ADMINISTRATIVE LAW SECTION NEWSLETTER

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Chairman's Message

Lambert

We are very proud of Dru Bell, who is directly responsible for having started the Administrative Law Section Newsletter last year. Dru is continuing to edit and publish the newsletter this year, making it one of the finest among the Section newsletters. Through her efforts, we have a vehicle to communicate information and express our ideas on Section business and administrative law. Each of us are encouraged to write letters, articles or essays for publication.

This year will be a continuation of efforts and goals set for the Section in the past few years. The most important goal is continuity of the Section's projects and progress.

A major goal of our Section is to continue publishing a newsletter with sufficient frequency to disseminate information and ideas while they are fresh. A frequently published, well edited newsletter will continue to provide our members with needed facts and information about the practice of administrative law.

Representatives from the Section have been active in working with The Florida Bar Long Range Planning Committee in developing a long range plan providing for a framework in which sections will work closer with the Board of Governors in planning, coordinating and carrying out Bar activities. Closer communications between the sections and the Board of Governors will improve the service the sections can provide their own members, while strengthening the overall Bar structure. Bar President Bill Henry understands the needs of sections and is supportive of the efforts of the Long Range Planning Committee and its Chairman Leonard Gilbert in addressing the improved relationship between the Bar and its sections.

The Administrative Law Section will host the Second Annual Florida Administrative Conference in Tallahassee on March 2 & 3, 1984. Under the planning of the Conference Committee Chairmanships of David Cardwell and George Waas, the conference will bring together representatives from the judiciary, legislature, state government agencies, local government, school boards, the private bar, the public, the news media and private industry to share ideas and view points about agency decision making. The Administrative Conference continues to be our Section's highest priority project. The Administrative Conference is patterned after the U.S. Administrative Conference and is the first such effort by any state in such a project. The Administrative Conference will provide a forum for developing ideas for improvement of the Florida administrative decision making process.

A major section goal in strengthening our newsletter is to keep section members informed of section committee activities. In the next newsletter the committee chairmen of the various section committees will report to you their committee's activities. You are encouraged to contact the chairman of the

see "Chairman", page 21

IN THIS ISSUE:

FCC Reconsideration Opinion

On August 22, 1983 the Federal Communications Commission released its Memorandum Opinion and Order on Reconsideration in the Message Toll Service and Wide Area Toll Service Market Structure Docket, No. 78-72. The Commission substantially affirmed the prior findings in its Third Report and Order (Access Charge Order). Of greatest significance, the FCC adhered to its previous decision to require local exchange telephone companies to recover those non-traffic sensitive costs assigned to the interstate jurisdiction through flat rate charges assessed against the end users (local customers). The Commission did, however, extend the transition period during which the method of recovery would be shifted from interexchange carriers on a usage basis to the end users on a flat rate basis. Business customers, other than existing Centrex customers, will experience an increase in flat rate charges of $6.00 per line per month. The rate for existing Centrex service will transition concurrent with the schedule for increases in the residential flat rate. In an attempt to achieve an equitable contribution from those interexchange services accessing the local exchange only indirectly, as through a "leaky PBX", the FCC has ordered the imposition of a $25.00 per month surcharge per termination on a facility based on resale carrier use of interexchange private lines and the closed end of WATS. The premium assessed AT&T pending phase in of equal access was increased and was expressed as a discount to other interexchange carriers.

State commissions across the country, including the Florida Public Service Commission, are holding hearings to investigate the strengths, weaknesses and, in particular, the economic impact of the FCC decision. The federal decision strongly influences the alternatives available to state commissions in the development of intrastate access charges.

Administrative Law Certification:

FOR

by George L. Waas

I ask that you give due consideration to the concept of certifying administrative lawyers in Florida.

As many of you are aware, the civil trial and tax sections have already implemented plans for certification. Other sections also are coming on line with plans to begin in the near future.

I believe certification is a concept whose time has come. The public has a right to be intelligently informed about members of the Bar who represent governmental bodies and before employing lawyers as private counsel to represent their interest in matters involving governmental action. Certification will act as a reasonable measure of a lawyer's experience, knowledge and interest in the administrative practice. The vagaries and peculiarities of administrative practice as established by the Legislature, interpreted by the courts and explicated by governmental agencies possessing executive as well as quasi-legislative and quasi-judicial powers demonstrate that there is no area of specialization that demands or requires a higher level of competence or that undergoes legislative and judicial changes so rapidly. The singular fact that a person's personal and property rights are subject to government regulation and activity demonstrates the necessity for heightened public awareness of those who practice in this critical area.

Government lawyers should be proud to represent to others that we specialize in this vital area. In addition to its value to the public, certification should be considered a matter of professional pride to the lawyer. I believe the administrative practitioner refuses to believe that tax, immigration, and torts are areas of practice worthy of certification but administrative law is not.

Those of us who handle administrative cases and provide representation in administrative law matters know that it requires more than being admitted to the Bar to be an effective advocate or counsel. Many can recall an injustice done by a lawyer who undertook a matter in this area without the necessary experience and training. That rights of private citizens can be waived so easily in the administrative law setting is reason enough to justify strong consideration for a certification

plan for administrative law practitioners.

The object of our section should be to improve the practice of administrative and governmental law and elevate the image of our specialization. I believe certification accomplishes this object more graphically than anything else the section will or may do.

I ask that you demonstrate your support for this proposal by a letter to that effect addressed to this bulletin.

Of course, if you have any questions, please do not hesitate to contact me personally at 1114 East Park Avenue, Tallahassee, Florida, (904) 224-5200.

AGAINST

by Ben Girtman

At the September 23, 1983, meeting of the Executive Council of the Administrative and Governmental Law Section, Mr. George Waas presented a proposed plan for certification of administrative and governmental lawyers. Certification imposes substantially greater requirements than the Bar's designation plan. (See footnote 3 herein).

There was sparse discussion of the merit of the proposal. There did not seem to be any substantial reason set forth to impose the additional burdens in the practice of administrative and governmental law as compared to certification which have been required in the civil trial and tax areas.

As a consequence of my inquiries seeking the rationale for the proposal, Mr. Paul Lambert (the Section Chairman) requested that I prepare an article in opposition to certification and that Mr. Waas prepare an article in favor of certification.

Mr. Waas has been active in areas of administrative law and was one of the first attorneys to file his application and be approved in administrative and governmental law under The Florida Bar designation plan. However, the rush to certification by some members of the Bar does not mean that all other areas of law practice should move to certification.

My position is not in opposition to the general concept of specialization and certification under appropriate circumstances. There is a plethora of literature regarding the question of certification[1], and the concept by itself has some merit. Development of The Florida Bar certification plan has been reported on frequently by The Forida Bar *News*[2] and the existing plans are readily available to the practitioner[3]. Certification has received greater emphasis due to U.S. Supreme Court Justice Warren Berger's complaints about the quality of trial representation. The certification program ostensibly has two principal goals: first, to assure some minimum level of competence within the organized Bar, and second, to increase the Bar's efficiency in providing legal services to the public through advertising.

My initial inclination was to present a lengthy analysis and discussion of the reasons why there should not be a certification program for administrative and governmental lawyers. However, due to space limitations and the upcoming publication of two articles in the December issue of The Florida Bar *Journal*[4] addressing the pros and cons of certification, I will limit this article to raising issues which should be considered before the decision is made by any substantive area of the Bar to impose certification on its membership.

The initial question is whether "to certify or not to certify" as a matter of policy for the Bar. That issue has been decided in favor of having a general plan for certification where it is otherwise appropriate (*In Re Amendment to Integration Rule,* 414 So.2d 490 (1982)). Rather,ue is "Should there be a certification requirement for the area of administrative and governmental law and, if so, what matters should be considered in that plan?" The issues presented here are for consideration by the reader and possible further analysis by those interested in the question of certification.

Rush to Judgment.

During the discussion of the proposed certification plan at the Executive Council meeting on September 23, 1983, one Executive Council member suggested that this certification plan should move forward promptly before any controversy arose about the Section taking this step. To the contrary, any proposal for certification should be fully advertised and made known to those people who will be affected by it.

Advertising.

The Florida Bar presently has a plan for "designation" in specific areas of practice. The

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plan sets forth requirements for continuing legal education and experience. The attorney may advertise his designation.[5] Therefore, an attorney need not be "certified" in order to advertise that he has expertise in a particular area. See also *Bates v. State of Arizona*, 433 U.S. 350 (1977) which removed many of the traditional restrictions on lawyer advertising.

Improved Qualifications.

The Florida Bar will assume no liability to anyone for the malpractice of a board certified attorney. Therefore, the Bar is admitting that it cannot guarantee the qualifications of attorneys who meet the most costly and time-consuming requirements of the certification plans. As data is collected by the ethics and discipline staff of The Florida Bar, it will be interesting to see the percentage of Bar certified attorneys who are the subject of disciplinary proceedings as compared to the percentage of the non-certified members of the Bar.

Cost.

The cost to the practitioner will be substantially higher under certification than under designation. Both the civil trial lawyers and the tax lawyers have non-refundable fees of $150 for the application, plus $150 for the examination, plus an annual $50 renewal fee. Therefore, in addition to the regular Bar dues, $300 must be paid out of pocket at the time of certification, with an annual renewal of $50. Civil trial and tax lawyers must be recertified every five years.

Excessive emphasis on litigation.

The proposed certification plan for administrative and governmental lawyers requires the handling of a minimum of twenty-five contested administrative cases (Section 2.(a)(2)). This requirement ignores the large number of administrative cases which require substantial expertise, but which are settled or resolved prior to formal hearings. Both the bench and Bar have expressed concerns about excessive emphasis on litigation. Neither the civil trial nor tax certification plans have this type of requirement, but they only require "substantial experience", including a specified number of years with a minimum percentage of that time of actual practice in the area for which certification is sought.

CLE Requirements.

The proposed administrative law certification plan would require a minimum of 30 hours per year for applicants in 1983 and 40 hours per year for applicants in 1984 and thereafter. There has been no showing that an increase in the number of hours above the 30 hours required for designation will be marginally productive for certification. The marginal utility of each additional hour of CLE education diminishes substantially; the cost increases; and the Bar itself has just gone through a year of cutting back on the number of CLE programs which it offers. Sections are prohibited by the Bar from exceeding the numbers of seminars determined by the Bar's CLE Committee. With the increase in the number of areas where certification is being required, the number of CLE courses will need to expand considerably. For example, the tax lawyer certification plan goes from 30 hours required by the designation plan to 60 hours for certification prior to 1985 and 90 hours in 1985 and thereafter. The civil trial lawyer certification plan goes from 30 hours for either designation or certification in 1982 to 40 hours in 1983 and 50 hours beginning in 1984 and thereafter. We do not have sufficient CLE programs now, regardless of the quality, to meet present needs. Apparently, inadequate thought has been given to the increased requirement of quality CLE programs for the certification plans. It will do our lawyers no good to miss a day from the office to sit through poor CLE programs.

Misrepresentation to the Public.

The concept of certification contemplates that an attorney who represents himself as "board certified" holds special qualifications in the area of his certification. This inferentially suggests to the public that non-certified attorneys, who may be just as well or better qualified than the board certified attorneys, somehow do not measure up to the standards of "board certification".

De Facto Specialization.

Although many practitioners are increasingly limiting their practice to fewer areas of law than has been done in the past, the certification requirements artificially and narrowly accelerate the "specialization" trend to fewer areas of the law than may be beneficial either to the attorney or to his prospective clients. With the imposition of larger numbers of hours

of continuing legal education and the percentage of practice which a lawyer must commit to the specialized area, it leaves him less of an opportunity to practice in other areas, whether related or unrelated to his specialization.

Governmental Lawyers.

Many governmental lawyers have substantial expertise in administrative and governmental law. However, because of the requirements of large numbers of CLE hours per year, many of them could not attend those hours of CLE courses, thereby preventing them from using their immediately preceding years of experience with government as qualification to meet the eligibility requirements when they leave government practice and enter private practice.

Excessive Narrowing of Law Practice.

Although each attorney should devote sufficient time to assure his competence in any area of law in which he intends to practice, the eligibility requirements for maintaining certification indicate that a lawyer will have to devote a major portion of his practice to the certified area to remain certified (30% for civil trial lawyers and 40% for tax lawyers). This means that a lawyer will probably have only one area in which he can be Bar certified. Even if he is "Bar certified", the eligibility and CLE requirements over the years may well be increased so as to even further limit his "non-certified" practice. Law schools recognize that an attorney should have a broad legal education in a significant number of subjects because he will be faced with many legal matters involving several areas of the law. Over-specialization may prevent the attorney from maintaining an awareness of and competence in those other (even related) areas of the law and can in fact result in greater possibilities of inadequate representation to the attorney's clients.

Monopoly and Antitrust.

The number of members of The Florida Bar has increased substantially over the past several years. There appears to be no letup of people who want to graduate from our law schools which are accommodating these aspiring applicants. Certification is one way to limit their practice. With the requirements of a minimum number of CLE hours per year, fees for certification, and minimum number of years of practice, not only the new admittees to the Bar but also other attorneys who have practiced many years in other areas will be substantially limited in their ability to develop expertise and clientele in these areas. One of the stated purposes of the certification plan is to allow certified attorneys to advertise their "board certification". If successful, this will draw clients away from other practitioners who are qualified but who are not, for whatever "board certified". If not successful, then the objective of the plan will not have been met anyway. In any event, the plans raise substantial issues of protectionism and lessened competition among attorneys.

Benefit v. Burden.

The proponent of any certification plan must affirmatively show the specific benefits of the plan and demonstrate that those benefits outweigh the burdens.

Administrative Bureaucracy.

The Florida Bar, regardless of its legal origin, is a part of the government of the State of Florida. It imposes restrictions, limitations and costs like a government. It grows like a government. And many of the Bar's programs and functions seem to impose unnecessary burdens on its members and, indirectly, on the public. The Bar has grown substantially in programs, functions and costs since my initial experience as a clerk in the discipline section ten years ago. Members, staff and officials of the Bar must continuously exercise vigilance and make all reasonable efforts to keep the cost and administrative burden of Bar functions to a minimum and to eliminate or prevent unnecessary functions from being undertaken by the Bar. Board certification for

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

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its own sake is an example of unnecessary and unwarranted bureaucratic growth.

No Demonstrated Need.

Not having had an opportunity to review Mr. Waas' article, I can only say that at the discussion of the proposed plan at the Executive Council meeting, there was no justification or need shown for the adoption of a certification plan for the Administrative and Governmental Law Section.

Conclusion.

Greater efforts must be made to improve the qualifications of attorneys as well as other professionals. However, certification is no guarantee of such improved qualifications, and indeed these certification plans may in fact cause more harm than good for many areas of the law. The burden is upon the proponent of a certification plan for any area of the law to show that it is needed and will be beneficial to both the public and to the members of the Bar of the state. That demonstration has not been made in the case of the Administrative and Governmental Law Section, and hopefully these two articles will generate sufficient discussion among the members of the Administrative and Governmental Law Section and other members of the Bar to resolve the question, "to certify or not to certify, and if so, under what conditions."

(Ben E. Girtman was graduated from the University of Florida with a Bachelor of Science in Business Administration in 1967. After four years active duty with the U.. Navy he attended Florida State University Law School where he received a Juris Doctor degree in 1974. Upon graduation he served as staff attorney for the Florida Senate Governmental Operations Committee for two years and subsequently served as executive assistant to one of three members of the Florida Public Service Commission for two years. Since 1978 he has been in private practice with the law firm of Madigan, Parker, Gatlin, Swedmark & Skelding in Tallahassee, primarily in the areas of administrative and commercial law. Mr. Girtman has served as a member and chairman of the Regulated Utilities Committee of the Administrative Law Section and is presently a member of the Executive Council of the Section. He also has written numerous articles on administrative law and has participated in several CLE programs as a speaker on administrative law. He is designated in Administrative and Governmental Law under The Florida Bar Designation Plan.)

[1] Hagglund & Birnbaum, *Legal Specialization: The Need for Uniformity*, FIC Quarterly/Summer 1982, 301-22. See The Florida Bar *Journal*, Vol. 48, No. 3, March 1974, for numerous articles on the question of certification. Esau, *Recent Developments in Specialization Regulation of the Legal Profession*, 11 Man.L.J. 133-76 (1981). Esau, *Specialization in the Legal Profession*, 9 Man.L.J. 255-318 (1979). A.B.A., Standing Committee on Specialization, *Handbook on Specialization* (1973). Many other articles and publications have discussed the pros and cons of designation and specialization.

[2] For example, see The Florida Bar *News*, Vol. 8, No. 11, page 5 (June 15, 1981); Vol. 8, No. 23, page 4 (December 15, 1981); Vol. 9, No. 3, pages 1, 4-7 (February 15, 1982) which contains the amendments to The Integration Rule, Bylaws and Code of Professional Conduct; Vol. 9, No. 19, page 1 (October 15, 1982). An excellent summary of the certification eligibility and fee requirements is contained in The Florida Bar *News*, Vol. 9, No. 12, page 3 (July 1, 1982).

[3] The Florida Bar *Journal*, Directory Issue, Vol. LVII, No. 8, Sept. 1983. See p. 58 for Article XXI of the Integration Rule; pp.69-73 for Article XIX of the Bylaws for Certification; and pp. 73-75 for Article XX of the Bylaws on Designation.

[4] Mr. Peter Zinober, a member of The Forida Bar Board of Certification, Designation and Advertising, will present the arguments in favor of certification. Mr. William Bryant and Mr. Richard Bellak, attorneys in the office of the Florida Attorney General, will present arguments in opposition to certification.

[5] See the Bylaws Under the Integration Rule, Article XX, Sections 8(a) and 12(a).

Recent Case Summaries

APA Hearings: Entitlement and Jurisdiction

Hillsborough County Environmental Protection Commission v. Williams, ___So.2d___ (Fla. 2d DCA 1983); 8 FLW 600:

A 120.56 rule challenge was filed in DOAH challenging rules of appellant. Appellant was created by special act in 1967; the special act referenced the "old APA." The appellant filed a motion to dismiss the rule challenge on the basis DOAH did not have jurisdiction since the new APA does not apply to the Commission. The DOAH hearing officer denied the motion and a petition for prohibition was filed in the DCA, which petition was granted.

The 1974 APA does not apply to commissions or agencies created by special acts in the absence of any general or special law mandating otherwise and are not agencies within the meaning of the APA. Accordingly, DOAH does not have jurisdiction to entertain challenges against rules of commissions or agencies created by special acts.

Caloosa Property Owners Association, Inc. v. Palm Beach County Board of County Commissioners, etc. and et al., ___So.2d___ (Fla. 1st DCA 1983); 8 FLW 940:

This case addresses the standing of adjacent property owners to challenge a development of regional impact permit. The Court explained that under Chapter 380, adjacent land owners are not granted standing to appeal a DRI application and do not have automatic party status under the APA which does not, and was not intended to, supersede Chapter 380 on such matters.

Henry v. State of Florida, Department of Administration, Division of Retirement, ___So.2d___ (Fla. 1st DCA 1983); 8 FLW 1241:

Henry has been an attorney since 1949 employed by various state agencies during which employment he participated in various state retirement programs that preceded the present Florida retirement system (FRS). Henry entered private practice in 1970 and had as his clients a city and a city hospital. After 1970, based upon his contract with the city hospital, Henry paid into the FRS from 1974 until 1978 when a director of the Division of Retirement notified Henry by letter of his ineligibility to participate in FRS based upon information available at that time. The letter further stated that administrative proceedings under Chapter 120 were available if Henry was dissatisfied with the decision. Henry did not pursue the matter until 1981 when he wrote the Director of FRS requesting credit for approximately four and one-half years of his employment with the hospital. The Director responded by letter that, based upon a review of the record, the previous 1978 decision was concurred in and there was no basis for continued membership in the FRS. The 1981 letter also stated a right to an APA hearing if requested within 21 days of receipt of the letter by filing a formal petition with the Division of Retirement. Henry requested a formal hearing, a hearing was held and the hearing officer found that the original 1978 letter provided a clear point of entry to administrative proceedings which Henry did not take timely advantage of. Further, the hearing officer found that Henry had been ineligible to participate in the FRS since 1974. The agency adopted the hearing officer's recommended order.

On appeal, the Court found that the 1978 letter did not bear the hallmarks of finality required for final orders affecting substantial interests in that it failed to inform Henry of his right to request administrative review and failed to state the time within which he was required to request proceedings under §120.57. Notice of agency action which does not inform the affected party of his right to request a hearing and the time limits for doing so is inadequate to trigger the commencement of the administrative process. An agency seeking to establish waiver based on the passage of time following action claimed as final must show that the party affected by such action has received notice sufficient to commence the running of time period within which review must be sought. The requirements for such notice are objective rather than subjective in nature and apply regardless of actual or presumed notice of agency action. Waiver is not a concept favored in the law and must be clearly demonstrated by the agency claiming the benefit.

Martin v. School Board of Gadsden County, ___So.2d___ (Fla. 1st DCA 1983); 8 FLW 1381:

A teacher was denied a hearing under

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§120.57 on a petition alleging her intra school system transfer for punitive reasons. The Court affirmed the hearing denial stating the petition for hearing wholly fails to identify what substantial interest is affected; there was no allegation of harm done to the teacher by the transfer, no pecuniary harm was alleged, no damage to reputation was alleged, although argued in the briefs.

Judge Irvin's dissenting opinion argues that the majority opinion will allow circumvention of the APA hearing process.

Beheshtitabar v. Florida State University, ___So.2d___ (Fla. 1st DCA 1983); 8 FLW 1385:

A decision by a University to deny readmission is not a determination in which the substantial interests of a party are determined by an agency within the meaning of §120.57, where the decision is based on academic evaluations.

Vincent J. Fasano, Inc. v. School Board of Palm Beach County, ___So.2d___ (Fla. 4th DCA 1983); 8 FLW 1593:

Fasano constructed a project for the School Board completed beyond contracted completion date. The School Board suggested that many of Fasano's claims for change orders be denied and that Fasano be assessed a certain sum as liquidated damages for tardy performance. The School Board suggestion was submitted to Fasano under cover letter suggesting that a formal hearing under the APA might be in order. Fasano requested a formal hearing resulting in an adverse order by the School Board which Fasano appealed.

In a per curiam opinion, the Court explained that it did not agree that the APA is implicated in a breach of contract situation involving an agency and an outside contracting party, except under very limited circumstances. Court held that a breach of contract is ordinarily a matter for the judicial rather than administrative consideration. An agency has no authority to administratively adjudicate claims made against it by persons with whom it has contracted for the purpose of materials or rendition of services, which disputes are traditionally settled in the courts.

The opinion contrasted *Grand Contracting, Inc. v. Department of General Services,* 363 So.2d 810 (Fla. 1st DCA 1978), cert. denied, 373 So.2d 457 (Fla. 1979).

The Court went on to hold that the final agency action of the School Board is of no force and effect and is a nullity providing Fasano liberty to pursue his cause in the appropriate judicial forum.

Booker Creek Preservation, Inc. v. Pinellas Planning Council, ___So.2d___ (Fla. 2nd DCA 1983); 8 FLW 1776:

The DCA upheld a DOAH dismissal of a challenge under §120.56 to rules adopted by the Pinellas Planning Council (PPC) on the grounds that it is not subject to the APA. The PPC was created by Special Act of the Legislature and operates only within the confines of Pinellas County with no authority outside the county. Even though the PPC adopted a rule of procedure requiring that the PPC rule adoption proceedings shall be conducted according to the provisions of Chapter 120, that does not make the PCC subject to the provisions of 120.

Londono et al. v. City of Alachua, Florida, et al., ___So.2d___ (Fla. 1st DCA 1983); 8 FLW 2164:

The case narrows the class of potential appellants under §380.07(2), as described in *Caloosa Property Owners Association, Inc. v. Palm Beach Board of County Commissioners,* 429 So.2d 1260 (Fla. 1st DCA 1983), to disqualify "owners" of land included in the DRI for purposes other than for development.

Bass v. Gilchrist County School Board, ___So.2d___ (Fla. 1st DCA 1983); 8 FLW 2221:

The School Board abolished Bass' position as School Food Service Supervisor which Bass appeals arguing entitlement to an APA hearing.

The School Board, after debating the position abolishment during more than one meeting, sent Bass a letter advising of the abolishment of the position and further advising that no other position was available at this time for which Bass was qualified.

During the meetings on the issue of the position abolishment, Bass was allowed to participate extensively. The Court found that Bass' participation was substantially similar to a 120.57(2) proceeding, even though a formal order under §120.59 was not entered. The School Board was at liberty to abolish the position and Bass failed to show prejudice by reason of the procedure followed or the form

of the Board's final action.

However, on the issue that "no other position was available for which Bass was qualified", the Court found that it involved a question of fact on which there was no opportunity for hearing. The Court rejected the School Board's argument that Bass waive the hearing right, because Bass was never provided notice of the opportunity for hearing.

The Court upheld the action on abolishment of the position but remanded for hearing the matter as to whether there was a position for which Bass was qualified.

License Application: Denial and Discipline

Guest v. Department of Professional Regulation, Board of Medical Examiners, ___So.2d___ (Fla. 1st DCA) 1983; 8 FLW 753:

Case is appeal from Medical Board Order revoking M.D.'s license. Court affirmed Order.

Application of Criminal Rules: Appellant argued application of statutes and cases relating to probation under criminal charges. The Court stated that although license revocation proceedings may be penal in nature, they are not criminal and did not apply the criminal statute and cases in question.

Case to Support Penalty: The Court applied *Bowling v. Department of Insurance,* 394 So.2d 165 (Fla. 1st DCA 1981) and found sufficient competent substantial evidence to support the penalty. This case indicates that the Court will apply the *Bowling* test to determine whether the record possesses the requisite substantial evidence to support the penalty.

Malpractice Charges: Appellant was charged with gross or repeated malpractice as a basis for license revocation under F.S. 458.331(1)(t); the Court found the standard of conduct required by F.S. 458.331(1)(t) as not so nebulous that medical practitioners could not conform to it.

Increase of Recommended Penalty: The Board of Medical Examiners rejected the penalty recommended by the hearing officer in the Recommended Order and imposed a higher penalty. However, since the record showed that all members of the Board possessed and reviewed the complete record before increasing the recommended penalty, the Court found the increased penalty action to be within the discretion authorized by §120.57(1)(b)9.

Wash & Dry Vending Co. v. State, Department of Business Regulation, etc. ___/___ (Fla. 3rd DCA 1983); 8 FLW 1032:

Appellant was denied application for a wholesale cigarette dealer's license on the basis of lack of good moral character. Appellant requested hearing before DOAH and presented various witnesses who testified as to Appellant's good reputation as honest people and in business dealings. The agency presented no witnesses but introduced a final order of the agency revoking a license of Appellant to operate a lounge, which order was based upon Appellant's negligently failing to exercise due diligence to prevent drug activity on the premise of the lounge in violation of the Beverage Law.

The hearing officer evaluated the testimony and exhibits and recommended the wholesale cigarette dealer's license application be granted. The agency adopted the recommended order including a finding of fact that Appellants are honest and trustworthy people; however, agency added a paragraph to the findings of fact detailing the reasons why Appellant's lounge license was revoked in the other case and used that additional paragraph to reverse the hearing officer and reject the application on the grounds of lack of good moral character.

The Court relied upon a definition of moral character from another case which included an isolated unlawful act or acts of indiscretion wherever committed do not necessarily establish bad moral character. The Court reversed the agency since the hearing officer based the determination of weighing the credibility of the witnesses, which determination should not be disturbed; the agency's reversal of the hearing officer was simply a substitution of its judgment for that of the hearing officer by placing greater weight on a different view of the same evidence. The Court reversed and remanded with instructions to reinstate the hearing officer's recommended order.

Dave Zinn Toyota, Inc., etc. v. Department of Highway Safety & Motor Vehicles, et al., ___So.2d___ (Fla. 3rd DCA 1983); 8 FLW 1034:

This case involves an application for a motor vehicle dealer license which was objected to by a competitor in the same area in which the applicant wished to operate. Both applicant and objector sold Isuzu automobiles. The

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hearing officer recommended granting of the license and the agency adopted the recommendation. The hearing officer relied upon §320.42, F.S., which establishes the standard for issuance or denial of a motor vehicle dealer's license and the standard of proof the applicant must establish for the granting of the license. The case discusses facts necessary to establish the granting of a dealer's application in light of other like dealers existing in the same area. The Court upheld the agency's final order.

Juhn v. Department of Professional Regulation, Board of Architecture, ___So.2d___ (Fla. 1st DCA); 8 FLW 1052:

The case is an appeal from Final Order of Board of Architecture increasing Hearing Officer's Final Recommended six month suspension penalty to a final ten year suspension followed by two years probation plus $1,000 fine. Architect was charged with negligence, misconduct and failing to perform statutory and legal obligations in the practice of architecture in performing services relating to the Harbour Cay Condominium project.

Negligence, elements of proof: the Hearing Officer found Juhn guilty of simple negligence since there was no proof of intent to mislead or defraud, his shortcomings were primarily the result of a comfortable and apparently undemanding relationship with the contractor over a period of time. DPR would probably never have filed charges against Juhn but for the collapse of the Harbour Cay project.

Juhn complained that the Board did not sufficiently review the record as required by §120.57(1)(b)1.9., before increasing the recommended penalty. The Court noted that the Board took a break during the proceedings to review the exhibits and could not find that the Board's review of the complete record, *although brief*, could not have been meaningful.

A court also rejected Juhn's argument that the transcript showed the Board members to actually reject the recommended findings of fact without specifically so stating in the final order.

Review of penalty: Since the Board did not exceed its statutory authority in imposing the harsher penalty, the Court could not find that there was substantive error regarding the severity of the penalty, citing *Florida Real Estate Commission v. Webb,* 367 So.2d 201 (Fla. 1978).

Board failure to comply with procedural rules: Juhn failed to object during the proceeding to violation of a rule of the Board requiring a vote by at least four members of the Board to increase a hearing officer's recommended penalty. In this case, the vote was only 3-1. The Court's opinion stated that aside from the apparent waiver to object to the vote, the agency's deviation from its rule has been adequately explained pursuant to §120.68 (12)(b), F.S.

Santaniello v. Department of Professional Regulation/Board of Real Estate, ___So.2d___ (Fla. 2nd DCA 1983); 8 FLW 1074:

In this case, Santaniello invested $5,000 in a corporate business venture which did not succeed; he filed suit against his business associates to recover the value of his investment. While his lawyer was out of town, Santaniello filed a lis pendens against land into which he thought his investments were being diverted by his associates. Later, upon advice of his lawyer, he did not contest a motion to discharge the lis pendens.

A hearing officer found that Santaniello did not act in his licensed capacity as a broker with respect to his investment in the business venture or the filing of the lis pendens. Nevertheless, the hearing officer recommended an Order of Guilt and a $500 fine. The Board of Real Estate adopted the findings and recommendations of the hearing officer except that it increased the penalty to include a one year suspension.

The court reversed the Board of Real Estate, stating that the mere filing of a lis pendens, which is a legal remedy available to anyone, is neither illegal nor immoral. The Court could understand why a broker should not be permitted to file a lis pendens in connection with his brokerage practice, but the Court did not believe that the legislature intended to prevent a broker from taking legitimate steps which are available to any other citizen in matters unrelated to his practice. The Court noted that there was no allegation or proof that the lis pendens was filed with malice or for an unlawful purpose.

The Court rejected the Board's interpretation of its statute making a violation the alleged acts. This is an example where the courts have found an agency to exceed its discretion in applying its expertise in its statutory interpre-

tation as contrasted to the Santaniello case previously discussed.

Hodge v. Department of Professional Regulation & Board of Medical Examiners, ___So.2d___ (Fla. 5th DCA 1983); 8 FLW 1164:

In a license disciplinary case against an M.D., a DOAH hearing officer concluded there was sufficient substantial evidence to establish violation of 22 counts of alleged violation of the Medical Practice Acts and recommended a penalty of revocation.

On consideration of the Recommended Order, the Board of Medical Examiners rejected the recommended revocation in favor of a three month suspension followed by a five year probation. Prior to announcing its penalty, a Board member asked Dr. Hodge to make a statement during which he sought to mitigate the charges, even though he did not testify at the hearing before the hearing officer.

Recognizing it would be improper for the Board to consider new evidence or testimony regarding its acceptance or rejection of a hearing officer's findings of fact, the Court did not find error in the Board requesting Dr. Hodge to make a statement prior to announcing its determination of the appropriate penalty to be imposed. §120.57 does not expressly forbid this practice and it struck the Court as basically fair and just. Although this is not a criminal procedure, the loss of a professional license is sufficiently serious loss to an individual to justify affording the licensee similar consideration and fair treatment; a convicted criminal has long been allowed to speak on his own behalf, in mitigation and denial, before sentence is imposed.

The Court found that, after a review of the record, that two of the 22 counts were not based upon competent substantial evidence. Even though the remaining counts were sufficiently serious to merit the penalty imposed, the reversal of the 2 counts justified remand of the case to the Board for reconsideration of the penalty, if it so elected to do so.

Aquino v. Department of Professional Regulation and Board of Real Estate, ___So.2d___ (Fla. 4th DCA 1983); 8 FLW 1263:

Aquino applied for a real estate salesman's license which was denied for a five year past indiscretion. A hearing before DOAH was held on the denial; the hearing officer found Aquino to have been rehabilitated during the five years since the indiscretion and recommended granting the license. The Board of Real Estate rejected the specific conclusion of law relating to rehabilitation and denied the application.

The Court found the Board's reversal of the recommended conclusion of law, absent any evidence in support of the reversal or any explanation for the reversal, to render the evidentiary hearing process a meaningless gesture. Rather than follow the requirements of §120.57(1)(b)(9) in modifying recommended conclusions of law, the Court found the Board to have reacted as if the hearing never took place. The Court remanded the matter to the Board for entry of an appropriate order.

It should be noted that the Court took the opportunity to correct a scrivner's error in *Feldman v. Department of Transportation,* 389 So.2d 692 (Fla. 4th DCA 1980), relating to agency's modifications of conclusions of law under §120.57(1)(b)(9), F.S. (1979).

Boedy v. Department of Professional Regulation, Board of Medical Examiners, ___So.2d ___(Fla. 1st DCA 1983); 8 FLW 1293:

A common statutory provision in the various statutes regulating professions under the Department of Professional Regulations, allows licensees to place their professional license on an inactive status during which practice of the profession is not pursued. Placing a DPR professional license on inactive status does not preclude prosecution against that inactive license for alleged violation of applicable licensing statutes.

On Motion for Rehearing the Court stated it did not overlook Boedy's contention that another Order of the hearing officer, requiring Boedy to answer interrogatories concerning the identity of his anticipated witnesses and the subjects on which his experts would testify, improperly compromises Boedy's Fifth Amendment privilege not to be a witness against himself. The Order does not compel Boedy to testify and the constitutional claim is without merit.

Engel v. Rigot, etc., et al., ___So.2d___ (Fla. 3rd DCA 1983); 8 FLW 1555:

During a professional disciplinary prosecution by DPR pending before DOAH, the prosecuted dentist sought to take the

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deposition of four dentists who the Department alleged had knowledge of facts supporting the charges. The Department filed a Motion to Quash the subpoenas alleging that Dr. Engel must tender expert witness fees in advance of the depositions. The hearing officer granted the Department's Motion to Quash, which Order, upon certiorari, the Third DCA quashed.

The Court recognizing that a professional license creates a property right vested in the holder and that a disciplinary action against a professional license is penal in nature, recognized previous case law that a prosecuted professional must be afforded a full opportunity to answer the charges in conducting an investigation as to the merits of the case. Judge Jorgenson further explained in his opinion, that it is deemed oppressive to require the prosecuted professional in an administrative hearing to pay expert witness fees in advance of the deposition. The Court held that given the penal nature of the proceedings these are appropriate circumstances in which payment of expert witness fees should not be required prior to the deposing of the experts. Judge Jorgenson also noted that the prosecuted dentists may be ultimately responsible for expert witness costs under appropriate civil rules of procedure. Judge Daniel Pearson, in a concurring opinion, observed that the Department did not have standing to object to the subpoena issued to the non-party witnesses unless the subpoena asks for documents in which the Department (as a party) claimed some personal right to privilege or asks for documents in the Department's (as a party) possession. Only the witnesses themselves have standing under the APA to object to the subpoenas. Judge Pearson opines that for this reason also the Motion to Quash the subpoenas should have been denied.

Daniels v. Gunter, ___So.2d___ (Fla. 2nd DCA, 1983); 8 FLW 2362:

Daniels appealed a one year suspension of his insurance license based, apparently, on at least two counts. One count revolved around a forgery charge in support of which there were no allegedly forged documents introduced, no names of alleged forgery victims presented, and no victims of the alleged forgeries presented for testimony. Uncorroborated testimony of the licensee's testimony was insufficient to sustain the agency's finding that the licensee engaged in the alleged forgery.

The license was suspended for one year, the maximum penalty authorized by the applicable statute. The court did not know whether the same penalty would have been imposed for the remaining violations absent the finding concerning the forgery. Therefore, the court vacated the penalty and remanded for reconsideration thereof in light of the court's opinion.

Doheny v. Grove Isle Ltd. and State of Florida, Department of Environmental Regulation, ___ So.2d ___ (Fla. 1st DCA, 1983); 8 FLW 2421:

Doheny appeals a March, 1982 order of DER directing that a default permit be issued to Grove Isle for construction of a 90-slip boat marina in Biscayne Bay across the water from Doheny's residence. The default resulted from DER's alleged failure to approve or deny, within the time prescribed by law, Grove Isle's second application to construct the marina.

The First DCA previously considered an appeal by Grove Isle affirming an order of DER denying Grove Isle's first application for a permit to construct the same marina at the same location. In both applications, Grove Isle sought a permit from DER to build a marina. In both cases, the issues were water quality and public interest. In both cases, Grove Isle sought and Doheny opposed the permit. DER opposed the first permit and opposed the second permit until it concluded it had to issue the permit by default. DER was the permitting authority in both cases.

The second application was filed with DER while the first application denial order was pending on appeal before the First DCA.

In the second decision, the First DCA held that DER did not have jurisdiction to consider Grove Isle's second application. The First DCA acquired jurisdiction of the second case by virtue of Grove Isle's appeal of DER's adverse ruling on its first application; the Court did not divest itself of jurisdiction after acquiring jurisdiction; the issues raised by the second application were ruled upon by the court in the first case at 418 So.2d 1046 (Fla. 1st DCA 1982), petition for review denied 430 So.2d 451 (Fla. 1982).

The court also found that Grove Isle was estopped from filing its second application by the court's decision on its first application. DER had ruled against Grove Isle on both issues raised by Grove Isle in its first

application, water quality and public interest. DER also denied the permit it sought.

Judge Nimmons writes a long dissenting opinion.

Mitchell, d/b/a/ Mitchell's Congregate Living Facility v. Department of Health and Rehabilitative Services, ___So.2d___ (Fla. 1st DCA 1983); 8 FLW 2482:

HRS denied Mitchell's application for renewal of his license to operate an adult congregate living facility (ACLF). The court found that HRS erred in rejecting the findings of fact in the hearing officer's recommended order and reversed HRS, vacating HRS's final order with instructions that HRS enter a final order in accordance with the hearing officer's recommended order.

ACLF's under Florida Statute and HRS rule are permitted to offer only "personal services" to their residents and may not provide "nursing services." During an inspection, HRS personnel observed activities on the part of Mitchell's employees which HRS determined were prohibited nursing services; accordingly, HRS denied Mitchell's license renewal application and filed an administrative complaint against him upon which a hearing before a DOAH hearing officer ensued. The hearing officer issued a recommended order making detailed findings of fact regarding the patients alleged to have been furnished nursing services and their lack of need for nursing services as testified to by their private physicians.

One of the services rendered by the ACLF which the hearing officer found to be personal services, rather than nursing services, involved self-administration of medicines prescribed by the patient's physician. An applicable statute defines "supervision of self-administered medication" which the court stated HRS has no authority to define by rule as nursing services. Other services statutorily defined as "personal services" may not be redefined by HRS as "nursing services." Accordingly, the hearing officer properly found that such services did not constitute nursing.

After detailing his conclusions of law, the hearing officer recommended renewal of Mitchell's license; HRS rejected many of the hearing officer's findings of fact on the grounds that they were not supported by competent substantial evidence and rejected the hearing officer's conclusions of law and ordered that the license be denied. The court found that ample substantial evidence in the record to support the hearing officer's findings of fact and the final order of HRS rejecting the findings gives no valid reason for the rejection.

Public Meetings & Public Records

Ruff et al. v. School Board of Collier County, et al., ___So.2d___ (Fla. 2d DCA 1983); 8 FLW 326:

Section 286.012, F.S., "Sunshine Law", requires the minutes of a collegial body public agency to reflect by either recording a vote or counting a vote for each member on matters on which votes are cast but does not require a role call vote to be recorded for each member.

The Tribune Company v. Cannella, et al., ___So.2d___ (Fla. 2nd DCA 1983); 8 FLW 2409:

This case involved actions seeking to mandamus release of personnel records of certain police officers under the Public Records Act. The court balanced the requirements of the Public Records Act with the right of privacy of the affected government employees and held:

1. The police officers had no right of privacy in their personnel records;
2. A custodial agency may delay disclosure of nonexempt public records for no more than 48 hours after a request therefor;
3. An agency may not transfer requested records merely to avoid disclosure, and if a transfer is necessary, it must make copies of requested records at the expense of the requesting party if asked to do so before the transfer is effected; and
4. Law enforcement officers' personnel records compiled and maintained by the employing agency can never constitute criminal investigative or criminal intelligence information within the meaning of the Public Records Act even if subpoenaed by another law enforcement agency at some point after their original compilation by the employing agency.

Mental Health District Board, II—B v. Florida Department of Health and Rehabilitative Services, et al., ___So.2d___ (Fla. 1st DCA 1983); 8 FLW 307:

A declaratory statement under §120.565, F.S., is only appropriate to be issued by an agency interpreting a statute or rule administered by the agency as applied to a petitioner for interpretation thereof in the petitioner's particular set of circumstances only. A declaratory statement should not be used to

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resolve disputes between a petitioner for declaratory statement and a third party. Declaratory statements are not appropriate when the result is an agency statement of general applicability interpreting law or policy—in such case the agency should adopt a rule. It is grounds for reversal of an agency declaratory statement in violation of the above.

Florida Power Corporation v. State, Department of Environmental Regulation, ___So.2d ___ (Fla. 1st DCA 1983); 8 FLW 1243:

This is an appeal from an agency declaratory statement rendered under §120.565 which the Court refused to disturb on appeal. The Court is not concerned with whether the agency's implementing interpretation of the critical statutory term in question is the only one possible; nor is the Court concerned with whether that interpretation is the most desirable one given the statutory scheme as the Court perceives it. It is enough that the agency's implementing interpretation is a permissible one, sufficiently expounded by the agency's declaratory statement.

Florida S&L Services, Inc. v. Department of Revenue, ___So.2d___ (Fla. 1st DCA 1983); 8 FLW 2093:

Appellant is in the business of furnishing computer information transmitted over intrastate private telephone lines provided by Southern Bell. Pursuant to a DOR interpretation, Southern Bell began collecting sales tax from appellant for the service provided of using the telephone lines. Appellant then filed a petition for declaratory statement with DOR seeking a determination of the taxability of the telephone line service. DOR subsequently issued its declaratory statement finding the service subject to the sales tax. Appellant appealed.

The Court dismissed the appeal finding Appellant without standing to seek the declaratory statement on the basis that Appellant does not fall within the definition of a substantially affected person as set forth in a DOR rule, notwithstanding the fact that the DOR issued a declaratory statement which, *ipso facto,* must mean DOR thought Appellant had standing or the declaratory statement would not have issued.

Discovery

City of Williston etc. v. Roadlander, etc., ___ So.2d ___ (Fla. 1st DCA 1983); 8 FLW 341:

Records of medical review committee of public hospital not subject to discovery in civil action and is not public record under Chapter 119, F.S., because of exemption in §768.40(4), F.S.

Court concluded that §90.502 attorney-client privilege for confidential communications does not encompass work product and the asserted work product privilege does not preclude access to documents otherwise subject to Chapter 119 inspection.

The Magnolias Nursing and Convalescent Center v. Department of Health and Rehabilitative Services, etc. ___So.2d___ (Fla. 1st DCA 1983); 8 FLW 2276:

HRS issued an administrative complaint against the nursing home alleging violations of applicable licensing statutes. After the matter was referred to DOAH upon request for a §120.57(1) hearing by the nursing home, HRS filed requests for admissions, essentially requesting admissions of the material allegations set forth in the administrative complaint. The nursing home failed to answer the request for admissions. At the hearing before the hearing officer, a rperesentative of the nursing home appeared, but HRS's attorney was unable to attend because of an emergency. No evidence was presented by the nursing home at the hearing, but the nursing home representative did give notice of his challenge to the constitutionality of the statute under which the allegations were based. Because of the nonappearance of HRS counsel, the hearing officer entered an order to show cause why the administrative complaint should not be dismissed for failure of proof; HRS responded with a letter explaining and apologizing for its counsel's failure to attend the hearing and informed the hearing officer that HRS did not intend to present any evidence at the hearing, but intended to rely upon the request for admissions. Enclosed with the letter was a motion requesting that all matters alleged in the administrative complaint be deemed admitted because of the nursing home's failure to respond to the request for admissions, and since there existed no disputed issues of material facts, HRS requested dismissal of the formal hearing. The hearing officer subsequently entered an order

reciting that under F.R.C.P. 1.370(a), matters set forth in a request for admissions not denied within 30 days, are deemed admitted, and gave the nursing home 10 days from the date of the order to respond to the request for admissions, otherwise the facts would be deemed admitted and a recommended order would be entered that the formal hearing would be dismissed and the matter be continued in an informal proceeding, since no disputed issues of fact would then exist. Upon the nursing home's failure to respond, the hearing officer entered an order dismissing the formal proceeding on the grounds that there existed no disputed issues of fact. The nursing home then filed objections to the requests for admissions, claiming among other things, that to be required to admit all essential allegations of the complaint would in effect deprive it of its constitutional right to defend against the allegations and charges and would unlawfully relieve HRS of its burden of presenting the necessary quality and quantem of proof required to sustain and support these charges. HRS then filed a final order finding the nursing home guilty as charged and imposing a fine.

On appeal, the court concluded that the hearing officer's dismissal of the formal §120.57(1) hearing was not imposed as a sanction for the nursing home's failure to respond to the request for admissions; once it appeared that there were no disputed issues of fact, which necessarily was the case after Magnolia's failure to answer the request for admissions, and failure to timely respond to the hearing officer's show cause order, there was no necessity for a formal hearing. Therefore, *Great American Banks, Inc. v. Division of Administrative Hearings,* 412 So.2d 373 (Fla. 1st DCA 1981), holding that a hearing officer has no authority to impose sanctions for failure to comply with an order requiring testimony of certain witnesses and production of documents, does not apply. The nursing home was not denied due process; it simply failed to demonstrate that there were disputed issues of material fact entitling it to a §120.57(1) hearing.

The court then considered and rejected the nursing home's challenge to the constitutionality of §400.141, F.S., and Rule 10D-29.46, F.A.C.

The court stated it was without authority to interfere with the penalty imposed since HRS's findings were fully supported by the record and the penalty being within the permissible range of the statute, citing *Florida Real Estate Commission v. Webb,* 367 So.2d 201 (Fla. 1978).

[Whether the conclusions of this case are to be applied to professional licensing cases, wherein licensees are deemed protected by the "right to remain silent" under *State ex rel. Vining v. Florida Real Estate Commission,* 281 So.2d 487 (Fla. 1973), is to be seen. In other words, it is to be seen whether a professional licensee under prosecution for a license suspension or revocation charge may be required to respond to an agency's request for admissions pertaining to the allegations against the licensee.]

Recommended Orders

Woodward, et al. v. Department of Professional Regulation, Board of Funeral Directors and Embalmers, ___So.2d___ (Fla. 1st DCA 1983); 8 FLW 1319:

The Board rejected certain findings of fact and the ultimate conclusion of a DOAH hearing officer to whom a license disciplinary prosecution was referred to hearing, and who upon the evidence recommended dismissal of the charges. The Board and the hearing officer disagree on a key finding or a conclusion whether the licensees unlawfully "knowingly employed unlicensed persons in the practice of funeral directing." The Court reversed the Board's Order and dismissed the charges refusing to consider changes of the hearing officer's recommended findings of fact and refusing to consider changes to the hearing officer's conclusions of law. The Court explains that to the extent the issue is one on which the Court should defer to the Board's professional expertise, the Final Order came to the Court without the necessary elucidation of the Board's definition of the "practice of funeral directing," and without a record foundation that would support the views attributed to the Board upon the appeal.

Best Western Tivolin etc. v. Department of Transportation, ___So.2d___ (Fla. 1st DCA 1983); 8 FLW 1842:

The agency reversed a hearing officer's recommended order by, generally, interpreting, different from the Hearing Officer, a key applicable agency rule in a manner adverse to the Appellants. Judge Robert Smith, writing for the majority, explained that the Court is prepared to defer to any permissible interpretation an agency may place upon statutes in its charge, or upon its rules though

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other interpretations may arguably be preferrable. However, Judge R. Smith recognized that the agency interpretation of its rule is one which may have resulted from an inducement to manipulate the language of the rule to achieve the desired result. This sort of reasoning hardly qualifies as deliberations appropriate to the dignity and burden of the agency heads responsibility. In interpreting its own rule to render certain key language inapplicable, the agency's order lacks convincing wisdom and fails to cope with the hearing officer's adverse commentary.

The Court vacated the agency's order and remanded the case with instructions that a new final order will be entered and evidenced to the Court by certified copy within 45 days after the Court's decision becomes final, in which instance, Appellants will forthwith dismiss the appeal. If the agency does not comply with the Court's Order, the parties are directed to file additional briefs on the merits within 30 days after the filing of the agency order.

Pelham v. Whaley, ___So.2d___ (Fla. 1st DCA 1983); 8 FLW 1843:

The Court reversed an agency final order adopting a hearing officer's recommended order where the hearing officer failed to address timely submitted proposed findings of fact pursuant to §120.57(1)(b)4.

The case involved charges brought by a school board against a teacher based upon charges contained in 12 counts of a formal pleading, only 2 of which were ultimately sustained (and those 2 being among the less serious charges).

The School Board did not rule upon the proposed findings of fact submitted by the dismissed teacher. Judge Nimmons, writing for the majority, explained when a party to a §120.57 hearing submits proposed findings of fact, the agency must make an explicit ruling on each proposed finding unless such finding is subordinate, cumulative, immaterial or unnecessary; to do otherwise would render the requirements of §120.57(1)(b)4., meaningless. The Court refused to apply the harmless error rule to this case and vacated the final order, remanding the cause to the Board for entry of an amended final order after submission of an amended recommended order by the Hearing Officer ruling upon the proposed findings of fact previously referenced. Thereafter, the parties are given the opportunity to submit exceptions to the Hearing Officer's Amended Recommended Order.

Rehearings

Department of Corrections v. Career Service Commission & Kelly, ___So.2d___ (Fla. 1st DCA 1983); 8 FLW 906:

The Department of Corrections (DOC) improperly increased the salary of its employee Kelly. The salary increase error was discovered and corrected by a DOC Order, issued some 9 months later, reducing Kelly's salary and requesting repayment of the overpayments. Kelly appealed to the Career Service Commission which found that, while DOC could prospectively correct the salary overpayment by reduction, DOC could not recover the overpayments.

DOC petitioned the Career Service Commission for reconsideration of its final order which reconsideration petition was denied. DOC then filed petition for judicial review under 120.68 with the First DCA.

Kelly moved the appeal dismissed as untimely filed (beyond the 30 days from rendition of Career Service Commission final order) arguing the Commission was without authority to consider petitions for reconsideration and the petition filed by DOC did not toll the time for filing appeal. The Court found that the Commission has a rule 21M-2.13 authorizing the Commission to entertain motions for rehearing and interpreted the rule as tolling the time for filing appeal if a petition for reconsideration is timely filed under the rule. The Court explained that its holding does not conflict with *Systems Management Association v. State,* 391 So.2d 688 (Fla. 1st DCA 1980), in which filing of a petition for reconsideration of an agency order does not toll the rendition of a final order and appeal time therefrom absent statutory or rule authority. The Court recognized that in the instant case there is a rule authorizing rehearing which makes the instant holding different from that of *Systems Management.*

Taking the matter further, the Court also found the Career Service Commission without authority to consider the matter and stated that Kelly has a remedy by filing for a proceeding under 120.57 as a substantially affected person.

Judge Wentworth dissented explaining that

Chapter 120 does not authorize tolling of the period for appeal of final agency action by any motion since the APA defines finality of an order without qualification or delegation of authority to redefine by rule.

City of Hollywood v. Public Employees Relations Commission, et al., ___/___ (Fla. 4th DCA 1983); 8 FLW 1027:

The Court held that PERC had authority to adopt a rule allowing for the filing of Motions for Reconsideration of final orders providing for suspension of rendition of final orders upon timely filing of such motions. However, the Court found that PERC does not have inherent power to extend the time for filing motions for reconsideration under its rule, since a circuit court cannot extend the time for filing a motion for new criminal trial in a criminal case.

Rulemaking, Rule Challenges & Non-Rule Policy

Pan American World Airways, Inc. v. Florida Public Service Commission and Florida Power & Light Company, ___/___ (Fla. 1983); 8 FLW 77:

Pan American challenges the validity of PSC rules which allowed Florida Power to, in essence, reclassify Pan Am's utility account from an "old account" to a "new account" requiring a "new account" utility deposit.

The Supreme Court upheld the PSC rules restating the long recognized doctrine that administrative construction of a statute by an agency or body responsible for the statute's administration is entitled to great weight and should not be overturned unless clearly erroneous; the same deference has been accorded to rules which have been in effect over an extended period and to the meaning assigned to them by officials charged with their administration. The Court concluded that Pan Am failed to demonstrate that the Order upholding the rules which was appealed from departs in any way from the essential requirements of law or was not based upon substantial competent evidence.

Florida Power & Light Company v. Florida Public Service Commission, ___So.2d___ (Fla. 1983); 8 FLW 116:

This case is an appeal from an order of the PSC adopting rules. At the public rules hearing, appellant requested a drawout hearing after which the PSC requested memoranda justifying the drawout request. The PSC denied the drawout request, adopted the rule and appeal ensued. The Court reversed the rule adoption finding a lack of statutory authority supporting the rule and abuse of discretion in denying the drawout hearing request.

Agency Authority: The Court stated the axiom that it is a cornerstone of administrative law that administrative bodies or commissions, unless specifically created in the Constitution, are creatures of statute and derive only the power specified therein. As such, they have no inherent power to promulgate rules, but must derive that power from a statutory base. Those rules which attempt to define or prescribe action set forth in a statute are considered legislative in nature and are designed to implement, interpret or prescribe law or policy. Accordingly, the court examined the statute cited in the history of the rule as being implemented to determine the legislative authority supporting the rule.

Effect of Subsequent Legislation: The Court examined the cited statutes (cited as being implemented) and found them to be wanting in authorizing the issuance of the rules. The Court noted that subsequent to the adoption of the rules, there was enacted a statute which would have supported the rules had the statute been enacted timely. However, the Court found that the new statute does not breathe new life into the already adopted rule and refused to provide retroactive support for the rule.

Drawout Hearing Requests: Appellant requested and was denied a drawout hearing. The PSC concluded Appellant to have standing but did not find reasons demonstrated supporting a drawout hearing under F.S. 120.54(16), 1981. The majority of the Court disagreed stating that the public hearing held for the rule under F.S. 120.54, though granting an excellent forum for a multitude of ideas, opinions and information, differs considerably from the type of hearing provided under 12057 which would be granted under a drawout request. The Court found that the record in the case supported Appellant's position that the public hearing did not provide an adequate opportunity to protect Appellant's interest and the agency abused its discretion in failing to grant the drawout hearing. The Court noted the abuses as including: witnesses were not sworn, cross-examination was not permitted, and oft times

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witnesses were not prepared to defend the written materials they were submitting; furthermore, much of the written material relied upon was not available to the Appellant to examine at the hearing; and except in a few instances, the agency staff did not explain or support the proposed rules, thus taking a passive and consequently unassailable role.

City of Tallahassee v. Florida Public Service Commission, ___So.2d___ (Fla. 1983); 8 FLW 162:

The City of Tallahassee (hereafter City), filed proposed revised tariff sheets with the PSC reflecting the continuation of a surcharge imposed on all electric utility customers residing outside the city limits. The PSC issued a comment letter to the City requesting it provide justification for the surcharge; the PSC found the City's reply inadequate and issued an order to show cause why the surcharge should not be reduced or eliminated. The City, arguing that it needed specific PSC standards under which it may justify a surcharge, requested the PSC to adopt a rule setting forth such standards. The PSC denied the City's petition to initiate rulemaking which was appealed to the First DCA which transferred the case to the Supreme Court which accepted jurisdiction.

The Court recognized that the PSC seeks to exercise its authority on a case-by-case basis rather than by adopting a rule setting forth such standards at this time. The Court found that the PSC did not abuse its discretion or authority when it declined to initiate rulemaking in favor of developing "incipient policy" or nonrule policy on a case-by-case basis, in light of the facts of the case.

Florida Medical Association, Inc., etc. v. Department of Professional Regulation, Board of Optometry, etc. ___So.2d___ (Fla. 1st DCA 1983); 8 FLW 429:

Appeal was taken from a Division of Administrative Hearings Order dismissing a proposed rule challenge taken under F.S. 120.54(4)(a) for lack of standing by challenging Medical Association, Ophthalmology Society, an optometrist patient, a pharmacist and a medical physician.

The Court reiterated the standing test to challenge proposed rules: (1) allegation of an economic injury or injury in fact and (2) a showing that the "zone of interest" asserted by challengers are within the "zone of interest" protected by the statute being implemented by the challenged rule. The hearing officer found an injury in fact to the physician challenging the rule but no showing of the "zone of interest" requirement. The hearing officer found the pharmacist, optometrist patient to be without any injury. The hearing officer found the Associations to be without standing.

The Court agreed with the hearing officer as to the lack of standing of the pharmacist and optometrist patient, but disagreed as to the standing of the physician. The rule in question authorizes optometrists to use legend drugs in treatment of the eyes, a subject also regulated by the physicians licensing statute. Because of the apparent common thread between the physician's licensing statute and the challenged optometry rule, the Court found the physician to be within the "zone of interest" test. Since the physician is found to have standing, the Medical Association and the Ophthalmology Society are likewise found to have standing under *Florida Home Builders Association v. Department of Labor and Employment Security*, 392 So.2d 21.

Case also has excellent discussion as to standing requirements to challenge proposed and existing rules.

Barker v. Board of Medical Examiners, Department of Professional Regulation, ___So.2d___ (Fla. 1st DCA 1983); 8 FLW 699:

This case is an appeal from an Order of the Board of Medical Examiners which denied appellant's application for licensure as a medical doctor on the ground he is not a graduate of a medical school or college approved by an accrediting agency which is recognized by the U.S. Department of Education and approved by the Board.

The Board did not have a rule setting forth criteria for approval of medical schools or colleges but had a non-rule policy which it applied to deny appellant's application for licensure.

The statute authorizing the Board to approve colleges without legislative criteria was challenged as granting too broad of a delegation of authority to the Board, an argument which the Court rejected.

The Court allowed the Board to apply its

non-rule policy and set forth a long summary of cases with explanation as to when and how non-rule policy may be applied. The case is very significant and should be read carefully.

Florida Department of Law Enforcement v. Hinson, et al., ___So.2d___ (Fla. 1st DCA 1983); 8 FLW 851:

This case is a judicial review of an order of the Career Service Commission reinstating a state employee to a position from which the employee was removed; the employee agency failed to prove that the employee was unable to perform assigned duties.

The Career Service Commission, under one of its rules, ordered the employee agency to remove all references to the charges from the employee's personnel file and forward the references to the charges to the Career Service Commission.

The employing agency appealed to the First DCA and raised for the first time before the DCA the invalidity of the rule upon which the Commission relied to enter its Order mandating purging of the employing agency records. Rather than remand the matter for a hearing on the rules' validity, the Court passed upon the validity of the rules since the Court stated resolution of the question involves an interpretation of law, thus no further fact finding was required, and remanding the matter would merely prolong litigation.

The Court examined the rule and it cited statutory basis and found the rule to be without authority stating an agency may not enlarge its authority beyond that provided in the statutory grant.

Farm Workers' Rights Organization, Inc., etc. v. State of Florida, Department of Health and Rehabilitative Services, ___So.2d___ (Fla. 1st DCA 1983); 8 FLW 1054:

This case was an administrative rules challenge pursuant to §120.56, brought by the Farm Workers' Rights Organization, Inc. and one of its members alleged to be a low income person of Hispanic background challenging an HRS rule adopted under a Florida Statute requiring the rule to comply with federal law. The federal law requires HRS to consider matters pertaining to medically underserved persons including low income and minorities in its consideration of applications for certificates of need.

Standing: The Court found Petitioner to have standing under *Florida Home Builders Association v. Department of Labor and Employment Security*, 412 So.2d 351 (Fla. 1982); *Farm Workers' Rights Organization, Inc. v. Department of Health and Rehabilitative Services*, 417 So.2d 753 (Fla. 1st DCA 1982).

Rule Invalidity: The Court reversed the Hearing Officer's Order finding the rule to be valid. The Court agreed with Petitioners that HRS's rules and questions did not contain the elements required under the federal law and state statute.

State of Florida, Department of Insurance, etc., v. Insurance Services Office, etc., ___So.2d___ (Fla. 1st DCA 1983); 8 FLW 1224:

The Department appealed the final order of a DOAH hearing officer declaring, pursuant to a §120.56 rules challenge proceeding, invalid rules prohibiting the continued use of age, sex, marital status, and scholastic achievement as automobile insurance rating factors. The hearing officer found the rules invalid on two grounds: (1) the rule extends, modifies, conflicts with or enlarges upon the requirements of the implementing statute and thus exceeds the Department's rulemaking authority and (2) the economic impact statement prepared by the Department in adoption of the rule is inadequate. Judge Larry Smith and Judge Joanos concurred that the rule is invalid on the first ground. Judge Joanos and Judge Robert Smith concurred that the economic impact statement is adequate.

Exceeding rulemaking authority discussion: Judge Larry Smith explains, generally, that the rule exceeds statutory authority because it completely prohibits discrimination of setting automobile insurance rates based on sex, marital status and scholastic achievement; however, the implemented statute is interpreted to allow at least some discrimination based upon these factors so long as this discrimination is not *unfair* or based *solely* on these factors. Judge L. Smith further explained that the question in the case is not one of arbitrariness or capriciousness of the rule (the wisdom of the rule was not before the Court), but the existence of statutory authority for the rule or the absence of statutory authority. Judge L. Smith writes that the Legislature rejected the Department's rule interpretation of the implemented statute and therefore explains that an agency may not institute by rule to restore a provision which the Legislature strikes from a legislative act when in progress of its passage.

Judge Robert Smith, dissenting, sets forth a

continued . . .

long, detailed argument, generally stating, that the Legislature did not reject the Department's statutory interpretation as adopted in the rule, that the Department's interpretation of the implemented statute is one of at least 12 possible interpretations, that the Legislature delegated to the agency the authority to interpret the statute, that the Court's rejection of a possible, defensible agency interpretation of statute places the Court in the position of substituting its judgment for that of the agency's judgment and that the hearing officer seems to have used a new criterion for measuring rule validity by requiring the agency to support its rule interpretation by a record foundation where the rule is a change in prior agency policy.

Adequacy of economic impact statement: Judge Robert Smith writes the opinion, concurred in by Judge Joanos, upholding the economic impact statement. Judge R. Smith explains that the Department's economic impact statement is a 7 page document that systematically complies, paragraph by paragraph, with the 4 substantive requirements of §120.54(2)(a), F.S. (1979). Generally, Judge R. Smith rejects criticisms of the economic impact statement as calling for speculation on the part of the Department of economic facts and factors not within the Department's grasp.

See dissenting opinion on denial of motion for rehearing at 8 FLW 1798.

Association of Condominiums, Inc. v. Department of Revenue, etc., ___So.2d___ (Fla. 5th DCA 1983); 8 FLW 1453:

Appellant requested advance notice of agency rulemaking proceedings. The conceded facts are: (1) agency served notice of proposed amendment on appellant; (2) appellant filed notice of intent to appear at proposed rulemaking hearing; (3) agency advised appellant hearing was postponed and would be rescheduled; (4) agency published notice in F.A.W. that hearing had been postponed one month; and (5) without further notice to appellant, nor any other kind of notice, agency adopted the proposed amendment and caused it to be filed with Secretary of State.

The Court found the appellant was not given notice nor was a hearing held before the amendment was approved by the agency and that judicial review under §120.68(1) was the appropriate remedy. The Court found that the procedure by which the rule amendment was adopted was fatally flawed by material error and under §120.68(8) the Court quashed the rule as amended and remanded the rule to the Department for further agency action, awarding appellants attorney's fees in the amount of $1,500 and the costs incurred in the filing of the appeal in the amount of $50.

Florida Public Service Commission v. Indian Town Telephone System, Inc., et al., etc., ___So.2d___ (Fla. 1st DCA 1983); 8 FLW 1857:

Rather than adopt a rule, the PSC sent a notice to telephone companies operating in Florida entitled "Notice of Proposed Agency Action" explaining an intent to take certain agency action through final orders issued within 30 days if hearings under §120.57 were not requested or agency action pursuant to hearings requested under §120.57. The telephone companies challenged the "Notice of Proposed Agency Action" by filing a Petition for Invalidity of a Rule; a DOAH hearing officer determined the "Notice of Proposed Agency Action" to be an invalid exercise of delegated authority due to failure to comply with rulemaking requirements of §120.54. The DCA on judicial review reversed the hearing officer.

Judge Joanos, writing the opinion of the Court, concludes that in the present context, there is a significant difference between agency action which is in effect a rule and proposed agency action which is not designated by the agency as a proposed rule, but may be a rule in effect if finally adopted. This is the necessary result if the agency's option to develop policy through either rulemaking or adjudication is to be preserved. If, as existing case law indicates, an agency cannot be compelled to use rulemaking as the sole means of developing agency policy, then the proposed agency action may not be challenged as a proposed rule unless it is designated as sucy by the agency. The Notice of Proposed Agency Action in the present case does not, by its own effect, create rights, require compliance, or otherwise have the direct and consistent effect of law, because the proposed agency action did not become final agency action. The notice provided for challenges and adjudicatory hearings pursuant to §120.57, and petitions for such hearings were

filed by the telephone companies. While it appears rulemaking would suit the type of policy being developed in the present case, and may even be preferrable in order not to waste resources by repeatedly explicating and defending the policy in §120.57 hearings, there is no authority to compel the agency to choose rulemaking over adjudication in this case. The Court concluded that the outcome of this case does not depend on whether the PSC deals with single or multiple parties and adjudication is not precluded because the order is resulting from §120.57 hearings may issue simultaneously rather than sequentially.

It was held that the PSC may proceed to develop the policy involved in the instant case through adjudication on a case-by-case basis. If the PSC continues to proceed only through adjudication, it will have to explicate and defend policy repeatedly in §120.57 proceedings.

Sarasota Surf Vacation Rentals, Inc., et al. v. Florida Department of Revenue, ___So.2d___ (Fla. 2nd DCA); 8 FLW 2315:

The court found that the procedure of adopting a rule amendment was fatally flawed by material error and, therefore, the amendment to the rule invalid, where appellants did not receive notice of the rule adoption hearing, other than the publication of intent to adopt the rule published in the F.A.W., and even though appellants attended the unnoticed meeting. The court found the agency's action to be a failure to comply with the statutory requirement of giving affected parties notice and an opportunity to be heard prior to adoption of the rule. The court's holding was in keeping with *Association of Condominiums, Inc. v. Department of Revenue,* 431 So.2d 748 (Fla. 5th DCA 1983).

Department of Health and Rehabilitative Services v. Wright et al., etc., ___So.2d___ (Fla. 1st DCA 1983); 8 FLW 2479:

DHRS appeals an administrative hearing officer's conclusion following a §120.56 hearing that the Florida Administrative Code Rule 10A-5.18(5) constitutes an invalid exercise of delegated legislative authority because (1) it is invalid as being improperly promulgated due to an inadequate economic impact stateme §120.54(2)(c), F.S., and (2) it is invalid as not encompassed by the legislative grant of authority found in the authorizing statute. The court affirmed the hearing officer's conclusion regarding the economic impact statement, thereby obviating consideration of his ruling on the statutory authority for the rule. The court explained that for it to gratuitously consider and rule upon the merits of the Department's authority in adopting the rule would be to resolve that issue without the benefit of the economic impact statement the court deems essential for consideration by the Department in its rulemaking process. Were the Department to have had the benefit of the impact information, its action on the rule, as well as that of the hearing officer, may or may not have been different; that is yet to be seen.

The parties challenging the rule had standing to bring the challenge even though they were noticed of the proposed rule adoption and did not raise objection to the economic impact statement or object to the merits of the rule while it was in the proposed stage. After the rules were adopted, the challenging parties challenged paragraph (5) of the rule pursuant to §120.56, alleging the paragraph to be an invalid exercise of delegated legislative authority in that the economic impact statement relating to it was insufficient.

The court explained that as the preparation of a statement of economic impact is a procedural aspect of an agency's rulemaking authority, it is subject to the statutory harmless error rule of §120.68(8), which provides for remand only where a material error in procedure in an administrative proceeding impairs the fairness of the proceeding or the correctness of the action taken. Thus, the absence or insufficiency of an economic impact statement is harmless error if it is established that the proposed action will have no economic impact, i.e., by its merely implementing already established procedures, or if it is shown that the agency fully considered the

continued . . .

CHAIRMAN, cont'd.

committees in which you have an interest so that you may participate and become involved where you are most interested. Following my letter is a list of the section committee chairpersons for your information. I look forward to keeping you informed of our section activities in future newsletters and invite you to contact me about any thoughts you may have about our section.

—Paul Watson Lambert

asserted economic factors and impact. In this case, the hearing officer correctly found that the rule was new and unique and a codification of agency interpretation, not merely a repetition of a specific statutory standard. Judge Ervin dissented.

Miscellaneous

Impropriety of TRO Against Agency Action After DCA Unfavorably Reviewed Same Matter on Petition For Stay Of The Same Agency Action

Department of Business Regulation, etc. v. Carl & Mike, Inc., etc., ___So.2d___ (3d DCA 1983); 8 FLW 360:

Agency issued emergency order, pending hearing, suspending appellee's liquor license. Appellees filed direct appeal from the emergency suspension order to the Third DCA and court denied application for stay pending appeal. Several days thereafter Appellees filed suit in circuit court obtaining TRO against agency enforcement of emergency order raising new issues not raised before DCA on application for stay. Agency appealed TRO to the Third DCA which reversed and remanded to trial court with directions to dismiss the TRO law suit recognizing that though appellee did not raise before the DCA the grounds brought to the attention of the Circuit Court, Appellee nevertheless had the opportunity to raise all grounds before the Third DCA during its direct appeal and application for stay and is precluded from raising any further grounds (in effect collaterally attacking DCA Order) in Circuit Court action. Though Court did not use term "res judicata," it appears that the doctrine was in fact applied.

Effect of Hearing Officer's Denial Of Motion To Dismiss Under Model Rule 28-5.205

Boedy v. Department of Professional Regulation, Board of Medical Examiners, ___So.2d. ___ (Fla. 1st DCA 1983); 8 FLW 885:

This case is a review of nonfinal agency action consisting of a DOAH hearing officer's Order denying appellant's Motion to Dismiss an administrative complaint filed by appellee seeking to revoke, suspend or otherwise discipline his license to practice medicine.

Appellant, before the filing of the administrative complaint, placed his license to practice medicine on an inactive status as provided by statute which he contends denies appellee jurisdiction to seek discipline of the license. Appellant raised this argument by a timely filed Motion to Dismiss before a DOAH hearing officer who denied the Motion. Appellant petitioned for immediate judicial review which the court accepted explaining that this is the sort of issue that may qualify, depending on the circumstances, for immediate review in a DCA since awaiting final agency action in the form of a final order on the merits may not provide an adequate remedy under the APA.

The Court interprets Model Rule 28-5.205 as seeming to regard a hearing officer's order as a recommended order only requiring final disposition by the attendant agency head. The Court remanded the matter to the agency head to pass upon the hearing officer's denial of the Motion to Dismiss as a recommended order which may then be reviewed by the DCA.

Career Service Commission

Bradford v. Florida Department of Transportation, ___So.2d___ (Fla. 4th DCA 1983); 8 FLW 1439:

The Court per curiam affirmed a Career Service Commission Order reinstating a demoted employee without back pay where the alleged misconduct occurred prior to, and the administrative proceedings occurred subsequent to, legislative revision of the statutes governing the Commission. The Court affirmed the Commission's authority to reinstate a demoted employee without back pay.

Equitable Estoppel Applied Against Agency

Salz v. Department of Administration, Division of Retirement, ___So.2d___ (Fla. 3rd DCA 1983); 8 FLW 1700:

Salz commenced employment as a teacher in Dade County School system in 1955 and enrolled in the teacher's retirement system (TRS). Upon inquiry in 1966, she was informed in writing by TRS that she could purchase 8 years credit for her Missouri teaching time; she made payments into TRS until 1977 representing the 8 years' prior service credit. Upon retirement in 1981, she was informed that the 8 years out of state service was not creditable because the school

in which she taught was a private rather than public school. A hearing before a hearing officer ensued which recommended that the Division of Retirement was estopped to deny Salz's credit for the contested 8 years service since she justifiably relied upon the representation made to her in 1966 et seq. The Division of Retirement reversed the hearing officer and the DCA reversed the Division of Retirement and remanded for further proceedings.

The Court recognized that the State may not be estopped for conduct resulting from a mistake of law. Here the mistake by the Division was a mistake of fact, not of law. Further, Salz demonstrated a special circumstance allowing the doctrine of equitable estoppel to be applied against a state agency.

Hearing Officer Authority To Require Notice To Unjoined Potential Parties To Intervene

Department of Professional Regulation v. Honorable William E. Williams, and Spiva, ___So.2d___ (Fla. 1st DCA 1983); 8 FLW 2350:

Florida Administrative Code Rule 28-5.107 allows a hearing officer, upon his own initiative, to enter an order requiring an absent person, whose substantial interests will be affected by a proceeding, to be notified of the proceeding and given an opportunity to be joined as a party of record. Persons other than original parties to a pending proceeding, who have a substantial interest in the proceeding and who desire to become parties, may petition the presiding officer for leave to intervene.

The case leaves open the question of if a person whose substantial interests are being affected by a hearing, in which that person is not a party, and if the hearing officer orders that person to be notified of the proceeding and given an opportunity to be joined as a party of record, and if that person does not choose to intervene, is that person bound by a decision of the hearing officer?

Petition for Writ of Prohibition Proper to Seek Disqualification of Agency Head.

Young and Leahy v. Trustees of Palm Beach Jr. College, and Eissey, ___So.2d___ (Fla. 4th DCA 1983); 8 FLW 2404:

A petition for writ of prohibition was filed seeking to disqualify the trustees of a junior college from participating in an administrative proceeding instituted to suspend two junior college teachers. The court found that the writ is authorized upon authority of *Villeneuva v. State,* 173 So. 906 (Fla. 1937); the writ was issued prohibiting the trustees from proceeding except to take such action as is necessary to have substitute trustees appointed according to law.

Administrative Law Section Meetings

- **Friday, January 27, 1984**
  Midyear Meeting
  Orlando Marriott Inn
  10:00 - 12:00 noon
  Executive Council Meeting
  5:00 p.m. - 6:00 p.m.
  Reception with Local Government and Environmental Law Sections

- **Friday and Saturday**
  March 2 and 3, 1984
  Administrative Conference
  FSU Conference Center

- **Friday, March 23, 1984**
  The Florida Bar, Tallahassee
  10:00 a.m. - 12:00 noon
  Executive Council Meeting

- **Thursday, June 21, 1984**
  The Florida Bar Convention
  Innisbrook
  9:00 a.m. - 12:00 noon
  Executive Council Meeting
  7:00 p.m. - 8:00 p.m.
  Reception

Administrative Law Section Executive Council Meeting

September 23, 1983
The Florida Bar
Tallahassee

Members present: Patrick F. Maroney, Drucilla E. Bell, James W. Linn, Steve Uhlfelder, Chris H. Bentley, George L. Waas, Steve Slepin, Ben Girtman, Judge Robert Smith, Chris D. Rolle, David E. Cardwell, Paul Watson Lambert, Bill Barfield, Michael Schwartz, Charles R. Ronson and Betty Ereckson, section coordinator.

Excused absences: Charles and Cynthia Tunnicliff, Jonathan Alpert, Leslie Stein, Judy Brechner, Deborah Miller, Frank Vickory, Monton Morris, Ed P. de la Parte, Mitch Hagler, Leonard Carson, Lloyd Nault (unexcused) and J. Boyd.

The meeting was called to order by **Paul Watson Lambert,** chairman of the Administrative Law Section of The Florida Bar, at 10:00 a.m., Friday, September 23, 1983. Secretary **David Cardwell** conducted a roll call of those present, which is reflected above.

Chairman Paul Lambert called for reports from various section committees: The Administrative Conference report was given by David Cardwell. The conference date is set for March 2 and 3, 1984, at the Center for Professional Development at Florida State University. Letters of invitation are scheduled to go out to selected individuals within the next two weeks.

Certification report by **George Waas:** Much discussion was had on the subject of certification after the reading of **Leslie Stein's** letter. It was decided that pro and con positions would be taken and anyone interested should have their position papers to **Dru Bell,** newsletter editor, by October 15, 1983.

Bill Barfield, chairman-elect, gave a report on the meeting of section chairmen and chairmen-elect. Bill said that there was widespread concern of budgetary disbursement to sections and that communication channels should be better between the Long Range Planning Committee of the Bar and the sections. As a result of this meeting, a regular meeting of section chairmen and chairmen-elect would be established with the next meeting at the Midyear Meeting in January.

Steve Uhlfelder was invited to address the Council concerning the DOAH. Mr. Uhlfelder said that he wanted the Bar to get involved in an effort to raise salaries for hearing officers. He also praised **Chris Bentley** for keeping quality people at the agency. There was much discussion had on the problems relating to salary and how the section might help to facilitate a change.

The following motion was made by **Ben Girtman:** That Chairman Paul Lambert draft a letter to express support for an examination of and an increase in salaries of Hearing Officers of the DOAH based upon (1) their required expertise, (2) the importance and applicability of their decisions and (3) their workload.

The following amendment was made by **James Lynn:** That the chairman's letter be circulated to Executive Council members and be returned in five days to DOAH for comment.

Steve Slepin reiterated a recommendation of the chairman to appoint an ad hoc committee to study the problem of salaries for Hearing Officers.

The meeting was adjourned.

Respectfully submitted,

David E. Cardwell
Secretary

and

Betty Ereckson
Section Coordinator

Committees of the Administrative Law Section

Administrative Conference Committee
David Cardwell, Co-Chairperson
Post Office Drawer BW
Lakeland, Florida 33802
(813) 682-1161

George L. Waas, Co-Chairperson
1114 East Park Avenue
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(904) 224-5200

Annual Meeting Committee
Charles Tunnicliff, Co-Chairperson
1117 Myers Park Drive
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Cynthia S. Tunnicliff, Co-Chairperson
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Appellate Rules Committee
Michael I. Schwartz, Chairman
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Tallahassee, Florida 32301
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Civil Rules Committee
Jonathan L. Alpert, Chairman
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Communications Committee
William B. Barfield, Co-Chairperson
666 N.W. 79th Avenue
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Leslie R. Stein, Co-Chairperson
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Morton Morris, Co-Chairperson
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Hollywood, Florida 33020
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Charles R. Ranson, Co-Chairperson
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(904) 222-1534

Model Rules Committee
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(904) 224-5200

Publications and Newsletter Committee
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(904) 488-0062

Frank Vickory, Co-Chairperson
Route 3, Box 4025
Havana, Florida 32333
(904) 539-9339

Regulated Utilities Committee
Lloyd Nault II, Chairmen
Southern Bell
666 N.W. 79th Avenue
Room 680
Miami, Florida 33172
(305) 263-3100

State Agency Practice Committee
Drucilla Bell, Co-Chairperson
130 North Monroe Street
Tallahassee, Florida 32301
(904) 488-0062

Joseph R. Boyd, Co-Chairperson
2441 Monticello Drive
Tallahassee, Florida 32303
(904) 386-2171

Delphene Strickland—
Liaison to ABA Administrative Law Section and U.S. Administrative Conference

Schedule of Section Activities

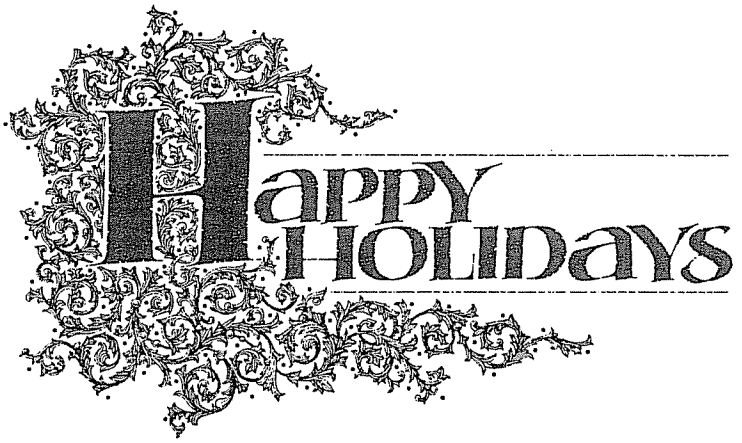
Thursday, January 26, 1984

On Thursday, the Administrative Law Section will co-sponsor (with the Health Law Committee) a seminar entitled "Health Law Update". The seminar will run from 9:00 a.m. to 12:00 noon. Topics include:

- Physician Contracts
- Licensing and Discipline of Health Care Professionals
- From the Point of View of the Department of Professional Regulation and other Appropriate Health Care Boards
- Home Health Agencies

Friday, January 27, 1984

10:00 - 12:00 noon Executive Council Meeting
5:30 - 6:30 p.m. Reception co-sponsored by Environmental and Land Use Law Section



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)_____

NICKNAME (as it is to appear on convention badge)_____

OFFICE ADDRESS_____

CITY_____ STATE_____ ZIP CODE_____

SPOUSE OR GUEST NAME, if attending_____

OFFICE PHONE_____

ATTORNEY NUMBER_____

ACTIVITY	Code	No. of Persons	Fee per Person	Amount
Wednesday, January 25				
Grievance Institute for Grievance Committee Members	101		No Charge	
UPL Institute for UPL Committee Members	102		No Charge	
Thursday, January 26				
Bankruptcy in Domestic Relations Seminar sponsored by Family Law Section	201			
Attorneys Fees Seminar sponsored by General Practice Section	202			
Health Law Update Seminar sponsored by Health Law Committee and Administrative Law Section	203			
Assistants Seminar sponsored by Economics & Management of Practice Section	204			
Communications Law Seminar sponsored by Communications Law Committee	205			
Economics & Management of Law Practice Section Exhibition & Exchange	206			
ALL MEMBER RECEPTION	207			
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.	208		$70.00	
Health Law Committee Breakfast	209		$ 8.00	
Family Law Section Luncheon	210		$11.00	
Friday, January 27				
How to Prosecute and Defend 42 U.S.C. §1983 Zoning and Land Use Actions Seminar sponsored by Environmental and Land Use Law Section	301			
Will and Trust Drafting Seminar sponsored by Real Property, Probate & Trust Law Section	302			
Choice of Entity for Real Estate Purchase Seminar sponsored by Tax Section	303			
Tax Techniques for Condominium Developer Seminar sponsored by Tax Section	304			
Trial Practice — An Overview Seminar sponsored by Trial Lawyers Section	305			
DAILY REGISTRATION FEE Entitles registrant to attend any of the above seminars. Please indicate the seminar(s) you plan to attend.	307		$70.00	
ALL MEMBER LUNCHEON	308		$11.00	
Florida Association for Women Lawyers Reception	309		$ 6.00	
Saturday, January 28				
Contemporary Legal Problems for the Military Attorney and Civilian Attorney Representing Military Personnel and Their Dependents sponsored by Military Law Committee	401		No Charge	

TOTAL $_____

THE FLORIDA BAR
TALLAHASSEE, FL 32301-8226