Administrative Law Section Newsletter

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From the Chair

by Dave Watkins

On October 12, 2001, the Section's annual long range planning retreat was held at Melhana Plantation in Thomasville, Georgia. The retreat was held immediately following the October Executive Council meeting. As in years past, a central focus of the retreat was the upcoming legislative session and the adequacy of the Section's adopted legislative positions in addressing as-yet-to-be filed bills affecting the APA. As many readers will recall, the Section spent a good deal of time and effort this spring evaluating the positions, including holding a general meeting of the entire Section in Tallahassee to consider possible changes. The result of that effort was the adoption of three new positions, and amendment of the three existing positions. Although minor "tweaking" of several of the positions was suggested by various council members, there seemed to be consensus that no major revisions were necessary at this time. The issue will be revisited if APA bills are filed that do not appear to be addressed by one of the existing positions.

The afternoon session of the retreat was spent preparing the Section's input into the Board of Governors' strategic plan. The plan, entitled "Meeting the Challenges," contains four strategic priorities: (1) to shape the practice of law to the legal needs of the public; (2) to enable members of the Bar to meet those needs and to maintain the independence necessary and appropriate to the legal justice system; (3) to set and maintain standards of ethics and professionalism; and (4) to institutionalize the strategic planning process. The Section was charged by the Bar to submit a report as to what has been accomplished by the Section during the past 18 months, and what is planned in the next 18 months, in furtherance of each of the above objectives.

Although initially there was some grousing about the assignment, it turned out to be an opportunity to take stock of what the Section offers, not only to its members, but to nonmembers as well. For example, the Section sponsors an annual Student Writing Contest to encourage law students statewide to take an interest in administrative law. As a part of ongoing educational efforts, Section representatives meet with incoming state agency heads and general counsels, as well as state legislators, to offer expertise in understanding and navigating the APA. And in an effort to help streamline the administrative hearing process, the Section passed a legislative position supporting the voluntary use of mediation as an alternative to formal hearings. The Council also voted to explore the feasi-

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The New and Improved APA: Another Question Answered

by Susan L. Kelsey

Nearly ten months after hearing oral argument, the First District Court of Appeal has decided another case that helps to answer one of the questions posed in an earlier volume of this newsletter, and arising naturally out of the 1996 and, particularly, the 1999 amendments to the APA: "How specific must the 'specific powers and duties' delegated to agencies be in order for rulemaking to be valid?"[1] The proposed rule in *Day Cruise* would have forbidden cruise-to-nowhere gambling vessels from mooring or anchoring on sovereignty submerged lands. 2001 WL at 1098261 *1. The Trustees claimed that section 253.03(7), Florida Statutes (1999), authorized them to promulgate the rule. Section 253.03(7), in pertinent part, authorized the Board of Trustees of the Internal

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bility of expanding the Section's Website, including the addition of links to assist non-administrative lawyers.

In a moment of quiet introspection, the question was raised whether the current composition of the Executive Council fairly represents a diverse cross-section of administrative law practitioners. It was noted that the makeup of the Council is roughly equal in women and men, and in government lawyers versus private practitioners. And, among the private practitioners, there are Council members from large, medium and small firms. However, it was also noted that the majority of the Council members practice in Tallahassee, and that "downstate" membership on the Council should be encouraged. It was also observed that most Council members are older than they would like to be, but that there wasn't really much we could do about that. The Section will be submitting its final report to the Board of Governors on November 9, 2001. Anyone interested in receiving a copy should feel free to contact our Section Administrator, Jackie Werndli, at jwerndli@flabar.org.

Under the guidance of Dan Stengle, planning continues for the Section's Winter CLE, to be held in January, as well as the annual Pat Dore Conference which will be held in the spring. Additional details of both the CLE and the Conference will be forthcoming shortly. Finally, I want to thank those members who took me up on my offer to share their thoughts about the direction of the Section via e-mail. I welcome your comments and ideas, and look forward to hearing from you (watkins@floridacourts.com).

THE NEW AND IMPROVED APA

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Improvement Trust Fund to "adopt rules governing all uses of sovereignty submerged lands by vessels, floating homes, or any other watercraft."

Judge Benton brought his extensive administrative law experience to the task of authoring a twenty-page slip opinion affirming the invalidation of the proposed rule. *State Bd. Of Trustees of Int. Imp. Tr. Fund v. Day Cruise Ass'n*, 26 Fla. L. Weekly D2240 (2001 WL 1098261) (Fla. 1st DCA Sept. 13, 2001). Judge Browning's concurrence provides additional reasons to reach the same result. 2001 WL 1098261 at *7 (Browning, J., concurring). Judge Allen dissented. *Id*. at *9 (Allen, C.J., dissenting).

Although the *Day Cruise* decision answers the APA question in one specific context, the subtitle above, "Another Question Answered," is somewhat disingenuous because the question is unanswerable in a vacuum. The First District previously declined to formulate an objective test or standard for making the determination. The Court further refused to adopt a sliding-scale analysis, and ruled instead that the issue must be determined on a case-by-case basis. *Southwest Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594, 599 (Fla. 1st DCA 2000).

The Court in *Save The Manatee* acknowledged that a mere "class of powers and duties" is insufficient to validate agency rulemaking, but expressly refused to develop any sort of extrinsic test or guideline for determining whether an enabling statute contains sufficient specificity to support any given agency rule. Instead, the Court simply required "an explicit power or duty identified in the enabling statute," while recognizing that rules will remain more detailed than enabling statutes. *Id*. (emphasis added). In other words, the Court in *Save The Manatee* recognized that greater levels of detail are required in enabling statutes than was the case prior to the 1996 and 1999 APA amendments, but still adhered to the principle that the Legislature will not "micro-manage" agency business by including all implementing details in enabling legislation. *Id*. at 599.

Applying the 1996 and 1999 amendments to the APA, and following its decision in *Save The Manatee*, the First District in *Day Cruise* ruled that the statute was not sufficient under the amended APA to authorize the Trustees to promulgate the proposed rule. The Court noted that the general grant of authority was followed immediately in the statute by limitations making it clear that the Trustees' authority must relate to "anchoring, mooring, or otherwise attaching to the bottom" and other anchorage or sewage issues, and "must not interfere with commerce or the transitory operation of vessels through navigable water." 2001 WL 1098261 at *5 (quoting section 253.03(7)(b), Fla. Stat. (1999)).

The First District in *Day Cruise* noted that "[t]he question is whether cruise ships and their tenders can moor or dock at facilities at which the Trustees have authorized physically

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comparable craft to moor or dock." 2001 WL 1098261 at *1. The Court reviewed in detail the recent amendments to the APA, concluding that "it is now clear, agencies have rulemaking authority only where the Legislature has enacted a specific statute, and authorized the agency to implement it, and then only if the (proposed) rule implements or interprets specific powers or duties, as opposed to improvising in an area that can be said to fall only generally within some class of powers or duties the Legislature has conferred on the agency." *Id.* at *3. The Court noted that the Trustees' proposed rule would have a disparate impact on gambling cruise ships solely on the basis of legal, offshore activities. *Id.* Because the proposed rule at issue in *Day Cruise* interfered with commerce over navigable waters and had nothing to do with mooring, but instead "deliberately and dramatically interferes with certain kinds of commerce solely on account of activities that occur many leagues from any dock," it was not valid. *Id.* at *5. The Court ruled that absent specific legislative authority to regulate cruises to nowhere, or gambling, or to regulate on the basis of offshore activities, the proposed rule exceeded the Trustees' rulemaking authority. *Id.* at *7.

At the heart of the *Day Cruise* decision is an obvious problem: the Trustees were attempting to utilize their rulemaking authority to adopt by administrative fiat a principle of public policy that the Legislature had not first adopted. Not only had the Legislature not enacted any statute to confine the activities of the day cruise industry, but in fact the Legislature had twice declined to enact such legislation when it had been introduced. 2001 WL 1098261 at *7 n.8. Thus, the Court concluded that the proposed rule "would not implement specific enabling legislation." *Id.* at *7.

The *Day Cruise* ruling is consistent with the principles discussed in *Save The Manatee*, because the question turned on whether or not the enabling statute contained sufficient detail to show with reasonable certainty that the Legislature had first exercised its exclusive prerogative to resolve the particular policy issues implicated by day cruise industry activities. In order for a rule such as that proposed by the Trustees to constitute valid rulemaking (although subject to attack on other grounds), the enabling act at a minimum would be required to announce expressly that it is the policy of the state of Florida to prohibit day cruise vessels from docking or mooring on sovereignty submerged lands. Lacking any such authorizing pronouncement, the proposed rule exceeded the Trustees' authority and was properly invalidated.

The Trustees moved for rehearing, rehearing en banc, clarification, and certification, asking the Court to certify the broad question of whether the Board's authority to control private use of sovereignty lands is limited to uses listed in the authorizing statutes. In response to the Trustees' motion, the Court issued another decision on November 2, 2001, adhering to its original decision, refuting various arguments the Trustees had asserted, and certifying the narrow question of whether the particular rule at issue was valid. 26 Fla. L. Weekly D2620 (Fla. 1st DCA November 2, 2001). At the time of this writing, it remains to be seen whether the Trustees will invoke the discretionary jurisdiction of the Florida Supreme Court, and whether the Court will accept jurisdiction.

Endnote:

[1] See S. Kelsey, The New And Improved APA: Three Questions, Three Answers, Admin. L. S. Newsletter (Mar. 2001).

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Section 2001-2002 Budget

REVENUES:	
Dues	$20,800
Dues Retained by Bar	10,400
Affiliate Dues	250
Affiliate Dues Retained by Bar	200
TOTAL DUES	**$10,450**
OTHER REVENUE:	
CLE Courses	$750
Audiotape Sales	3,000
Interest	7,732
Course Material Sales	150
Section Service Programs	5,000
TOTAL REVENUE	**$27,082**
EXPENSES:	
Staff Travel	$424
Postage	500
Printing	300
Newsletter	2,500
Photocopying	275
Meeting Travel	500
Committees	500
Council Meetings	500
Bar Annual Meeting	1,700
Awards	500
Council of Sections	300
Section Service Programs	5,000
Retreat	4,500
Writing Contest	2,400
Officer Expense	500
Membership	500
Officer Travel	2,500
CLE Speaker Expense	100
Operating Reserve	2,400
Public Utilities	500
TOTAL EXPENSES	**$26,399**
BEGINNING FUND BAL.	**$108,644**
PLUS REVENUES	**27,082**
LESS EXPENSES	**26,399**
OTHER COST CENTER	**(1,025)**
ENDING FUND BALANCE	**$108,302**

SECTION REIMBURSEMENT POLICIES:

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

APPELLATE CASE NOTES

by Mary F. Smallwood

Rule Challenges

Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc., 26 Fla. L. Weekly 2240 (Fla. 1st DCA 2001)

See feature article.

Renee B. v. Agency for Health Care Administration, 26 Fla. L. Weekly 487 (Fla. 2001)

Several individuals, physicians, and reproductive health care clinics sought declaratory relief in circuit court, challenging the constitutionality of rules adopted by the Agency for Health Care Administration ("AHCA"). The rules in question excluded medically necessary abortions from Medicaid coverage. The plaintiffs argued that the exclusion violated their rights to equal protection and their rights to privacy under the Florida Constitution.

The circuit court held that there was no violation of the right to privacy but did not address the claim that there was a violation of the right to equal protection. The First District Court of Appeal affirmed.

The Florida Supreme Court upheld the lower court's decision. While recognizing that the Florida Constitution creates a stronger right to privacy than the U.S. Constitution, the Court concluded that there was no violation of that right by AHCA in deciding not to fund certain medically necessary abortions. The Court agreed with the U.S. Supreme Court in *Maher v. Roe*, 432 U.S. 464 (1977), that the decision not to fund certain abortions is different in kind from adoption of a law that limits the right to an abortion. Even though restrictions on funding might have the effect of preventing some women from obtaining an abortion, funding restrictions do not prohibit women from pursuing such an action. The right to privacy under the Florida Constitution does not create an entitlement to funding.

The majority of the Court declined to reach the issue of whether the exception for funding of medically necessary abortions violated the equal protection clause, concluding that there was an inadequate record below. Justice Shaw dissented, opining that there was an adequate record and that the issue had been fully briefed and argued below.

Adjudicatory Proceedings

Sakelson v. Department of Environmental Protection, 26 Fla. L. Weekly 1889 (Fla. 2d DCA 2001)

Sakelson filed two petitions for hearing related to a sovereign submerged lands lease, one challenging the department's denial of his request to modify the lease and the second challenging the department's termination of the lease. The department dismissed both petitions on the grounds that Sakelson lacked standing. Prior to the dismissal, Sakelson had transferred his interest in the lease to a third party. The department's order of dismissal relied upon the fact that Sakelson no longer had an interest in the lease and the department's allegation that the lease had expired prior to Sakelson filing the petitions.

The court reversed. It found that there was a disputed issue of fact as to the date the lease expired. Moreover, the court concluded that Sakelson may have had a continuing interest in the status of the lease following its transfer to a third party. The case was remanded to the agency for a hearing on the disputed issue of fact.

McClash v. Department of Business and Professional Regulation, 26 Fla. L. Weekly 2070 (Fla. 2d DCA 2001)

McClash owned multiple duplexes on a single road, and the Department of Business and Professional Regulation asserted that the duplexes were subject to licensing by the Division of Hotels and Restaurants. McClash sought a formal administrative proceeding. Based on evidence at the hearing and the pre-hearing stipulation of the parties, the administrative law judge held that the Department had failed to meet its burden of proof on one issue: whether McClash had advertised the dwellings as regularly rented to the public.

After receipt of an adverse recommended order, the Department issued a final order rejecting the administrative law judge's conclusion on that issue. It held that the prehearing stipulation was consistent with a finding that McClash had advertised the properties.

The court reversed, holding that the Department had improperly rejected the administrative law judge's finding of fact. While noting that the drafting of the stipulation was "inartful and equivocal," the court concluded from the record as a whole that McClash had not stipulated to the Department's position on advertising.

S.S. v. Department of Children and Family Services, 26 Fla. L. Weekly 2222 (Fla. 2d DCA 2001)

Noting the "somewhat bizarre" facts involved in the case below, the court reversed an order of the Department of Children and Family Services denying S.S.'s request to have her name expunged from the list of neglectful caregivers. S.S. and her mother, M.S., lived together. M.S. had fallen at the family home getting out of the car and S.S. was unable to lift her mother and get her into the house. The mother refused to let her daughter call emergency services or a physician. Accordingly, the mother remained on the floor of the garage for several days. The daughter had brought her food and blankets during that time. After five days, the daughter finally called emergency medical services, and the mother was transported to the emergency room. Despite suffering only minor injuries in the fall, she was affected by severe ulcers as a result of lying for an extended period of time in her own feces and urine. She was released to a nursing home where she died shortly thereafter.

The administrative law judge held that the daughter's actions constituted neglect and that she was a caregiver as that term is defined in Section 415.102(4), Fla. Stat. Testi-

mony at the administrative hearing on the request for expungement indicated that the mother was independent in her living arrangements; made decisions for herself and, generally, controlled joint decisions; and had consistently refused medical help for other health problems in the past. Based on those findings, the court concluded that S.S. did not have a "commitment, agreement, or understanding" with her mother that she would serve as her mother's caregiver. *Id*. In reaching this conclusion, the court noted that the Legislature had expressed its intention that the Adult Protective Services Act not interfere with persons' rights to make medical decisions for themselves.

Strickland v. Florida A&M University, 26 Fla. L. Weekly 2238 (Fla. 1st DCA 2001)

Strickland appealed a final order of the University dismissing him from his tenured professorship on the grounds that he violated a rule prohibiting harassment of students. In reaching this result, the University rejected numerous findings of fact and conclusions of law in the recommended order.

After the administrative hearing, the administrative law judge had determined that the student's testimony did not support a conclusion that she was sexually harassed by Strickland. The student had alleged that Strickland had withheld a grade in his class to cause her to have sexual relations with him. At the hearing, the student testified at great length about conversations between herself and a third party (Norton) who was a friend of Strickland. She stated that Norton had told her that she should have sex with him if she wanted financial or professional assistance from Strickland. Norton did not testify. Strickland, however, did state under oath that he had never made the alleged statements to Norton and had not solicited sexual favors from the student either on his or Norton's behalf. The administrative law judge concluded that the hearsay testimony regarding Norton's alleged conversations with Strickland was not credible and concluded that Strickland had not violated the University's rule. The University, however, concluded otherwise in its final order.

The court reversed the final order and remanded the matter. It recognized that the determination of whether the student was sexually harassed was a matter of fact. Noting that the administrative law judge is ultimately responsible for evaluating the credibility of witnesses and weighing evidence, the court held that there was competent substantial evidence supporting the administrative law judge's findings. Moreover, it noted that much of the evidence relied upon by the University in rejecting the findings of fact in the recommended order was hearsay, and therefore, the University failed to meet its burden in rejecting that order.

Resort Sales International, Inc. v. Department of Business and Professional Regulation, 26 Fla. L. Weekly 2261 (Fla. 1st DCA 2001)

Resort Sales International and its principals, the McKays, argued on appeal that a default order of the Department should be set aside because the Department failed to serve notice of its proposed action on counsel for the respondents. The Department had issued a notice to show cause to the McKays personally and to an attorney listed as the registered agent for the McKays. The notice stated that a default order would be issued if the McKays failed to request a hearing within 21 days. Approximately two months later, the Department issued the default order imposing penalties and notifying the McKays of their right to appeal pursuant to Section 120.68, Fla. Stat.

Counsel for the McKays filed a motion to set aside the final order with the Department and, before the Department acted on that motion, filed an appeal with the First District. The attorney argued on appeal that the Department should have known that he represented the McKays as he had appeared on their behalf in circuit court.

On appeal, the court rejected the McKays' arguments, finding that they were not supported by the record on appeal. The court noted that the record on appeal from the administrative proceeding did not, and could not, include any materials from the circuit court proceeding. Since the McKays' attorney had never made a formal appearance in the administrative proceeding until after issuance of the final order, the Department was not required to serve him. The court suggested that the McKays could have presented evidence as to the attorney's representation of them if they had pursued the motion to set aside the order; however, they failed to do so and chose to pursue the appeal.

United Insurance Company of America, et al. v. Department of Insurance, 26 Fla. L. Weekly 2262 (Fla. 1st DCA 2001); and *Life & Health Insurance Company of America, et al. v. Department of Insurance*, 26 Fla. L. Weekly 2263 (Fla. 1st DCA 2001)

The respondent insurance companies filed appeals challenging emergency final orders of the Department of Insurance requiring that the companies cease and desist from practices allegedly discriminatory toward African-American customers.

The Department issued numerous generic final orders to insurance companies engaged in business in the state alleging that some companies had charged African-American customers higher premiums or offered inferior benefits in comparison to other customers, and that if the respondents were doing so, they should cease and desist. The only allegations in any of the orders specific to the particular companies was one paragraph stating that the company was licensed to transact life insurance business in Florida and one paragraph stating that the company had a certain number of industrial life insurance policies in force in the state. The orders did not set forth the statutory requirements alleged to have been violated or allege any facts specific to the individual companies that were violative of state law.

On appeal, the court reversed the orders. It held that the "one size fits all" orders did not meet the requirements of Chapters 120 or 624, Fla. Stat., with respect to pleading facts with specificity. It noted that the requirements for entry of an emergency final order were even more stringent than the pleading requirements for administrative complaints, which were not met. The allegations

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in the orders that an immediate threat to the public health, safety, and welfare existed were conclusory in nature and inadequate.

And Justice For All, Inc. v. Department of Insurance, 26 Fla. L. Weekly 2304 (Fla. 1st DCA 2001)

And Justice For All, d/b/a Legal Club of America, appealed a final order of the Department of Insurance that reversed in part the recommended order of the administrative law judge. Legal Club had filed a petition for hearing on the Department's notice of intent to issue a cease and desist order. The Department took the position that Legal Club was providing legal expense insurance as that term is defined in Section 642.015(5), Fla. Stat.

The evidence at the final hearing indicated that Legal Club charged an annual membership fee and provided, upon request, a referral to a private attorney who had agreed to abide by a fee schedule established by Legal Club. Legal Club did not pay the attorney any monies nor did it reimburse the club member for the member's legal fees. The administrative law judge found that Legal Club was not in the same shoes as other licensed legal expense insurance companies as it did not reimburse policyholders or directly pay the legal providers.

Section 642.015(5) defines "legal expense insurance" as a contract to provide specific legal services or reimburse for legal expenses. In its final order, the Department concluded that Legal Club was providing legal services through its referral to a specific plan attorney.

On appeal, the First District reversed. It held that the Department had erred in rejecting the administrative law judge's determination that the activities of Legal Club did not constitute providing legal expense insurance. The court concluded that construction of the rule did not require a special expertise in the area of insurance; and, thus, the Department's interpretation was not due any deference. It held that the record contained competent substantial evidence to support the administrative law judge's finding that Legal Club was merely operating a referral service for its members.

Alameda Isles Homeowners Association, Inc. v. Department of Health, 26 Fla. L. Weekly 2364 (Fla. 2d DCA 2001)

Alameda sought a declaratory statement from the Department of Health that it did not meet the definition of a mobile home park. The Department's final order concluded that petitioner did fall within that definition. On appeal, the Department filed a confession of error conceding that it had made findings of fact in the final order that were not based on the record below.

The court reversed and remanded the matter to the Department for an evidentiary hearing. It held that the findings of fact and conclusions of law are so "inextricably intertwined" that remand was necessary. The opinion did not specify what findings of fact in the final order were at issue.

Licensing

South Broward Hospital District v. Brooks, 26 Fla. L. Weekly 2629 (Fla. 1st DCA 2001)

Joe DiMaggio Children's Hospital sought approval for designation as a cardiac care provider and craniofacial center. When the Department of Health failed to act on the application within 90 days, the Hospital sought mandamus to require the agency to approve the application under the default permit provisions of Section 120.60, Fla. Stat.

On appeal, the Department argued that the approval sought was not a "license" as defined in Section 120.52(9). The court rejected that argument and directed the Department to grant the license.

Department of Health v. Grinberg, 26 Fla. L. Weekly 2417 (Fla. 1st DCA 2001)

After failing to pass the medical licensure examination, Grinberg challenged his score and sought discovery of the entire examination during the administrative proceeding. The administrative law judge issued an interlocutory order requiring the Department of Health to provide the entire examination and Grinberg's answers to Grinberg, his counsel and his experts on the first day of the administrative hearing. It further provided that the hearing would not resume for a period of at least three days thereafter to allow the petitioner to conduct discovery on the examination. The Department appealed.

Chapter 456, Fla. Stat., addresses the procedures under which an applicant for a license may review the examination after receiving a failing score. Section 456.017(2) provides that the applicant may review the questions he answered incorrectly or, if that is not feasible, the parts of the examination failed. Section 456.014 (2) states that questions and answers are "not subject to discovery but may be introduced into evidence and considered only in camera in any administrative proceeding." The questions and answers must be kept confidential unless invalidated by the administrative law judge.

On appeal, the court reversed and remanded. It concluded that the applicant had no right to review questions that he had answered correctly. In response to the applicant's argument that he was unsure that the Department had provided him with all questions that were incorrectly answered, the court held that the administrative law judge should review all questions and answers to determine whether the applicant had been provided with the questions for all incorrect answers. The court also held that allowing the applicant, and his counsel and experts, to review the examination on the first day of the hearing and then hold depositions prior to reconvening the hearing violated the statutory prohibition on discovery. Finally, the court construed the term "in camera" in the context of Section 456.014(2) to mean that the challenged questions and answers could be revealed to those individuals attending the hearing, limited to parties, counsel for parties, expert witnesses and the administrative law judge. It concluded that "in camera" was intended to require that the hearing be a closed proceeding, not that it limit document review to the administrative law judge.

DeWitt v. The School Board of Sarasota County, 26 Fla. L. Weekly

2488 (Fla. 2d DCA 2001)

The Superintendent of Schools suspended DeWitt with pay from his position as assistant principal at Riverside High School, alleging numerous areas of misconduct. The Superintendent subsequently recommended to the School Board that DeWitt's employment be terminated. DeWitt requested an administrative hearing.

The administrative law judge issued a recommended order concluding that the School Board had failed to establish any of the alleged violations and recommending that DeWitt be reinstated as an assistant principal. During the pendency of these proceedings and prior to entry of the recommended order, DeWitt's two year contract with the School Board expired. The School Board, upon receipt of the recommended order, requested that the partied address by memorandum whether the matter was moot as result of the expiration of DeWitt's employment contract. Upon consideration, the School Board issued a final order holding that DeWitt was not entitled to reinstatement since he had been paid in full under the expired contract and he had no right under that contract to renewal of the contract. It entered an order dismissing the case as moot and overruling the exceptions to the recommended order on the same grounds.

The Second District reversed in part. It concluded that the dismissal of the case as moot did not adequately address the recommendation of the administrative law judge that the charges against DeWitt should be dismissed. The court held that under Section 120.57(1), Fla. Stat., the only actions available to the School Board were to adopt the findings of fact and conclusions of law of the administrative law judge, while rejecting the recommendation of reinstatement, or to reject or modify the findings or conclusions. The court noted that leaving the charges unresolved by the final order could have collateral consequences for DeWitt.

Bid Protests

Department of Lottery v. GTECH Corporation, 26 Fla. L. Weekly 1733 (Fla. 1st DCA 2001)

On motion for rehearing, rehearing en banc, and certification, the First District certified the following questions to the Florida Supreme Court:

> 1. DOES THE DEPARTMENT OF THE LOTTERY, PURSUANT TO A SPECIFICATION INCLUDED IN A REQUEST FOR PROPOSALS, HAVE THE AUTHORITY TO NEGOTIATE SUBSTANTIVE CONTRACT TERMS WITH THE MOST HIGHLY QUALIFIED RESPONDENT, AND PURSUANT TO SUCH NEGOTIATION, AWARD A CONTRACT THAT MUST BE UPHELD ABSENT A FINDING OF ILLEGALITY, FRAUD, OPPRESSION, OR MISCONDUCT?
>
> 2. WHERE THE NEGOTIATION CLAUSE IN A REQUEST FOR PROPOSALS INDICATES THAT THE AGENCY WILL NEGOTIATE A CONTRACT WITH THE MOST HIGHLY QUALIFIED RESPONDENT, INCLUDING CONDITIONS AND A PRICE THAT THE AGENCY DEEMS TO BE FAIR, COMPETITIVE, AND REASONABLE, MAY AN UNSUCCESSFUL PROPOSER THAT HAS FAILED TO ADMINISTRATIVELY CONTEST THE NEGOTIATION CLAUSE LATER ATTACK THE CONTRACT IN CIRCUIT COURT ON THE BASIS THAT THE NEGOTIATIONS CONDUCTED PURSUANT TO THE TERMS OF THAT CLAUSE WERE IMPERMISSIBLE?

The motions for rehearing and rehearing en banc were denied.

AVMED, Inc. v. The School Board of Broward County, 26 Fla. L. Weekly 1829 (Fla. 4th DCA 2001)

AVMED filed a petition for review challenging the decision of the School Board not to stay the award of a contract to a competing bidder after a formal bid protest had been filed. The Board issued a written statement explaining its reasons for proceeding with the award of the contract. It explained that the existing health care provider had stated its intention to deny coverage to school board employees after a certain date. Granting the stay would result in a potential gap in coverage for employees.

While recognizing the importance of the mandatory stay provision of Section 120.57(3)(c), Fla. Stat., the court agreed that the school board had met its burden in explaining the need to proceed with an immediate award of the contract.

Statutory Constitutionality

Department of Agriculture and Consumer Services v. Miami-Dade County, 26 Fla. L. Weekly 1788 (Fla. 3d DCA 2001)

Miami-Dade County and the City

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of North Miami challenged the constitutionality of Section 581.031(15)(a), Fla. Stat., which purports to allow the Department to enter on property and search any place or container thought to contain plant pests. The local governments argued that the statute was unconstitutional as to searches of private residential property under the Fourth Amendment to the U.S. Constitution because it did not require the Department to obtain a warrant. On the basis of the challenge, the City and County sought and obtained preliminary injunctions preventing the Department from conducting searches pursuant to the statute.

The Department argued that the local governments lacked standing to challenge the constitutionality of the statute. The County took the position that it had a statutory duty to assist the Department in enforcing the citrus canker eradication program and could be subjected to legal liability from property owners as a result. The City did not have a corresponding statutory duty, but it argued that it could be asked to assist the County under a intergovernmental agreement.

The trial court concluded that the local governments had standing, that the Department was required to obtain a warrant to search property in future cases, and that probable cause was evident in light of the concerns over the spread of citrus canker.

On appeal, the court reversed, holding that neither local government had standing to challenge the constitutionality of the statute. The court noted that a ministerial governmental officer does not have a right to raise a constitutional challenge to legislation affecting his duties unless he can show a special injury to himself that would result from enforcement of the legislation. Citing *Department of Education v. Lewis*, 416 So. 2d 455 (Fla. 1982), the court found that the threat of a lawsuit does not create a special injury. Accordingly, the majority declined to rule on the merits. In a dissenting opinion, Judge Cope concluded that the same claim was likely to be made by individual property owners. Thus, he would have reached the merits of the constitutional challenge. He concluded that the statute was constitutional on its face and as applied.

Statutory Construction

Chancellor Media Whiteco Outdoor Corp. v. Department of Transportation, 26 Fla. L. Weekly 1796 (Fla. 1st DCA 2001)

Chancellor challenged a notice of violation issued by the Department of Transportation requiring it to remove several new signs that Chancellor had erected after grandfathered signs at the same location had been destroyed by wildfires. Chancellor relied upon Chapter 99-292, § 24, Laws of Fla., which allowed nonconforming structures destroyed by the 1998 wildfires to be reconstructed unless such reconstruction was prohibited by federal law. The federal rule allows reconstruction of signs destroyed by "vandalism and other criminal or tortious acts." 23 C.F.R. § 750.707(d)(6).

The administrative law judge determined that the wildfires had been caused by lightening strikes which did not constitute criminal or tortious acts. Accordingly, he recommended that the signs be removed. The Department adopted the recommended order *in toto*.

On appeal, Chancellor argued that the federal rule's reference to criminal or tortious acts was not intended to be exclusive. The First District agreed with the Department that the federal rule should not be construed to allow reconstruction of signs that had been destroyed by wildfire. It noted that the Fifth District had reached a contrary decision in *Chancellor Media Whiteco Outdoor Corp. v. Department of Transportation*, 26 Fla. L. Weekly 627 (Fla. 5th DCA 2001), and certified conflict with that opinion. Subsequently, that decision was modified by the Fifth District on Motion for Rehearing En Banc.

In the substituted opinion at 26 Fla. L. Weekly 1894 (Fla. 5th DCA 2001), the Fifth District agreed with the First District that the signs could not be re-erected. In addition, the court rejected the portion of its earlier decision that the Division of Forestry had engaged in tortious actions by failing to protect the private property of the sign owners.

Venue

Fish and Wildlife Conservation Commission v. Wilkinson, 26 Fla. L. Weekly 2026 (Fla. 2d DCA 2001)

Wilkinson filed an action in Lee County pursuant to Section 86.011, Fla. Stat., seeking a declaratory judgment as to the validity of the Commission's rule establishing a manatee protection speed zone in the Caloosahatchee River. The Commission filed a motion to dimiss, alleging, *inter alia*, that is should be allowed to assert the home venue privilege in Leon County and that Wilkinson had failed to exhaust administrative remedies. After a hearing on the Commission's motion to dismiss, the court entered an order denying the request on all grounds. The Commission took an appeal of the nonfinal order with respect to venue.

The court reversed and remanded. The court first addressed the issue of the burden of proof in establishing the right to the home venue privilege and the existence of any exception to that privilege. It stated that the agency must first establish its headquarters location. If the other party asserts that the sword-wielder exemption applies, it must then plead and prove facts that would support that assertion. In this case, the court found that Wilkinson had never pleaded sufficient facts to establish the sword-wielder exception. Since the complaint sought a determination of the validity of the Commission's rule, not protection from the action of the Marine Patrol Officer issuing the speeding ticket, the court held that the exception did not apply. The court also noted the weakness of Wilkinson's constitutional claim that the speed zone regulation infringed upon his "right to travel." Finally, in a footnote, the court noted that the circuit court might be required to reconsider the issue of failure to exhaust administrative remedies when the record was more fully developed. At the time the order on the motion to dismiss was entered, the circuit court had only the initial pleadings before it.

Temporary Injunctions

Lee County v. South Florida Water Management District, 26 Fla. L. Weekly 2484 (Fla. 2d DCA 2001)

Lee County sought a temporary injunction to prevent South Florida Water Management District from discharging fresh water from Lake Okeechobee into the Caloosahatchee River. The action was filed under Section 403.412, Fla. Stat. In a prior case, the County had also challenged the District's adoption of an emergency order under Chapter 120 adopting the Shared Diversity Plan. The District's order in that case had been affirmed. *Lee County v. South Florida Water Management District*, 766 So. 2d 1103 (Fla. 2d DCA 2000).

In this case, the County sought to enjoin the District from violating laws protecting the state's natural resources. In particular, the County alleged that fresh water discharged from the lake would constitute pollution under Section 403.031(7), Fla. Stat., since it would alter the salinity in the river, adversely affecting the ecological balance of the system.

To establish entitlement to an injunction under Section 403.412, the plaintiff must demonstrate immediate and irreparable harm. The circuit court denied the injunction, holding that it was legally impossible to cause pollution by a discharge from one navigable waterway to another. The County appealed. Although the discharge had already occurred, the Second District heard the appeal because it found that the case raised issues of great public concern or issues that were likely to recur.

On appeal, the court affirmed the lower court's decision, although it disagreed with the breadth of the trial court's opinion. The court noted that the District's action was at least facially within its discretion and the County was required to proved that the proposed discharge would constitute a patent violation of law or an abuse of discretion commensurate with illegality. The County failed to meet that burden of proof.

Based on evidence presented at the trial, the court found that high normal variability in the amount of fresh water discharges to the river existed. Thus it concluded that the proposed discharge, which only slightly exceeded the 28 year daily mean, could not be patently illegal or palpably abusive. Furthermore, it rejected the County's argument that there would be irreparable harm, noting that evidence at the trial supported the trial court's finding that the effects of the discharge would be temporary.

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

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