ADMINISTRATIVE LAW SECTION NEWSLETTER

Vol. XI, No. 2 M. Catherine Lannon, C. Gary Stephens, Co-Editors December 1989

Chairman Joins International Law Firm and Moves to Clearwater

In mid-October, I packed my office and home and moved it all to Clearwater where I hope and plan to practice administrative and international law. Part of that will involve helping American businesses to develop joint ventures with Soviet cooperatives. To that end, I wanted to meet and talk with Russian attorneys on my recent trip to find a contact who could keep me current on developments in Moscow. Those dicussions have made me examine the administrative lawyer's job description more closely, much as learning a foreign language makes one more analytical of English.

I was introduced to Russian law in 1986, when I made my second trip to the USSR. That was a CLE tour consisting of an overview of the legal system. Most of my fellow travelers were attorneys, with one law professor who was fluent in Russian legalese. We were provided, and expected to read in advance, a book on Russian laws and the legal system. We met with the head of the Moscow Bar Association, a judge in Tbilisi, a prosecutor in Erevan and a "private attorney" in Baku. At that time, however, all attorneys were employed by the state, and the great majority prosecuted criminals, while others mitigated their sentences. In civil cases, the government also decided which cases would be filed and assigned counsel, if necessary. The divorce case that I observed had no attorneys representing either party, and I understand this is the normal procedure.

On my recent trip, although my main focus was business contacts through the cooperatives in Krasnodar, the business club had their attorney at our meeting. He explained that attorneys now advise businesses and help them attain the legal status necessary to enter into joint ventures. Another attorney, with whom I had corresponded, sought me out to discuss the changes in their system. He was employed in a lawyer's cooperative; their version of a law firm. They had contracts with clients for agreed upon fees and they pay a 5% tax to the Soviet government for this privilege. He had worked for the government "procurator" and the procurator was trying to hire him back, but he wasn't sure he wanted to return. He said that he could practice more honestly and ethically working for the cooperative than when he worked for the government. Another attorney told me that he felt he wasn't really practicing law because he was researching and advising people. That was never a lawyer's job before in the USSR.

Consequently, my business cards that read "attorney" meant to the business people that I

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CHAIRMAN

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was a "representative;" their attorneys-at-law are called "avocats" (accent on last syllable), which all of them had to be until very recently. This made me realize how multi-faceted our profession is and how multi-talented practitioners must be. The administrative law area shows this especially well, with all of our substantive speciality areas: environmental law, regulatory licensing law, CON law, utilities law, to name just a few, and in all of those specialty areas, we use both our counseling and advocacy skills to represent our clients. The Russian attorneys are finding out that there is much more to the practice of law then prosecuting criminals, mitigating their sentences, and suing or defending on behalf of the state. Somehow, in the next few months, I'm sure I will make similar discoveries about the new facets of law and practice required in the private sector.

—Drucilla Bell

"Non-Rule Policy" Does Not Exist!

by Paul Watson Lambert

The case of *McDonald v. Department of Banking & Finance*, 346 So.2d 569 (Fla. 1st DCA 1977), has been repeatedly interpreted as carving out a major exception to the meaning of the term "rule," authorizing "non-rule policy statements of incipient agency policy" do not have to be adopted as formal rules. However, the APA does not authorize "non-rule policy."

The *McDonald* decision is, probably, the most cited, misread, unread (by those who often cite it) and misunderstood case in Florida administrative practice. Agencies and courts have repeatedly interpreted *McDonald* to allow agencies to develop and take agency action upon "non-rule policies," and avoid the rulemaking requirements of F.S. 120.54. For example, in *Florida Power v. State Siting Bd.*, 513 So.2d 1343 (Fla 1st DCA 1987), the court followed "those opinions recognizing that the non-rule policy of an agency will not be invalidated if it is clearly explicated in an adjudicative setting and is supported by a record foundation," citing to *Barker v. Board of Medical Examiners, Department of Professional Regulation,* 428 So.2d 720 (Fla 1st DCA 1983); *Anheuser-Busch, Inc. v. Department of Business* [393 So.2d 1177 (Fla. 1st DCA 1981)]; *McDonald v. Dept. of Banking and Finance.*"

A careful reading of *McDonald* reveals that "non-rule policy" is neither condoned nor authorized. Judge Robert Smith's opinion in *McDonald* recognizes the strong requirement of APA rulemaking. F.S.120.52(16)defines the term "rule" to include

> ". . . each agency statement of general applicability that implements, interprets, or prescribes law or policy . . ."

Judge Smith explains that

> "The APA does not in terms require agencies to make rules of their policy statements of general applicability, nor does it explicitly invalidate action taken to effectuate policy statements of that character which have not been legitimated by the rulemaking process. But that is the necessary effect of the APA if the prescribed rulemaking procedures are not to be atrophied by nonuse." At 346 So.2d 580. (Emphasis supplied.)

Judge Smith's opinion continues with a lengthy discussion of agencies' developing emerging incipient policy through adjudication prior to initiating rulemaking. However, the policy about which Judge Smith wrote was not a *statement of general applicability* affecting substantial rights of people. *Gar-Con Development, Inc. v. State of Florida, Dept. of Environmental Regulation*, ___ So.2d ___ (Fla. DCA 1st 1985), at ___; 10 FLW 1056.

Incipient means "beginning to exist or appear; in an initial stage." *The Random House Dictionary of the English Language*, Second Edition Unabridged. An incipient agency policy is one that is beginning to appear or one that is in its initial stages. A policy that is capable of being reduced to writing, articulated and understood is no longer incipient. A policy that is no longer incipient must be dignified through formal rulemaking adoption, if it is one of general applicability. See, *McCarthy v. Dept. of Insurance and Treasurer*, 479 So. 2d 135 (Fla. DCA 2nd 1985); 10 FLW 2344.

In *McCarthy,* the Second District Court of Appeal rejected the interpretation of *McDonald* which permits avoidance of F.S. 120.54 rulemaking under the guise of "non-rule policy" statements of general applicability in agency

memoranda or letters. The "non-rule policy" statement in the *McCarthy* case was in a letter, therefore, it was not incipient policy, since it was capable of reduction to writing. A policy that can be expressed in writing is capable of articulation through the F.S. 120.54 rulemaking process. An articulated policy of general applicability meets the definition of a rule as defined at F.S. 120.52(16). An articulated policy that meets the definition of a rule, but which is not adopted through F.S. 120.54 is an "unadopted rule" or policy statement that should be adopted as a rule if it is to be validly applied; it is not "non-rule." Action that is taken on an "unadopted rule" is invalid. *McCarthy,* ibid. Therefore, "non-rules" do not exist under the APA and should no longer be tolerated.

Paul Watson Lambert is a sole practitioner in Tallahassee. He received his B.A. in 1968 in History and his J.D. in 1971 from Florida State University and Florida State University College of Law, respectively. Mr. Lambert is a past chairman of the Administrative Law Section of The Florida Bar and is a past president of the Florida Government Bar Association. He has written numerous articles for the Administrative Law Section, The Florida Bar Journal *and The Florida Bar Continuing Legal Education program.*

The Record in Proceedings on Recommended Orders Before Regulatory Boards Under DPR

by Stephanie A. Daniel and Lisa S. Nelson

The Department of Professional Regulation is, by statute, an "umbrella" agency comprised of some thirty-one boards. Pursuant to the applicable practice acts, Final Agency Action is taken by the respective Boards which meet as collegial bodies to conduct business. The statutory framework on final agency action with respect to Recommended Orders presents some interesting issues, not all of which may be addressed here. One area of interest which will, in all probability, be addressed by the courts in the near future, is that of the record which may be considered by a regulatory board in taking final agency action on a recommended order.

Pursuant to Section 120.57(1)(b)(10), Florida Statutes, the agency (the regulatory board) in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the recommended order, but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings did not comply with essential requirements of law. Further, Section 120.57(1)(b)(10), Florida Statutes, provides that the agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefore in the order, by citing to the record in justifying the action. Given the requirement that the record be reviewed when tinkering with either recommended findings of fact or recommended penalty, the scope of the record must be ascertained.

Section 120.57(1)(b)(6), Florida Statutes, provides that the record of a case where a formal hearing has been held shall consist only of: all notices, pleadings, motions, and intermediate rulings; evidence received or considered; a statement of matters officially recognized; questions and proffers of proof and objections and ruling thereon; proposed findings and exceptions; any decision, opinion, proposed or recommended order, or report by the officer presiding at the hearing; all staff memoranda or data submitted to the hearing officer during the hearing or prior to its disposition, after notice of the submission to the parties, except communications made by advisory staff; all matters placed on the record after an ex parte communication pursuant to Section 120.66(2), Florida Statutes; and the official transcript.

Clearly, Section 120.57(1)(b)(6), Florida Statutes, does not envision evidence being placed in the record after the issuance of the Recommended Order. It is equally clear that, in its

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deliberations on recommended orders, the regulatory board must confine itself to that record. Additionally, it should be noted that, pursuant to Section 120.57(1)(a)(1), Florida Statutes, regulatory boards within the Department of Professional Regulation are not authorized to conduct hearings to resolve factual disputes. Such factual disputes must be resolved by a Hearing Officer appointed by the Division of Administrative Hearings.

An analysis of relevant statute and case law reveals that, should a regulatory board under the Department of Professional Regulation consider evidence or testimony beyond the record as established before the Division of Administrative Hearings, then the regulatory board would be without statutory authority to resolve any resultant factual disputes which might arise. Further, regulatory boards have been criticized by the courts for straying beyond the record in acting on a hearing officer's recommended order. In *Nest v. Department of Professional Regulation*, 490 So.2d 987 (Fla. 1st DCA 1986), the Board of Medicine (a regulatory board within the Department of Professional Regulation) was criticized by the First District Court of Appeal because, in a licensing case, the Board of Medicine considered testimony by the applicant, given after the issuance of the Recommended Order, in modifying findings of fact and denying licensure to the applicant, contrary to the recommendations of the Hearing Officer. Additionally, the court awarded to Dr. Nest $30,000 in attorney's fees for that abuse of discretion by the Board. Clearly, the holding in this case would have a chilling effect on the willingness of the regulatory board to consider any information which is not in the record when deliberating on a recommended order.

There have been no cases at the appellate level dealing with license discipline and the application of Section 120.57(1)(b)(6), Florida Statutes, in which a regulatory board has been a party. There are several cases currently pending in the appellate courts which may dispose of this issue. Given the current status of the law, it appears that no evidence or testimony should be accepted or considered after the issuance of the recommended order.

It should be noted that the issue of what should be considered by the Board during Final Agency action on license discipline was discussed in *dicta* in an attorney malpractice action. In *Oteiza v. Braxton,* 14 F.L.W. 1486 (Fla. 3rd DCA 1989), which was a case brought by a physician charging malpractice by his attorney in representation provided by the attorney in a license disciplinary proceeding before the Board of Medicine, the court noted that:

> "statements before the board itself supplied additional information not contained in the record before the Hearing Officer, and may have in substance admitted some of the matters as to which there had been insufficient proof before the Hearing Officer. The statements of Oteiza, made on the record and in the presence of counsel, were part of the record before the board for purposes of administering discipline, and could properly be taken into account by the board in deciding whether to depart from the hearing officer's recommended penalty. See *Hodge v. Department of Professional Reg.*, 432 So.2d 117, 118-119 (Fla. 5th DCA 1983)."

See *Oteiza*, 14 F.L.W. 1486 at 1487.

The *Oteiza* case is distinguishable and inapplicable under the current statutory framework for penalty consideration. The *Oteiza* case was predicated on a version of Section 120.57, Florida Statutes, which existed before amendments made in 1984. The *Oteiza* case contains no mention of Section 120.57, Florida Statutes, in reaching the above-quoted conclusion in dicta. However, the court in *Oteiza* in that same *dicta* relies on the *Hodge* case. The *Hodge* case was predicated on an earlier version of Section 120.57, Florida

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

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Statutes, which existed prior to 1984, which was amended in two important respects. Prior to 1984, there was no requirement in Section 120.57(1)(b)(10), Florida Statutes, that the agency cite with particularity to the record in justifying any action on penalty. Further, prior to 1984, the agency could reduce the penalty without a review of the entire record. Section 120.57(1)(b)(10), Florida Statutes, as it exists today, very clearly requires justification *in the record* for any deviation in penalty from that recommended by the Hearing Officer. Clearly, the Legislature has expressed their intent that final agency action on Recommended Orders be confined to the record.

In view of the current status of the law, it would appear that the better practice would be to present all evidence, including evidence on penalty (whether aggravating or mitigating evidence), to the Hearing Officer. Evidence not submitted to the Hearing Officer may not be considered by the regulatory board on the issue of penalty. Presentation of such evidence to the Hearing Officer is a logical requirement in view of the Hearing Officer's responsibility to make a recommendation as to penalty. Common sense would dictate that a meaningful recommendation on penalty is best made when all relevant evidence on penalty has been provided. When in doubt as to appropriate mitigating or aggravating evidence on penalty, a review of the applicable disciplinary guidelines for the respective board may be instructive.

Stephanie A. Daniel, a 1981 graduate of Florida State University, was admitted to the Bar in 1981 and is the Chief Medical Attorney for the Department of Professional Regulation, where she has worked for eight years.

Lisa Nelson, a 1983 graduate of Florida State University, was admitted to the Bar in 1983 and is the Appellate Attorney for the Department of Professional Regulation, where she has worked three and one half years. Formerly, Ms. Nelson was a law clerk for Chief Justices Alderman and Boyd of the Florida Supreme Court.

. . . .On the Federal Side

by Walter S. Crumbley

Attorneys who practice in the area of federal administrative law have understood well the court-made rule that the regulations published by an agency to interpret and explain statutory provisions of a particular act are normally given great weight and special deference by courts. This is especially true for interpretive regulations adopted contemporaneously with statutory passage, and/or ones which have been in place for a long period. See *EEOC vs. Associated Dry Goods Corp.*, 101 S.Ct 817 (1981); see also *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 103 S.Ct. 2778 (1984).

Recently, however, the Supreme Court overturned such a regulation in the case of *Public Employees Retirement System of Ohio v. June M. Betts*, 109 S.Ct. 2854 (1989). At issue in the the case was an age discrimination action brought by Betts against the Public Employee Retirement System (PERS) of Ohio for disability benefits under a plan adopted in Ohio in 1933. Betts alleged that the PERS plan, as amended in 1976, was a subterfuge to evade the Age Discrimination in Employment Act's (ADEA) purpose of banning arbitrary age discrimination. ADEA was enacted in 1967. In 1969 the Department of Labor issued an Interpretive Bulletin, later codified at 29 CFR S 820,120(a)(1970), indicating it was not unlawful for an employer to observe the terms of any bona fide employee benefit plan which is not a subterfuge to evade the purposes of the ADEA. Plans where benefit reductions were justified by age-related cost justification would be considered in compliance with the ADEA, according to the regulation. Betts (and the Equal Employment Opportunity Commission, as amicus curiae) relied heavily on the interpretive regulation which protected only those age-based distinctions in employee benefit plans where they could be justified by the increased costs of benefits for older workers.

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The Supreme Court, after considering the statutory language of the ADEA, as well as amendments made in 1978 and the legislative history, concluded that the bulletin and regulation were inconsistent with expressed legislative intent, and declared the regulation invalid. The Court emphasized that even contemporaneous and/or longstanding agency interpretations must fail to the extent that they conflict with statutory language, nor is such a regulation entitled to any special deference.

The implications of this case are clear that Agency rules and regulations must always be read in context with the underlying statute with its legislative history. Interpretive regulations will continue to be accorded special deference by the courts, but only to the extent that they are consistent with the intent of Congress, expressed in statutory terms and legislative history.

Walter S. Crumbley, recently elected to the Executive Council of the Administrative Law Section, has served as Administrative Law Judge for the Social Security Administration since 1975. A Tampa resident, Crumbley is also an Adjunct Professor for Golden State University and the Stetson College of Law. He is active in the American Bar Association, the Federal Administrative Law Judges Conferences and the American Society for Public Administration.

Minutes of Administrative Law Section Executive Council Meeting

Friday, July 14, 1989, 10:10 a.m.
(Telephone Conference Call)

MEMBERS PRESENT:

Drucilla E. Bell	Vivian F. Garfein
Richard T. Donelan	M. Catherine Lannon
William L. Hyde	Stephen T. Maher
G. Steven Pfeiffer	R. Terry Rigsby
Walter S. Crumbley	Diane D. Tremor

OTHERS PRESENT:
John N. Hogenmuller
Wallace Saunders
Peg G. Griffin

Chairman Drucilla Bell called the meeting to order at approximately 10:10 a.m. She stated the purpose of the meeting was to alert the Council to the fact the pilot TV series project as currently proposed would exceed the approved budget by approximately $2,000. Ms. Bell stated the need to either propose alternatives to reduce the cost of the program or to authorize additional funds to support the project.

Steve Maher outlined the anticipated costs of completing the project and stated he was willing to absorb the additional $2,000 in costs if not approved by the Council. It is Mr. Maher's hope that upon completion of the project and review by the Bar's Public Relations Committee the section will be reimbursed for the costs incurred.

John Hogenmuller stated he will waive having the section pay for staff time, thereby reducing the cost of the project by $888. The section will, however, be expected to pay for staff travel expenses incurred in connection with the project (anticipated at $300).

After discussion, a motion to approve a budget amendment in the amount of $1,200 was made by Steve Maher, seconded by Bill Hyde and passed unanimously. Peg Griffin was asked to prepare the necessary paperwork and submit the amendment to the Budget Committee for consideration at its July 26 meeting. Because the deadline for submission of agenda items to the committee's July 26 meeting has passed, the amendment will possibly not be considered until the September meeting of the committee.

There being no further business to bring before the Executive Council, the meeting was adjourned at approximately 10:40 a.m.

New Addresses:

Drucilla E. Bell
Swacker & Associates, P.A.
1617 U.S. 19 South
Clearwater, FL 34624

Betty J. Steffens
McFarlain, Sternstein, et al.
P.O. Box 2174
Tallahassee, FL 32316

Administrative Law Section Calendar

January 19, 1990
Executive Council Meeting, Hilton at Walt Disney World Village, Orlando, 9:00 a.m.-12:00 noon

March 15, 1990
Executive Council Meeting, Tallahassee

March 16-17, 1990
Administrative Law Conference, Florida State Conference Center, Tallahassee

April 27, 1990
CLE Seminar: "Administrative Law Overview", Tallahassee

Minutes of the Administrative Law Section Executive Council Meeting

Friday, October 13, 1989 Tallahassee

Persons Present: D. Bell, G. Stephens, B. Steffens, B. Hyde, W. Crumbley, V. Garfein, M. Dresnick, S. Pfeiffer, C. Lannon, W. Dorsey, T. Rigsby, L. Rigot and R. Donelan. Diane Tremor arrived while meeting was in progress.

The meeting was called to order in the vicinity of 2:30 p.m. and commenced with a review of the draft minutes of a telephonic council meeting which took place on July 14, 1989. Council members Lannon, Bell and Donelan took exception to the listed attendees of said conference, expressing the belief that they too had been telephonically present. The aforesaid minutes were then approved as amended.

Chairman's Report

Chairman Drucilla Bell announced that she was joining a law firm in Clearwater, Florida, effective October 16. She will continue to function as chairman in her new professional setting. She also circulated voluminous photographic albums fresh from her recent travels in Russia. Chairman Bell and Peg Griffin confirmed that the Administrative Law Directory would be out soon.

Treasurer's Report

Steve Pfeiffer submitted a written treasurer's report (our first in some time) and noted a steady decline in its cash balance. He also tendered a draft budget for 1990-91 noting the final submittal date as January 23, 1990. A lengthy discussion then ensued concerning expenditure patterns over the last couple of years, with particular emphasis on the Administrative Law Conference, the video pilot projects undertaken by Steve Maher with section funding and expenses associated with the annual meeting and reception.

CLE Committee

Vivian Garfein reported on recent CLE activities including an apparently successful session that same morning with more than 140 persons in attendance. It was generally agreed to forego a CLE presentation at the annual meeting in view of the paltry response in recent years.

The upcoming (November 9-10) CLE program scheduled at the Sandestin Marriott generated some heat over the inconvenient location. Ms. Garfein blamed this entirely on the Local Government Section by whom the program is being co-sponsored. The possibility of videotaping the program was discussed but apparently contravened Bar videotape policy. The word "petulant" was tossed about.

Federal Court Study Committee

Walter Crumbley, newly appointed chairman of the Federal Court Study Committee, reported that he did not have much to report but deferred to his predecessors for more substantive input. They in turn likewise reported no knowledge or activity. Whereupon, on motion by Gary Stephens, seconded by Donelan, and voted favorably by Council, the entire effort was abandoned. No one could remember just

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THE FLORIDA BAR
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MINUTES

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how it got started.

Florida Bar *Journal*

Bill Dorsey gave a vague description of two articles in progress and indicated space available for two additional articles during the course of the year.

Legislative Committee

Betty Steffens reported that nothing had happened that week on the legislative front despite the presence of the Governor, the Legislature and many bus loads of women in the city. Her report got better, however, as it went along.

Bill Hyde expressed several personal opinions, including a continuing concern about possible indexing of agency orders. Cathy Lannon also expressed several views, some official, some not. Attention was focused on the role of the Senate Governmental Operations Committee in considering changes to Chapter 120.

Peg Griffin noted a previous vote by the Council to provide transcripts in indigent cases. After considerable discussion, the Council decided to refer the matter to the Florida Bar Foundation for consideration as a possible pilot program.

Vivian Garfein announced her upcoming de parture from the DER and her association with Fine, Jacobson, Schwartz, etc., effective December 1.

Newsletter

Editor Stephens announced that the autumn issue of the newsletter would be spearheaded by co-editor Cathy Lannon. Materials are due by the end of October. Some discussion of the certification question, including its treatment in the pages of the newsletter, followed. Richard Donelan indicated he had fulminated over the telephone, which no one understood.

Bill Hyde gave a brief report on the public access to administrative proceedings which no one understood either.

Administrative Law Conference

A lengthy discussion of the content and scheduling of the Administrative Law Conference followed without clear result. Whereupon a viewing of the first pilot tape of the proposed educational series on state agencies was had. The meeting more or less degenerated from there.

Respectively submitted.
Charles G. Stephens