Administrative Law Section Newsletter

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Insulated from Review: *Barfield v. Department of Health, Board of Dentistry*

by Lisa S. Nelson

Before the 1996 amendments to the Administrative Procedure Act, agencies were free to reject conclusions of law in a recommended order submitted by an administrative law judge, and often did so. See, for example, *Public Employees Relations Commission v. Dade County Police Benevolent Association*, 467 So. 2d 978 (Fla. 1985); *MacPherson v. School Board of Monroe County*, 505 So. 2d 682, 683 (Fla. 3d DCA 1987) (agency is free to reject the conclusions of law by a hearing officer in whole or in part); *Devor v. Department of Insurance*, 473 So. 2d 1319, 1320 (Fla. 1st DCA 1985) (conclusions of law could be rejected by agency without specific findings); *Seiss v. Department of Health and Rehabilitative Services*, 468 So. 2d 478 (Fla. 2d DCA 1985); *Alles v. Department of Professional Regulation*, 423 So. 2d 624, 626 (Fla. 5th DCA 1982) (statute makes clear distinction between findings of fact and conclusions of law; Board may reject conclusions of law without limitation). When interpreting what was formerly codified at section 120.57(1)(b)10, Florida Statutes (1995), the Second District Court of Appeal stated:

> Essentially, the duties of a hearing officer assigned by DOAH following a proper request under section 120.57(1)(b)3 are twofold. First, the officer shall make findings of fact, based exclusively upon a record compiled at a full evidentiary hearing at which all parties shall have the opportunity to present evidence and conduct cross-examination. See §§ 120.57(1)(b)4,8, and 9, Fla. Stat. (1987). Such factual conclusions are generally binding upon the agency requesting the hearing, and may not be disregarded unless the agency finds them to be unsupported by competent, substantial evidence. Agency factfinding independent of and supplementary to DOAH proceedings has been specifically disapproved. Second, the hearing officer shall state his or her conclusions of law regarding the

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From the Chair

by Dave Watkins

The Administrative Law Section has long been a lightening rod for controversy. That is as it should be. Controversy is good, especially when it leads to productive change.

In my last column, I spoke of the Section's continuing efforts to promote diversity among its membership, particularly in the composition of the Executive Council. To a large extent, those efforts have been successful. Represented on the Council are lawyers who work for the government, as well as those who make their living litigating against the government. Obviously, from time to time these practitioners will have a different perspective on the limitations that should be placed on government, particularly state agencies, in the exercise of delegated legislative authority. These different perspectives naturally influence opinions about the role the Section should be taking in opposing or supporting proposed legislation.

Our Section currently has six legislative positions adopted by the membership of the Section and approved by the Florida Bar. They are:

1. Opposes any amendment to Chapter 120, Florida Statutes, or other legislation, that undermines the

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rule-making requirements of the Administrative Procedure Act by allowing statements of agency policy without formal rule-making. (As amended February 9, 2001)
2. Opposes any amendment to Chapter 120, Florida Statutes, or other legislation to deny, limit or restrict points of entry to administrative proceedings under Chapter 120, Florida Statutes, by substantially affected persons. (As amended February 9, 2001)
3. Opposes exemptions or exceptions to the Administrative Procedure Act, but otherwise supports a requirement that any exemption or exception be included within Chapter 120, Florida Statutes. (As amended February 9, 2001)
4. Supports voluntary use of mediation to resolve matters in administrative proceedings under Chapter 120, Florida Statutes, and supports confidentiality of discussions in mediation; but opposes mandatory mediation and opposes imposition of involuntary penalties associated with mediation.
5. Supports uniformity of procedures in administrative proceedings under Chapter 120, Florida Statutes, and supports modification of such procedures only through amendment of or exceptions to the Uniform Rules of Procedure.
6. Opposes amendment to Chapter 120, Florida Statutes, that limits, restricts, or penalizes full participation in the administrative process, in the absence of compelling justification or non-anecdotal evidence which demonstrates that the existing provisions of law are not adequately protecting the administrative due process rights of all participants.

The Section's Legislative Committee Co-Chairs, Bill Williams and Linda Rigot, monitor all proposed legislation that has the potential to impact not only Chapter 120, but substantive areas of administrative practice as well (environmental, health care, insurance, etc.). When such legislation is identified, Linda and Bill determine whether it is addressed by one of the Section's adopted positions, and if so, they make sure the Section's position is communicated. If a bill is not directly addressed by one of the positions, or if there is a question as to whether a position applies, a meeting of the Executive Council is called for the purpose of discussing the bill and voting on whether the Section should take a position on the bill. These meetings often generate spirited debate, which again, is a good thing.

Any Section member who is interested in a particular item of proposed legislation, or in the position being taken by the Section regarding a bill, is invited to contact me to discuss the matter. Better yet, I invite you to attend the next scheduled meeting of the Executive Council and share your thoughts (and perspective) with the entire Executive Council. Chances are at least one or two Council members will share your point of view, and who knows, maybe your insight will bring about some productive change.

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> *ultimate action* to be taken by the agency on the disputed matter. The hearing officer's conclusions, as opposed to factual determinations, come to the agency with no equivalent presumption of correctness. Instead, the final decision as to the applicable law rests with the agency, subject, of course, to judicial review.

Manasota 88, Inc. v. Tremor, 545 So. 2d 439, 441 (Fla. 2d DCA 1989) (citations omitted; emphasis supplied). As noted by the First District Court of Appeal in *Barfield v. Department of Health, Board of Dentistry*, 27 Fla. L. Weekly D24a (Fla. 1st DCA Dec. 19, 2001)[1], that is no longer the case. What is interesting about the *Barfield* decision, however, is not its result, but the circular route by which it was reached and the questions left unanswered.

Barfield applied to the Florida Board of Dentistry for a license as a dentist. Unfortunately for Dr. Barfield, he had difficulty passing Florida's dental exam. After his third attempt, he challenged his test score and requested a formal hearing pursuant to § 120.57(1), Fla. Stat.[2] The administrative law judge issued a recommended order with findings of fact indicating that as to one procedure for which the scoring was challenged, Barfield was accorded everything from a "0" to a "5," which is a perfect score. She found that Barfield properly performed the challenged procedures and should have been awarded full points on both procedures, which would have been sufficient to give him a passing score on the examination. Several of the factual findings clearly relied upon Barfield's testimony of what occurred during the examination, and the administrative law judge acknowledged as much, stating that as Barfield was licensed in California and Georgia, he testified both as to facts and to his opinion regarding his performance on the exam and the grade he received. Conversely, in the ALJ's view, the Department presented no competent evidence regarding the work performed by Barfield during the examination. With respect to the grading sheets, the administrative law judge stated:

> 16. Although the Department presented the testimony of two witnesses, neither of them was present when Petitioner took the examination and neither of them was, therefore, able to testify as to whether Petitioner properly performed the procedures. They simply testified as to how graders are selected and trained, how the examination is administered in general, and as to the contents of grade sheets and other grade documentation forms. Those documents, however, are hearsay and cannot form the basis for a finding of fact as to

> what happened during the examination. Section 120.57(1)(c), Florida Statutes. No grader who scored Petitioner's clinical examination testified as to what occurred or as to the accuracy of the scores assigned to Petitioner.

Barfield v. Department of Health, Board of Dentistry, DOAH Case No. 99-4052 (R.O. Jan. 2000).

The Department filed exceptions to both the findings of fact and conclusions of law. The final order, which is available on DOAH's website, indicates the Board granted the exceptions both to findings of fact and to conclusions of law. The Board acknowledged that its ability to reject or modify conclusions of law is limited to those over which it has substantive jurisdiction, and that it does not have substantive jurisdiction over the Evidence Code. It determined, however, that the "proceedings under which the Administrative Law Judge made the challenged findings of fact and conclusions of law did not comply with the essential requirements of law" because the ALJ had received the evidence regarding the grading sheets without objection regarding its admissibility, thus prejudicing the Department. The Board also stated:

> 8. The Board further finds that the Administrative Law Judge assigned an improper burden of proof to the Department. When an applicant challenges the grades he received on a professional licensing examination he must show by a preponderance of evidence that the grades in issue were arbitrarily or capriciously given by the examining agency. Absent some showing that the examining agency failed to follow standard procedures for grading the examination, or that the candidate was treated differently from other examination candidates, test results will not be disturbed. In the present case, the Petitioner did not carry his burden of proof. The Administrative Law Judge instead implicitly imposed on the Department the burden of disproving Petitioner's allegations by bringing in the actual examiners who examined Petitioner! No reported case has ever assigned such a burden of proof. . . .
>
> 9. The Board acknowledges that a rejection or modification of a conclusion of law may not form the basis for rejection or modification of a finding of fact. However, under the particular facts of this case, the failure to comply with essential requirements of law by ignoring competent substantial evidence after the fact under the guise of a conclusion of law permeates both the findings of fact and conclusions of law.

(Final Order, Board of Dentistry, March 2000).

On appeal, the First District found that the Board could not reject conclusions of law over which it did not have substantive jurisdiction and did not have the authority to reverse the administrative law judge's evidentiary conclusion regarding the grading sheets. In a surprising twist, however, the Court found that while the evidentiary ruling should have been addressed by way of an interlocutory appeal, the parties had fully briefed the issue and it was properly before the Court. It then reversed the administrative law judge's evidentiary ruling, and found the grading sheets to be within the business records exception to the hearsay rule. Rather than remand to the ALJ for consideration of the record in light of its determination that the grading sheets were admissible, the Court affirmed the Board's refusal to certify Barfield for licensure. There is no mention in the Court's opinion regarding the Board's treatment of the exceptions to findings of fact.

The opinion is rather amazing in three respects. First, the Court states that the 1996 amendments to the APA made no substantive changes to the provisions of the Administrative Procedure Act, citing the final Staff Analysis by the House of Representatives Committee on Streamlining Governmental Regulation, Fla. H.R. Comm. on Streamlining Govtl. Regs., CS/SB 2290 & 2288 (1996). Those familiar with the 1996 amendments will remember that the "technical rewrite" portion of Ch. 96-159, Laws of Florida, was supposed to be just that: a simplified redraft intended to make the APA easier to read without major substantive changes. However, other significant changes to the APA were included in the bill as a result of the work performed by the Administrative Law Commission created by the late Governor Chiles. See *Florida Administrative Practice*, §2.1 (6th ed. 2001); Rossi, "The 1996 Revised Florida Administrative Procedure Act: A Survey of Major Provisions Affecting Florida Agencies," 24 Fla.St.U.L.Rev.283, 289 (1997); Blanton and Rhodes, "Florida's Revised Administrative Procedure Act," Vol. 70, Fla. Bar J. No. 7, page 30 (July/August 1996). The 1996 amendments have been the subject of several appellate decisions. See, for example, *Florida Department of Business and Professional Regulation v. Investment Corp. Of Palm Beach*, 747 So. 2d 374 (Fla. 1999); *Chiles v. Division of Elections*,

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711 So. 2d 151 (Fla. 1st DCA 1998); *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*, 724 So. 2d 100 (Fla. 1st DCA 1998).

Whether the 1996 amendments were technical or substantive, the 1999 amendments left no doubt as to the limitation placed upon an agency's authority to address conclusions of law: as stated by the Court, the amendment to section 120.57(1)(l), Florida Statutes (1999), adding the provision "over which it has substantive jurisdiction" after the language forbidding agencies from rejecting or modifying conclusions of law "is a clear departure from earlier provisions of the statute which had delegated broad authority to administrative agencies' determinations on whether to accept conclusions of law in a recommended order."

Second, not only did the Court address the admissibility of the grading records, it seemed to find the evidence conclusive of the issues presented. In previous cases where a ruling on the admissibility of evidence has been reversed on appeal, the Court has remanded to the trier of fact to reconsider the record, or hold a new evidentiary proceeding, in light of its ruling. See, for example, *Department of Professional Regulation v. Wise*, 575 So. 2d 713 (Fla. 1st DCA 1991); *Lieberman v. Department of Professional Regulation*, 573 So. 2d 349 (Fla. 5th DCA 1991); *Miller v. Department of Environmental Regulation*, 504 So. 2d 1325 (Fla. 1st DCA 1987). Judge Allen's dissent advocates this approach as well. Here, the Court determined that not only were the grading sheets admissible, but apparently entitled to more weight than the testimony which the administrative law judge clearly found persuasive.[3] The Court states that because the grading sheets disclose that Barfield did not pass the clinical portion of the examination, he was not entitled to licensure. This conclusion, however, misses the point. The purpose of the section 120.57(1) hearing was to challenge that very conclusion by showing that the grades accorded were arbitrary or capricious. *Sate ex rel. Glasser v. Pepper*, 155 So. 2d 383 (Fla. 1st DCA 1963). By determining that the grading reports are conclusive, the right to challenge the examination results is illusory.

Finally, the Court considers but refuses to decide what remedy should be provided to agencies that disagree with conclusions of law made by administrative law judges that they are powerless to address. It states that section 120.68(1), Florida Statutes, implies that an aggrieved agency has the option to enter a final order "under protest" and then appeal from its own order, or to seek immediate judicial review from the ALJ's recommended order. The Court ultimately determines that it need not decide the issue and commends to the Legislature the adoption of a specific appellate remedy to deal with this thorny issue.

Which remedy is appropriate is, of course, open to speculation at this point. While neither remedy is perfect, at least this writer prefers granting the agency the right to appeal from the final order as opposed to forcing the agency to seek an interlocutory appeal. For reasons more practical than philosophical, this approach is more workable in terms of the time deadlines affected by an interlocutory appeal. Consider that once a recommended order is submitted to the agency, a final order must be rendered within ninety days. See section 120.569(2)(l)2., Fla. Stat. (2001). Exceptions, and any responses to exceptions, must be filed in fifteen and ten days, respectively. §120.57(1)(k), Fla. Stat.; Rule 28-106.217(2), F.A.C. For collegial bodies, notice of a public meeting at which such a case can be considered must be published in the Florida Administrative Weekly at least seven days prior to the meeting. §120.525(1), Fla. Stat. (2001). Rule 1S-1.003(1)(b), F.A.C., requires that proposed notices must be received for publication by noon on the Wednesday in the week preceding the Friday publication, i.e., at least nine days prior to publication, which, taken together, effectively requires at least sixteen days' prior notice. As a practical matter, most collegial bodies meet on a set schedule that varies from once a month to once a quarter.

Should an agency take an interlocutory appeal, the *petition* and appendix must be submitted to the Court within thirty days of the recommended order. See Rule 9.100(c), F.R.A.P. Unless and until a petition is filed and a stay issues pursuant to Rule 9.310(b)(2), the deadlines for the agency's consideration of the recommended order march on. At least with respect to collegial bodies, counsel for the agency would be placed in the posture of filing a petition on behalf of a client before the client knows about the decision much less authorizes the attorney to proceed, or effectively waiving the right for the client to proceed at all. While the agency may not ultimately decide that an appeal is necessary, the attorney would be hard pressed to take that chance. On the other side of the coin, a private litigant would be placed in the posture of defending a recommended order in two separate forums simultaneously. Allowing an agency to appeal from the final order, while not a perfect solution, would avoid some of the practical problems created by an interlocutory appeal, and perhaps result in fewer appeals being filed. Whatever your preference, the best part of the *Barfield* decision is the request that the Legislature settle the issue for us all.

Lisa "Li" Shearer Nelson *is Chair-Elect of the Administrative Law Section and a director of the Holtzman, Equels & Furia law firm in charge of its Tallahassee office. She most enjoys administrative and appellate practice and invites anyone holding a different view on the* Barfield *decision to submit their opinion for the next publication of the newsletter.*

Endnotes:

[1]Rehearing was denied on February 1, 2002.
[2]According to the recommended and final orders, Dr. Barfield appeared pro se during the administrative proceedings.
[3] Appellant's motion for rehearing specifically addressed the need for a remand.

APPELLATE CASE NOTES

by Mary F. Smallwood

Rule Challenges

Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc., 27 Fla L. Weekly 230 (Fla. 1st DCA, 2002)

In a consolidated appeal of several rule challenges filed on proposed or enacted rules of the Board of Medicine, the First District Court of Appeal upheld the validity of the challenged rules and addressed the appropriate standard of review by an administrative law judge in a rule challenge proceeding. The rule challenges involved three provisions of the rules. First, rule 64B8-9.009(4)(b) required that a physician performing level II office surgery have a transfer agreement with a licensed hospital within reasonable proximity of the office if the physician does not have staff privileges at such a hospital. Rule 64B8-9.009(6)(b), requiring that a physician performing level III office surgery have staff privileges at a hospital in proximity to the office, was also challenged by the Florida Academy of Cosmetic Surgery, Inc. (FACS) and two individual surgeons. Third, FACS, the individual physicians, and the Florida Association of Nurse Anesthetists (FANA) filed separate challenges to proposed rule 64B8-9.009(6)(b)1.a. The proposed rule would require physicians performing level III office surgery to have staff privileges at a licensed hospital, document compliance with certain training criteria, and have knowledge of the principles of general anesthesia. In addition, the proposed rule would require that the anesthesia provider either be an anesthesiologist or that an M.D., O.D., or anesthesiologist other than the surgeon provide direct supervision.

The First District addressed three significant issues on appeal: the standing of the FANA and the Florida Nurses Association (FNA) to petition for hearing or intervene in the proceedings; the validity of the rules under Section 120.52(8), Fla. Stat.; and the meaning of the term "competent substantial evidence" under Section 120.52(8)(f), Fla. Stat.

With respect to the standing of the FANA and FNA, the court affirmed the administrative law judge's determination that both associations had demonstrated standing. The court noted that it was not necessary for the associations to show that their members were regulated by the rules to demonstrate standing. Instead, it was sufficient that the rules had a "collateral financial impact" on the members' business interests. In this case, there was testimony at the hearing that a number of the regulated surgeons would no longer employ certified registered nurse anesthetists (CRNAs) because it would be unnecessary and cost prohibitive where another doctor was required to be present to supervise. The court noted that the CRNA statute did not require supervision to the extent of the proposed rule, requiring only that they be supervised by a licensed physician, osteopath, or dentist.

The court reversed the ALJ's determination, however, that the rules and proposed rule were invalid exercises of delegated legislative authority. In particular, the court concluded that Section 458.331(1)(v), Fla. Stat., provided sufficient authority for adoption of the challenged rules. That statute authorizes the Board to adopt "standards of practice and standards of care for particular practice settings." It further enumerates a number of areas that may be covered in setting such standards, including education and training and transfer agreements. The court held that office surgery was a "practice setting" and that the requirement that a physician have staff privileges was a standard of care or practice. In reaching this conclusion, the court rejected the ALJ's determination that this grant of authority was not specific enough. It held that the degree of specificity in the statutory grant of authority is irrelevant under Section 120.52(8)(b), citing *Southwest Florida Water Management District v. Save the Manatee Club*, 773 So. 2d 594 (Fla. 1st DCA 2000).

In addressing the issue of whether the rules met the requirements of Section 120.52(8)(f), providing that a rule must be supported by competent substantial evidence, the court first addressed the standard of review. It noted that the definition of competent substantial evidence in a rule challenge proceeding was a question of first impression. Citing *Florida Power & Light v. City of Dania*, 761 So. 2d 1089 (Fla. 2000), the court held that there are two possible meanings of the term. First, at the agency fact-finding level, competent substantial evidence refers to a standard of *proof*. However, at the appellate level, the term refers to a standard of *review*. The court then concluded that an administrative rule challenge proceeding under Chapter 120 is in the nature of "certiorari review in circuit court of quasi-judicial action by local governmental agencies," or essentially appellate in nature. Having reached this conclusion, the court determined that it was inappropriate for an ALJ to reweigh evidence before the agency in adopting the rules. Under this interpretation, the ALJ simply reviews the record of evidence before the agency to determine if it is supported by legally sufficient evidence. The court appeared to be persuaded by the Board's argument that its expertise should be weighed heavily in a rule challenge proceeding.

Licensing

Ryan v. Department of Business and Professional Regulation, 26 Fla. L. Weekly 2494 (Fla. 4th DCA 2001)

Robert Ryan was a licensed contractor and qualifying agent for Personalized Homes, Inc. (PHI). In February and September of 1993, Stephan Humphrey entered into contracts with PHI for construction of a personal residence. As a result of disputes over the construction,

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Humphrey filed suit in circuit court and sought recovery from the Construction Industries Recovery Fund. Ryan was not a party to the lawsuit and was not named in the recovery claim. The circuit court litigation was resolved by stipulation of the parties; the court entered a final judgment finding, inter alia, that Humphrey and PHI had entered into an agreement in September 1993 and that Ryan was the qualifying agent for PHI.

Initially, the Construction Industry Licensing Board denied Humphrey's request for recovery under the Fund, finding that the contract for services had been entered into in February 1993, prior to the July 1993 statutory eligibility date. Humphrey requested a formal administrative hearing, arguing that the contract dated from September 1993. At the scheduled final hearing, the parties indicated that they had reached a settlement and requested an abatement of the proceeding to allow the agreement to be reduced to writing and approved by the Board.

Although Ryan was not a party to the recovery action, the Board gave him notice on April 12 that the Board would meet on the 16th to rehear the recovery claim. Ryan's request for a continuance was denied, and he was advised to attend the hearing on his own behalf. At the Board hearing, which Ryan attended pro se, the Board voted to approve the settlement of $25,000 and to request that the administrative law judge relinquish jurisdiction to the Board for entry of a final order. The administrative law judge granted Ryan's motion to deny the Board's request to join him as a party and dismiss him from the proceeding. The administrative law judge also approved the Board's motion to relinquish jurisdiction.

At its September 15, 2000, meeting, the Board entered a final order vacating the original order of denial and approving the settlement agreement. By the terms of the order, Ryan's license was suspended and he was ordered to reimburse the Fund for the settlement amount.

On appeal, the Board conceded and the court agreed that Ryan had not received adequate notice under Chapter 120. Finding that the April decision of the Board was the basis of its subsequent decision in September to approve the settlement proposal, the court concluded that the four days' notice given to Ryan was not sufficient. The court noted that the administrative law judge had not relinquished jurisdiction to the Board prior to the April 12th meeting. Accordingly, pursuant to Section 120.569(2)(a), Fla. Stat., the Board had no authority to act on the matter. The matter was remanded to the Board for a formal administrative hearing.

Pinehurst Convalescent Center v. Agency for Health Care Administration, 26 Fla. L. Weekly 2766 (Fla. 4th DCA 2001)

Pinehurst appealed a final order of the Agency for Health Care Administration that imposed a penalty for a Class II deficiency, arguing that AHCA failed to provide a written notice of the deficiencies with a specified time for correcting the problems. Pinehurst noted that Section 400.23(9)(b), Fla. Stat., provided that no penalty would be assessed for a Class II deficiency if the situation is corrected within the time specified in the citation. In its final order, AHCA held that a verbal notice given to Pinehurst was adequate to meet the statutory requirements.

On appeal, the court reversed. In view of the statutory provisions requiring that a citation indicate on its face the classification of the deficiency and specify a time-frame for correcting the deficiency, the court held that a written notice was required.

Raimi v. Department of Business and Professional Regulation, 26 Fla. L. Weekly 2675 (Fla. 1st DCA 2001)

Raimi appealed the action of the Construction Industry Licensing Board lifting its stay of a suspension of Raimi's license. Raimi and the Board had previously entered into a consent agreement requiring Raimi to make restitution to the victims in monthly payments. The agreement further provided for suspension of Raimi's license but stayed the effect of that suspension for seven years so long as Raimi made timely payments.

Subsequently, Raimi paid the required restitution in a lump-sum payment which was intended to obtain his release from a criminal probation that had resulted from the same set of facts. The Board found that the lump-sum payment was not consistent with the intent of the consent agreement and lifted the stay of the license suspension.

On appeal the court reversed and remanded. It held that the consent agreement was ambiguous on its face since it did not specifically address the effect of a lump-sum payment on the license suspension. On remand, the court directed the Board to determine factually the parties' intent in this regard, taking into consideration the proffered testimony of former counsel for the Department who had drafted the agreement.

Mayes v. Department of Children and Family Services, 26 Fla. L. Weekly 2905 (Fla. 1st DCA 2001)

The Mayes appealed the denial of their request for a foster home license by the Department following a formal administrative proceeding. The Mayes had three foster children under their care while living in West Palm Beach and sought a license when they wished to relocate to Marianna. The Administrative Law Judge and the Department found that the Mayes had violated Section 409.175(8)(b)1, by engaging in an "intentional or negligent act materially affecting the health or safety of children in the home." Specifically, the ALJ found that Mrs. Mayes on two occasions had used a harness to control a two-year old foster child who was extremely active and had, on two occasions, locked the door to his bedroom for a brief time while he was asleep. While the evidence indicated that she was attempting to prevent injuries to the child, the Department concluded that she knew or should have known that the actions "could have" materially affected the child's health or safety.

The court reversed and remanded. The court held that the statute did not specifically identify locking the

bedroom door or use of a harness as a prohibited act. While the court agreed with the Department that the statute did not have to anticipate and prohibit every possible prohibited act, it held that the ALJ must make specific findings as to how the particular acts constituted a violation of the statute.

Adjudicatory Proceedings

Miller v. State of Florida, Division of Retirement, 26 Fla. L. Weekly 2315 (Fla. 1st DCA 2001)

Miller appealed the denial of his petition for in-the-line-of-duty disability retirement benefits. At the hearing on his petition before the State Retirement Commission, the Division presented, inter alia, the deposition testimony of Dr. Waldman to support its position. Miller raised no objection to the deposition testimony at the hearing. Miller moved for reconsideration, but that motion was denied by the Chairman of the Commission.

On appeal, Miller argued that Dr. Waldman's deposition was not competent substantial evidence as he had never examined or treated Miller. In making this argument, Miller relied on the state workers' compensation law and federal social security disability cases governing the use of medical testimony and evidence.

The court affirmed the decision below. Judge Benton noted that the controlling provisions of law were the Florida Retirement System Act and Chapter 120, Fla. Stat. Under Section 120.57(1)(c), any evidence "admissible over objection in civil actions" may support a finding of fact. In this case, Miller had failed to object to the deposition on the grounds of hearsay at the hearing below.

With respect to the motion for reconsideration, the court found no error in the action of the Chairman in ruling on the motion. First, the court noted that the Commission's rules do not provide for the filing of a motion for reconsideration. However, since the order of the Commission had not been reduced to writing, the court did not reject the request on that basis. Instead, it rejected Miller's argument that the Chair could not act alone in ruling on the motion since he was the presiding officer under Rule 28-106.102, Fla. Admin. Code.

McGann v. Florida Elections Commission, 26 Fla. L. Weekly 2630 (Fla. 1st DCA 2001)

McGann sought a formal administrative hearing challenging a probable cause order that alleged multiple violations of the elections code. The Administrative Law Judge entered a recommended order finding that only one of the violations was willful. However, upon review of the recommended order, the Commission cast the findings of fact with regard to willfulness as conclusions of law and modified the ALJ's determination. The Commission concluded that the violations were willful as a matter of law, applying a statute that had been enacted after the occurrence of the acts in question.

On appeal, the court reversed. The court held that the Commission had erroneously characterized the findings as conclusions of law. Judge Benton opined that a determination of willfulness is a question of fact. Moreover, the court held that the Commission acted illegally in applying the new statutory provisions *ex post facto* to authorize sanctions for actions occurring before the statute was enacted. Finally, the court reversed the Commission's action in penalizing McGann six times for actions alleged in a single count of the probable cause order. The order had alleged that McGann failed to report multiple contributions. The court held that the Commission should have set each alleged failure to report in a separate count if it intended to seek a penalty for each alleged violation.

Department of Highway Safety and Motor Vehicles v. Stevens, 26 Fla. L. Weekly 2565 (Fla. 5th DCA 2001)

Stevens' driver's license was suspended for driving with an unlawful blood alcohol level, and he requested a "formal review" pursuant to Section 322.2615(6), Fla. Stat. A hearing officer conducted a formal review, and determined that the preponderance of the evidence supported the suspension, rejecting Steven's argument that the individual who had inspected the breathalyzer did not have a valid inspector's license.

On petition for certiorari review, the circuit court reversed the suspension. It held that the inspector was not properly qualified to conduct the instrument inspections because he had not received sufficient hours of training under the Department's rules. The Department appealed.

The District Court affirmed the lower tribunal. On appeal, the Department argued that the circuit court had applied an incorrect rule in determining that the inspector was insufficiently qualified. It contended that the inspector had been licensed previously under a different rule and that he was simply renewing his certification. The Department also argued that the hearing officer's determination that the inspector was qualified was supported by competent substantial evidence and could not be overturned.

The District Court rejected both of the Department's arguments. First, it found that the Department had not presented any evidence at the hearing that the inspector had been licensed previously under a different rule. Second, it held that the determination of the hearing officer that the inspector was validly licensed was a legal conclusion that could be rejected by the circuit court.

Ross v. City of Tarpon Springs, 27 Fla. L. Weekly 55 (Fla. 2d DCA 2001)

Ross appealed a final order of the Department of Environmental Protection dismissing his petition for failure to comply with discovery requests. Ross had received only telephonic notice of the hearing before the Administrative Law Judge one day before the hearing. The Department argued that written notice of the hearing was not required under Rule 28-106.208, Fla. Admin. Code, because there were no disputed issues of fact.

The court reversed. It held that an evidentiary hearing is required on a request for sanctions for failure to comply with a discovery request to determine whether the violations were willful or in bad faith. Accordingly, notice of the hearing must be served on all parties.

Appeals

Florida Chapter of the Sierra Club v.

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Suwannee American Cement Company, Inc., 27 Fla. L. Weekly 100 (Fla. 1st DCA 2001)

In the proceeding below, the Florida Chapter of the Sierra Club and Save Our Suwannee, Inc. had sought an administrative hearing on the issuance of a permit to the Suwannee American Cement Company to construct a cement manufacturing plant. Initially, the Department of Environmental Protection proposed to deny the permit. However, during the course of the proceedings, the Department reversed its position and supported issuance of the permit.

Save Our Suwannee filed its petition for hearing under Section 403.412, Fla. Stat., which has been construed to allow any citizen of the State to seek an administrative hearing without a demonstration that his substantial interests are affected. On the other hand, The Sierra Club alleged that its substantial interests were affected by issuance of the permit, alleging that its individual members used the Suwannee River.

After entry of a final order by the Department granting the permit, Save Our Suwannee and The Sierra Club appealed to the First District. Suwannee American moved to dismiss the appeal on the grounds that the environmental organizations lacked standing under Section 120.68, Fla. Stat. The court dismissed the appeal.

The court held that the environmental groups were not adversely affected parties under Section 120.68. Specifically, the court relied on *Legal Environmental Assistance Foundation v. Clark*, 668 So. 2d 982 (Fla. 1996), which held that a public interest advocacy group's allegations that its members' use and enjoyment of the State's natural resources would be affected was not sufficient to demonstrate that the advocacy group's interests would be adversely affected. The court found the *LEAF* decision to be consistent with the U.S. Supreme Court's holding in *Sierra Club v. Morton*, 405 U.S. 727 (1972), that a general interest in environmental issues was not sufficient to establish standing.

With respect to Save Our Suwannee, the court stated that the fact that the group had standing to participate in an *de novo* administrative proceeding challenging the agency's permitting decision did not automatically give it standing to appeal the final order from that proceeding. Clearly, this decision substantially negates the efficacy of Section 403.412, Fla. Stat., as a vehicle to establish standing in a Section 120.57 proceeding.

With respect to The Sierra Club, the court held that the group's failure to provide any facts demonstrating that any individual member of the club was adversely affected deprived it of standing under Section 120.68 to appeal. The court rejected the reasoning in *Challancin v. Florida Land and Water Adjudicatory Comm'n*, 515 So. 2d 1288 (Fla. 4th DCA 1987), in which the Fourth District found that the Audubon Society had standing because those organizations' "raison d'etre" was environmental preservation. The court concluded that *Challancin* had been overruled *sub silencio* by the *LEAF* decision.

Statutory Constitutionality

Accelerated Benefits Corporation v. Department of Insurance, 26 Fla. L. Weekly 2906 (Fla. 1st DCA 2001)

Accelerated Benefits Corporation (ABC) appealed a final order of the Department of Insurance revoking its license to act as a viatical settlement provider. Viatical settlement providers market the right to receive proceeds under a life insurance policy for a terminally ill policyholder. The Department alleged that ABC was in violation of Section 626.989(6), Fla. Stat., for failing to report a fraudulent insurance act. Following an administrative hearing on the allegations, the Administrative Law Judge found that ABC must have had knowledge that certain policyholders whom it represented had provided false information regarding their health to the insurance companies to obtain life insurance. The ALJ concluded that failure to report these misrepresentations to the Department was a violation of the statute.

On appeal, ABC challenged the constitutionality of Section 626.989(6), arguing that it was too vague on its face in that it required ABC to divine the intent of the policyholder to defraud the insurance company.

On appeal, the court affirmed the final order of revocation. Relying on *Goin v. Commission on Ethics*, 658 So. 2d 1131 (Fla. 1st DCA 1995), the court held that ABC had the opportunity in the administrative hearing to demonstrate that it did not have the requisite knowledge. In fact, it found Section 626.989(6) to be even more narrowly drawn than the ethics provision in *Goin* in that it required actual knowledge as opposed to constructive knowledge.

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

Administrative Law Section Executive Council Meeting and Long Range Planning Retreat – October 12, 2001

Minutes

I. Call to Order: The meeting at Melhana Plantation was called to order at 9:05 a.m. by Executive Council Chair Dave Watkins.

Present: Li Nelson, Dan Stengle, Mary Smallwood, Booter Imhof, Charlie Stampelos, Paul Rowell, Debby Kearney, Bill Williams, Linda Rigot, Allen Grossman, Catherine Lannon, Donna Blanton, Christiana Moore, and Andy Bertron.

Absent: Robert Downie, Seann Frazier, Clark Jennings, Ralph DeMeo, and Elizabeth McArthur.

II. Preliminary Matters

A. The minutes of the June 22, 2001, meeting were approved following one correction.

B. The Treasurer's report was given by Jackie Werndli, who reported that the Section is in sound financial condition.

C. Chair Dave Watkins gave a brief report noting that the Executive Council must participate in preparing The Florida Bar's strategic plan, which addresses accomplishments and goals of each Bar section.

III. Committee Reports

A. Dan Stengle and Li Nelson gave the CLE Committee report in the absence of CLE Chair Ralph A. DeMeo. They discussed plans for a half-day CLE program in January 2002 that will include presentations on exceptions to the Uniform Rules of Procedure; ethics involved in administrative practice; points of entry into the administrative process; the Election 2000 controversy as a Florida APA case; and election of remedies. The Pat Dore Conference, which will be held later in 2002, also was generally discussed.

B. Charlie Stampelos and Debby Kearney gave the Publications Committee Report. Discussions were held concerning ways to encourage Section members to write articles for the Newsletter and the Bar *Journal*. The Council agreed it would be a good idea to compile a list of possible topics that could be published in the Newsletter.

C. Bill Williams and Linda Rigot gave the Legislative Committee report. They noted that the Bar has asked for Executive Council comments on House Joint Resolution 1, which addresses jurisdiction of the Florida Supreme Court and the District Courts of Appeal. The Council agreed that Bill Williams should attend a "legislative summit" that has been scheduled by the Bar.

Discussions were held concerning bills relating to administrative procedure that are expected to be proposed in the 2002 legislative session. It was agreed that Bill Williams and Linda Rigot would work with the authors of the legislation.

Discussions also were held concerning a proposed rewrite of chapter 287, Florida Statutes, and the possible impact on the ability to bring and litigate bid protests. It was agreed that all interested Executive Council members should review and comment on proposed legislation that impacts administrative practice.

D. No one was present to give the report for the Public Utilities Law Committee. Jackie Werndli said she had talked with Committee Chair Joe McGlothlin, who said he was planning a CLE program.

E. Booter Imhof gave the report of the Membership Committee. He said the Section now has 1,136 dues-paying members. It was agreed that a Membership Brochure would be sent to former members who did not renew their Section membership. Discussion also was had concerning whether to structure CLE registration fees so that Section members receive a discount.

F. No one was present to discuss the Law School/Student Writing contest. Dave Watkins said he would talk with Seann Frazier about the status of the project.

G. Cathy Lannon gave the report of the Council of Sections. She said the council had been quiet recently and there was little to report.

IV. Old Business: None.

continued...

MINUTES
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V. New Business

Bob Fingar of the Environmental and Land Use Section had inquired whether the Administrative Law Section would work with the Environmental section on joint projects. It was unanimously agreed that the Section would do so.

Long Range Planning Retreat

I. Introduction

Retreat Chair Li Nelson called the meeting to order.

II.Retreat Topics

A. Legislative Positions. The Executive Council discussed each of the Section's legislative positions. It was agreed that no changes to any of the positions would be recommended at the current time. All positions were approved for the Bar's Legislative Biennium, which runs from June 2000-June 2002. The Council agreed that all six positions would be re-evaluated in June 2002.

B. Review of Minutes from September 29, 2000, retreat. The Council discussed several issues that were raised in the previous year's retreat, including increasing the involvement of agency lawyers in the Section and whether the Uniform Rules of Procedure need to be revised. It was agreed that Debby Kearney would contact the group of agency general counsels to determine if their lawyers would be interested in presentations by the Section on various administrative law issues. The Council agreed that any proposed changes to the Uniform Rules should be reported to Dan Stengle by April 1, 2002. Finally, the Council agreed that it would continue to explore improvements to the Section's website.

C. Breakout Roundtable Discussions

1. CLE/Pat Dore Conference. It was generally agreed that the 2002 Pat Dore Conference would be a "back to basics" approach to the APA, with an emphasis on explaining why the APA was enacted in the mid-1970s and how it has changed since that time. Speakers with different perspectives on the APA should be invited, the Council agreed. Bill Williams and Li Nelson agreed to coordinate planning for the conference.

2. Publications. Charlie Stampelos said he would work with Newsletter Editor Elizabeth McArthur to determine how to attract additional articles for the Newsletter and the Bar *Journal*. The Council agreed that the articles should be even-handed and informative.

3. Writing Contest. Section members with ideas for contest topics should contact Debby Kearney or Sean Frazier.

4. The Council worked on the Section's response to the Bar's Strategic Plan.

III. Adjournment. The retreat was adjourned at 2:50 p.m.

Respectfully submitted,

Donna E. Blanton
Secretary

Please share this with a colleague

ADMINISTRATIVE LAW SECTION
MEMBERSHIP APPLICATION

This is a special invitation for you to become a member of the Administrative Law Section of The Florida Bar. Membership in this section will provide you with interesting and informative ideas. It will help keep you informed on new developments in the field of Administrative Law. As a section member you will meet with lawyers sharing similar interests and problems and work with them in forwarding the public and professional needs of the Bar.

To join, make your check payable to "THE FLORIDA BAR" and return your check in the amount of $20 and this completed application card to ADMINISTRATIVE LAW SECTION, THE FLORIDA BAR, 650 APALACHEE PARKWAY, TALLAHASSEE, FL 32399-2300.

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Note: The Florida Bar dues structure does not provide for prorated dues. Your Section dues covers the period from July 1 to June 30.

THE FLORIDA BAR
APPLICATION FOR AFFILIATE MEMBERSHIP
ADMINISTRATIVE LAW SECTION

Affiliate membership in the Administrative Law Section is open to members of administrative boards, agency staff, law students, legal assistants, members of the legislature and legislative staff, and other administrative personnel. This membership will help keep you up to date in administrative law and processes.

NAME: _____

FIRM NAME: _____

OFFICE ADDRESS: _____

CITY/STATE/ ZIP CODE: _____

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PROFESSIONAL SPECIALTY(IES): _____

WHAT AGENCIES DO YOU PRIMARILY WORK WITH? _____

_____

_____

WHAT LEGAL AREAS ARE YOU MOST INTERESTED IN? _____

_____

_____

FROM THE STANDPOINT OF YOUR PROFESSION, WHAT ISSUES INVOLVED IN ADMINISTRATIVE LAW AND PROCEDURE AND STATE AGENCY PRACTICE ARE MOST IMPORTANT? _____

_____

_____

I understand that all privileges accorded to members of the section are accorded affiliates, except that affiliates may not advertise their status in any way, nor vote, or hold office in the Section or participate in the selection of Executive Council members or officers.

SIGNATURE: _____ DATE: _____

Note:Membership dues are $25.00 (Law Students - $20.00). Membership in the section will expire June 30. The Florida Bar dues structure does not provide for prorated dues. To be considered for affiliate membership,

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