, J., concurring specially).

The legal standard, which is generally used in assessing whether medical records are adequate, is a statutory standard as opposed to a local or national standard. *See generally Rizzo supra; Robertson v. Department of Professional Regulation, Board of Medicine*, 15 F.L.W. D1647, D1649 (FLA. 1ST DCA June 19, 1990). In *Robertson*, the court, in affirming the Board's adoption of a finding of the hearing officer, suggested in part that the reasoning for keeping records is so that 'neutral third parties can observe what transpired during the course of treatment of a patient.' *Id.* at 1649. The court further observed: "[i]t is clear from the evidence and from the hearing officer's findings that the hearing officer applied neither a local or national standard, but the Florida statutory standard in finding a violation on this charge." *Id.*

Furthermore, section 458.331(1)(m) does not encompass the Joint Commission on Accreditation of Hospitals (JCAH) standards or those of a "reasonably prudent physician." *Breesmen v. Department of Professional Regulation, Board of Medicine*, 15 F.L.W. D2249, D2250 (Fla. 1st DCA Sept. 5, 1990) (rehearing pending). In *Breesmen*, a patient was admitted to a hospital complaining of chest pain. Dr. Breesmen, a cardiologist, tried to persuade the patient to allow him to conduct various tests and treatment. The patient refused and told Dr. Breesmen not to tell anyone. The patient also instructed the doctor not to record her refusal in the hospital chart. Dr. Breesmen agreed to abide by her request. Four days later, the patient died. DPR filed an administrative complaint against Dr. Breesmen alleging, in part, that he failed to keep written medical records justifying the course of treatment of the patient.

During the administrative hearing, both DPR and Dr. Breesmen offered expert testimony as to whether Dr. Breesmen's records were adequate. The appellate court reversed the Board of Medicine's Final Order suspending Dr. Breesmen for six months, term of probation, and payment of costs. The court strictly construed section 458.331(1)(m) and noted: "[I]t cannot be interpreted as authorizing disciplinary action for a physician's failure to document in a patient's medical chart a basis for *not* undertaking a particular course of treatment. There was no showing on this record that Dr.

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

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Breesmen did not record all medical treatment administered to his patient, or that the entries he made were false or inaccurate. The entire case against him rests on failing to note why he did not follow other courses of treatment. Thus, it cannot be said that Dr. Breesmen violated the statutory standard established by the language set forth in section 458.331(1)(m)." *Id.* (citation omitted). Importantly, the court also noted: "The opinions of the expert witnesses offered by the parties cannot make certain, after the fact, those standards of conduct that are not clearly set forth in the statute or a rule." *Id.*

Unlike the factual scenario in *Breesmen*, a physician is "required to maintain medical records which are adequate to justify his course of treatment." *See generally Department of Professional Regulation v. Jamilla*, 12 F.A.L.R. 544, 546 (DPR Dec. 28, 1989), for a good discussion of the requirement that the medical records reflect the course of treatment of the patient. In *Department of Professional Regulation, Board of Medicine v. Escobar*, 11 F.A.L.R. 6314 (DPR Oct. 17, 1989), the Board of Medicine revoked the physician's license for, in part, failing to keep adequate medical records. Dr. Escobar performed a lipectomy. The doctor's medical records were "inadequate because they [did] not include preoperative photographs, evidence of informed consent or adequate documentation of monitoring of the patient's vital signs during the surgical procedure." *Id.* at 6323.

In cases where record keeping is found to be inadequate, but not egregiously so, the physician can be reprimanded and required to attend continuing medical education courses in medical record keeping or in risk management. *Department of Professional Regulation v. Okuboye*, 11 F.A.L.R. 3204, 3205 (DPR June 21, 1988).

"Inadequacy" of medical records is one thing. Knowing "alteration" of records is another. In *Department of Professional Regulation, Board of Medicine v. Jiminez*, 10 F.A.L.R. 3579 (DPR May 5, 1988), DPR began an investigation based on a complaint. During the investigation, copies of the physician-patient records were obtained from the doctor. However, the records obtained during the investigation were compared with earlier records obtained by the complainant. It was discovered that Dr. Jiminez had made at least two additions to them after being notified of the complaint and investigation. At the hearing, the hearing officer and the Board concluded that Dr. Jiminez was guilty of intentionally or negligently failing to file a report or record because he failed to indicate that the additions to the record were late entries, *not* because the substance of the entries was false. Dr. Jiminez was also found guilty of failing to keep written medical records justifying the course of treatment of the patient. It was not until over one year after the patient's death and only after an investigation had been instituted that Dr. Jiminez prepared the expiration summary. This amounted to a failure to keep written medical records. Dr. Jiminez was also found guilty of an additional count in the administrative complaint which charged him with failing to perform any statutory or legal obligation placed upon him. Because the physician was guilty of violating two other provisions as noted which places affirmative duties on a licensed physician, he was necessarily found guilty of failing to perform statutory obligations.

Dr. Jiminez was required, in part, to pay an administrative fine in the amount of $5,000 and his license was suspended for a period of one year. 10 F.A.L.R. at 3580. Most importantly, the Board concluded: "[a]lteration of records is [a] basic act of dishonesty and is very serious in light of the importance of a physician's need to keep accurate and honest medical records." *Id.*

Often, we attorneys are called upon by our physician clients to advise them with respect to malpractice or disciplinary cases. It would not be inconceivable for a physician/client to ask his lawyer whether the physician may add to or delete entries having had the benefit of hindsight. A physician most likely could add notations to a patient's medical records as long as the physician documented the entry and the time and date when it was made. Under no circumstances should a physician delete or alter any information from a medical record after the fact.

Conclusion

The keeping of medical records is of paramount importance for a physician and is perceived by the Board of Medicine as an important statutory requirement. Failure to keep adequate records or altering medical records can result in severe sanctions being imposed on a physician. Therefore, lawyer advise; physician, take heed.

Charles A. Stampelos is a shareholder in the Tallahassee firm of McFarlain, Sternstein, Wiley & Cassedy, P.A.

On the Federal Side . . .

Equitable Estoppel

by Walter S. Crumbley

In a case decided in the last weeks of the 1989 term of the Supreme Court clarified the doctrine of equitable estoppel. Administrative law practitioners have long accepted the general holding of *Federal Crop Insurance v. Merrill*, 332 U.S. 380, 68 S.Ct.1, 92 L. Ed. 10 (1947) as the leading case on estoppel. In *Merrill* a farmer had applied for crop protection under the Federal Crop Insurance Act. Coverage was issued for the crop, and subsequently the entire crop was lost. After the loss it was determined that the advice of the crop insurance agent was in error and part of the crop was not eligible for coverage under applicable regulations. While sympathetic to the farmer's plight in relying upon the government agent's erroneous advice, the court upheld the denial of coverage because the courts were under a duty to observe the conditions defined by Congress in order to recover funds from the public treasury.

This doctrine was upheld on similar grounds in *Schweiker v. Hansen*, 450 U.S. 785, 101 S.Ct. 1468, 67 L. Ed. 685 (1981) when a Social Security claimant was denied benefits because the application for benefits had not been timely filed as required by the applicable law and regulations. Erroneous advice had caused the late filing.

Several years thereafter, in *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 104 S. Ct. 2218, 81 L. Ed. 2d 42 (1984), the estoppel doctrine was again upheld, but the opinion contained language which stated simply that the court was hesitant to say that there are *no cases* where the government might be estopped (emphasis supplied). That opinion suggested, as did others that some sort of a balancing of the equities might be the appropriate way to determine whether equitable estoppel should lie. Relying on this lead several district and circuit courts searched for and found compelling circumstances which would permit estoppel to lie against the government where its agents had given erroneous information and guidance.

When *Office of Personnel Management v.Richmond*, 110 S. Ct. 2465 (1990), came before the Court the preceding opinion in *Community Health Services*, supra was clarified. Richmond had qualified for a disability pension from the Navy, where he was employed as a civilian welder. Certain restrictions as to how much he could earn in other employment without losing all or part of his pension were explained to him in 1981 when he retired. In 1982 Congress amended the law to a more restrictive setting. In 1986, Richmond had the opportunity to earn extra money by working overtime. As his earnings in previous years had been within allowable limits he sought the advice of an Employee Relations Specialist. The government agent advised Richmond orally and provided written information (in a form that was prepared in 1981 and was rendered obsolete by the 1982 statutory change) that assured him he could do the extra work without penalty. His earnings exceeded the statutory amount under the 1982 law, and as a consequence Richmond lost his disability pay for a six month period. Richmond appealed the Office of Personnel Management adverse decision to the Merit Systems Protection Board, who upheld OPM. The Court of Appeals who heard the case reversed, accepting Richmond's contention that misinformation from Navy personnel estopped the government and that estoppel required that disability payments were to be made in spite of the contrary statutory language relying on the Supreme Court language in *Community Health Service*, supra.

The Supreme Court reversed, acknowledging that dicta in earlier cases may have lead the lower courts to search for appropriate cases to apply estoppel against the government. While indicating that they would leave for another day the decision as to whether an estoppel claim could ever succeed against the government, they proceeded to delineate one instance where it would not.

They identified the Richmond claim as one for money from the Federal Treasury, and thus governed by the Appropriations Clause of the Constitution (Art. I, sec. 9, cl. 7). In short, it said

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Editor's Note:

The Administrative Law Section Newsletter is of, by and for the members of the Section. We welcome any contributions you wish to make. Please send articles of interest to M. Catherine Lannon, Editor, The Capitol, Room 1602, Tallahassee, FL 32399-1050.

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directly that no money can be paid out of the Treasury unless it has been appropriated by an Act of Congress. They then cited several statutes where Congress had acted to provide relief for erroneous advice in certain identified situations, but went on to point out that the Federal Tort Claims Act by its terms excludes both negligent and intentional misrepresentation from its coverage. Funds may be paid out only on the basis of a judgment based on a substantive right to compensation based upon the express terms of a statute. When the relevant statute excludes a person's claim his remedy will lie with congress and not the courts. The terms of the applicable statute(s) will not be ignored on the basis of the facts of individual cases.

This case advances a new theory to block equitable estoppel, but leaves considerable room for doubt as to cases where a money claim is not the issue. It should also be noted that three justices wrote concurring opinions stating that this case would not bar estoppel in other more compelling cases, and two justices dissenting, believing that equitable estoppel should lie under a variety of circumstances.

Minutes

Administrative Law Section Executive Council Meeting

Friday, September 7, 1990
Tampa, Florida

Members present: William L. Hyde, Charles Gary Stephens, G. Steven Pfeiffer, Walter S. Crumbley, William R. Dorsey, Jr., Betty J. Steffens, O'Bannon M. Cook, Vivian F. Garfein and M. Catherine Lannon.

Linda M. Rigot and Mark A. Dresnick had contacted the Chairman, and were excused.

Also present was Peg Griffin.

CALL TO ORDER. The meeting was called to order at 9:10 a.m. by Chairman Hyde.

MINUTES. Minor errors in the minutes of the June 15, 1990 meeting were noted, and the minutes were then approved as corrected.

Terrence Russell, a candidate for President of the Florida Bar, visited the Executive Council Meeting. He stated that he believed that the most important issue facing the Bar during the coming year is to assure provision of legal services to all segments of the society. He discussed these issues and his candidacy with members of the Council.

Chairman's Report

The Chairman discussed the role of the Administrative Law Section with regard to Federal Administrative Law and the Section's relationship with the local government bar. He appointed himself, the Chairman Elect, the Secretary, and Executive Council members Garfein, Lannon and Crumbley to a committee to explore the roles of the Administrative Law Section. He expressed goals to encourage more participation in the section by government lawyers.

Old Business

The Executive Council voted to discontinue efforts to achieve certification status in the area of administrative law.

Committee Reports

Budget Committee Report. There was no Budget Committee report.

The Chairman noted that a series of articles by participants in the Seventh Administrative Law Conference is being prepared for publication in the "Florida State University Law Review." The Chairman expressed his desire to obtain copies of the symposium article for distribution to judges, hearing officers and other administrative law practitioners who would benefit from it. Walter Crumbley moved that the Chairman be authorized to purchase 150 copies of the article at approximately $5 per copy, including the cost of mailing, and to develop a distribution list for the copies. The motion was seconded by Gary Stephens, and passed unanimously.

Continuing Legal Education Committee. Vivian Garfein discussed the Division of Administrative Hearings Seminar scheduled to be conducted on October 15, 1990. The seminar will include a luncheon, and a reception honoring the hearing officers. A mock formal administrative hearing is scheduled for the afternoon of the seminar.

The Council discussed the role of the Bar's Continuing Legal Education Section vis-a-vis the Administrative Law Section's Continuing Legal Education Committee.

Bar *Journal*. Bill Dorsey reported that a column on rulemaking draw-out proceedings was being prepared by Pat Dore for publication in the Bar Journal.

Legislation Committee. Betty Steffens reported that there were no significant developments. The Council discussed the questionnaire that had been distributed by the House of Representatives Committee on Governmental Operations.

Newsletter Committee. Catherine Lannon expressed the need for authors to write articles for the newsletter.

Television Pilot. Steve Pfeiffer moved to disband the TV Pilot Series Committee. The motion was tabled to be placed in the old business agenda for the next meeting of the Executive Council.

New Business

The Executive Council discussed the implication of reductions in participation in continuing legal education programs as noted in a July 11, 1990, memorandum from Michael A. Tartaglia regarding 1989-90 Continuing Legal Education Programs.

Next Meeting

The next meeting will be held in Tallahassee on November 9, 1990 beginning at 2 p.m.

Respectfully submitted,
G. Steven Pfeiffer, Secretary

Administrative Law Section

Statement of Financial Operations

For Year Ending June 30, 1990

REVENUE	BUDGET	ACTUAL
Dues	$14,900	$15,000
Dues Retained by Bar	7,450	7,510
Net Dues	$ 7,450	$ 7,490
CLE Seminars	1,965	3,351
Video Sales	75	246
Audio Sales	50	441
Interest	1,800	2,138
Admin Law Conf	300	10,710
Miscellaneous		15
TOTAL REVENUE	**$11,640**	**$24,391**
EXPENSES		
Postage	500	543
Printing	150	282
Officer/Council Office	100	62
Newsletter	1,200	540
Membership	200	
Supplies	50	
Photocopying	150	110
Officer Travel	250	
Meeting Travel	2,500	116
Out-of-State Travel	100	
CLE Speakers	100	
Committees	100	147
Council Meetings	250	306
Bar Annual Convention	3,000	2,029
Midyear Meeting	250	
Awards	250	267
Admin Law Conf	7,500	12,466
FAX Processing		93
Pilot TV Series	6,200	6,035
Membership Directory	2,500	1,403
TOTAL EXPENSES	**$25,350**	**$24,399**
Beginning Balance	**$28,233**	**$27,165**
Plus Revenues	**+11,640**	**+24,391**
Less Expenses	**-25,350**	**-24,399**
Ending Fund Balance	**$14,523**	**$27,157**

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