Administrative Law Section Newsletter

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From the Chair

by Donna E. Blanton

The Administrative Law Section Executive Council's review of the Uniform Rules of Procedure is underway. Originally adopted in 1997 by the Administration Commission, most of the uniform rules have not been revised since then.

Mandated by section 120.54(5), Florida Statutes, and found in chapter 28 of the Florida Administrative Code, the uniform rules serve as the procedural rules for every state agency unless the Administration Commission has granted an agency a specific exception. The requirement that a set of uniform rules be adopted was part of the 1996 rewrite of chapter 120. The uniform rules replaced agency-specific procedural rules scattered throughout the Florida Administrative Code, as well as the old Model Rules of Procedure.

The purpose of requiring uniform rules was to establish one set of procedural rules that everyone could find and follow. Before 1996, agencies had the option of adopting their own procedural rules or using the model rules. Thus, procedural requirements varied widely from agency to agency, and the multitude of rules was considered both confusing and a potential trap for those who do not often practice state administrative law.

The Executive Council has been talking for two years about undertaking a review of the uniform rules, with hopes that any recommended changes will be considered for adoption by the Governor and Cabinet sitting as the Administration Commission. In the late summer of 2003, Chris Moore, an attorney at the Public Service Commission and member of the Executive Council, convened a committee that has been discussing the rules and whether changes should be recommended.

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Section 57.105 Attorney's Fees in Administrative Litigation

by Seann M. Frazier

Litigators in administrative proceedings have long had a variety of means by which they might seek attorney's fees from opposing parties and their counsel. Most of these were found in the Administrative Procedure Act, at Chapter 120 of the Florida Statutes.[1] Litigators in courts of general jurisdiction have often turned to a different chapter of the Florida Statutes for authority to seek fees in those forums, Chapter 57, Florida Statutes. Now, however, recent legislative amendments to Section 57.105 not only have made that statute an avenue for seeking fees in administrative proceedings, but have also changed the standard for the award of fees under that section.

Many of the actions which might lead to an award of fees, the filing of unwarranted papers and even a party's entire position in a case, are now compensable both under Chapter 120 and Chapter 57. Thus, administrative litigators now have a choice of statutes under which they may seek attorney's fees. This article will briefly review those choices and note a recent First District Court of Appeal case which raises an uncertainty about what standards should apply

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to recent amendments to Section 57.105.

Attorney's Fees under Chapter 120

Most of the means by which attorney's fees may be awarded under the Administrative Procedure Act are found within Section 120.595, Florida Statutes.[2] This section sets out to what extent attorney's fees may be made available when challenging proposed, existing or unadopted rules,[3] and when challenging another's participation in a hearing for an "improper purpose." Additionally, Section 120.569(2)(e) allows for attorney's fees to sanction the filing of papers for an "improper purpose," such as "to harass, or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation."

Except for in rule challenge proceedings, most awards of fees under Chapter 120 require a showing of an "improper purpose." Some have commented that this standard has not been frequently met in administrative proceedings, making the sanction of fees difficult to obtain.

Attorney's Fees under Chapter 57

Section 57.105 has long been a source of authority for attorney's fees in general civil litigation. For many years, this section allowed for an award of attorney's fees to a prevailing party whenever a court found "a complete absence of a justiciable issue of either law or fact,"[4] another difficult standard to meet.[5] However, in 1999, the Florida Legislature amended the standard for awarding fees under this section.[6]

The statute now provides for attorney's fees to the prevailing party in equal parts from the losing party and the losing party's attorney[7] on any claim or defense which the court finds the losing party or their attorney "knew or should have known" was "not supported by the material facts" or "the application of then-existing law to those material facts."[8] The Legislature also revised Section 57.105 to allow for the award of fees when an action was taken "for the primary purpose of unreasonable delay."[9] These new standards liberalized the award of fees. A showing of a "complete absence" of justiciable issue is no longer necessary to win fees. Now, under the new language of the statute, a party must only show that his opposition "should have known" that their position was not supported by the law or by the facts.

In 2003, the Legislature amended Section 57.105 in order to explicitly make all of the section's methods of fee recovery available in administrative proceedings.[10] Thus, administrative litigators now have a new avenue by which they may seek an award of attorney's fees. This new option raises a strategic decision when seeking fees: whether to pursue the award pursuant to Chapter 57 or pursuant to Chapter 120, or both.

At first glance, the decision seems an easy one. Fees sought under Chapter 120 generally require a showing of an improper purpose. Fees sought under Section 57.105 only require that a court find that the unsuccessful party should have known they were going to lose based on the law or facts.[11] Section 57.105 seems the much easier standard to meet. However, recent interpretations of the amended Section 57.105 have called into question just how liberally the courts will apply this new law.

What Standards Truly Apply to Awards under Section 57.105?

Florida courts have acknowledged that the revisions to Section 57.105 were made as a part of the 1999 Tort Reform Act and were intended generally to reduce "frivolous" litigation and reduce the ultimate costs of employing the civil justice system.[12] Some of the earliest decisions applied the letter of the law and awarded fees when a position was taken without support in fact or law. However, one decision offered what it termed a "cautionary note" about the application of the newly liberalized standard for attorney's fees under Section 57.105:

> The courts must apply Section 57.105, Florida Statutes (1999) carefully to ensure that it serves the purpose for which it was intended. If an order dismissing a claim or striking a defense routinely leads to a motion for attorneys' fees, the point of the statute would be subverted and, in the end, it might even have the reverse effect of making civil litigation more expensive.

See Bridgestone/Firestone, Inc. v. Herron 828 So. 2d 414, 419 (Fla. 1st DCA 2002).

In the *Bridgestone/Firestone* decision, the court did not suggest how future courts should distinguish between actions truly deserving of the sanction of attorney's fees from other "routine" cases which are not. Later courts seized upon the term "frivolous," once used to describe the purpose of the 1999 Tort Reform Act (to describe the types of suits it was generally intended to discourage) and appear to have made that – "frivolousness" – a new test of whether fees should be imposed under Section 57.105.

In *Wendy's of NE. Florida, Inc. v. Vandergriff*, No. 1D02-2284, 2003 WL 22714995 (Fla. 1st DCA Sept. 19, 2003), a customer brought a slip and fall case against a restaurant franchisor and its insurer. Following summary judgment dismissing some of the plaintiff's claims, the lower court granted a motion for attorney's fees based upon Section 57.105. The First District Court of Appeal reversed that holding and supplied a detailed analysis of the standard it would apply to award fees.

The court in *Wendy's* acknowledged the prior decision in *Bridgestone/Firestone* but placed particular significance on the *Bridgestone/Firestone's* admonition that not every lost case is deserving of the sanction of fees. It summarized that caution is needed in order to have Section 57.105 meet the purpose for which it was intended, "to deter frivolous pleadings."[13]

The *Wendy's* decision goes on to analyze how "frivolousness is determined" and cites to another court's analysis of the award of fees under Section 57.105.[14] However, that authority appears to be interpreting a prior version of Section 57.105, which called for a determination of a complete absence of a justiciable issue of law or fact, the so-called "frivolous"

standard.[15] Thus, the *Wendy's* decision may signal a new use of a "frivolousness" test in addition to the language of Section 57.105, which makes no mention of the word "frivolous."

The *Wendy's* decision is not yet final,[16] but if it becomes precedent, fees under Section 57.105 may now require a showing that an action is "frivolous" as well as lacking a basis in fact or law. If that is the case, how different is that relief from the requirement to show an "improper purpose" under the attorney's fees provisions in Chapter 120?

It remains to be seen what standard will be used by the courts and administrative tribunals in Florida. Thus far, only one administrative decision has awarded fees based upon the recent amendments to Section 57.105. In *Alcegueire v. EMC Mortgage Corp*., DOAH No. 03-2153, 2003 WL 22996931 (Rec. Order, Fla. Div. Admin. Hrgs., Dec. 17, 2003), a petitioner brought highly charged allegations in the context of an alleged violation of the Fair Housing Act. The ALJ found the allegations totally unsubstantiated and imposed fees.[17] The fees were imposed after a straightforward recitation of the law as revised in Section 57.105. The petitioner failed to establish that its position was warranted either based on the facts or the law. This decision, like the one in *Wendy's,* is not yet final.[18]

Conclusion

Practitioners seeking an award of fees may be encouraged by the recent amendments to Section 57.105, Florida Statutes. On their face, they appear to offer a more liberal method of winning fees than those typically available through Chapter 120 remedies. However, we must all monitor decisions from Florida's appellate courts and administrative tribunals in order to determine whether what appears to be a liberal standard will or will not be interpreted conservatively.

Endnotes:

[1] A notable exception is found at Section 57.111, Florida Statutes, which awards fees in administrative litigation to prevailing small business owners forced to participate in administrative litigation due to actions of a state agency. *See* §57.111(4), Fla. Stat. (2003).

[2] Attorney's fees are also available for papers filed for an improper purpose pursuant to Section 120.569(2)(e), Florida Statutes, and, as discussed *infra*, in Sections 57.105 and 57.111, Florida Statutes.

[3] *See* §120.595(2), (3) and (4), Fla. Stat. (2003). The section also addresses the award of fees in appeals. *See* § 120.595(5), Fla. Stat.

[4] *See* §57.105(1), Fla. Stat. (1995).

[5] Others have commented that the former standard for awarding fees "made it the rare case when sanctions were imposed." *See* Gary S. Gaffney and Scott A. Mager*, Section 57.105's New Look*, 76 Fla. Bar J. 8 (April 2002) which also provides an excellent, comprehensive review of the revisions to Section 57.105. *See also* John P. Fenner, *New §57.105 Lawyer Sanctions, Our Ethics and the Florida Constitution*, 77 Fla. Bar J. 26 (May 2003).

[6] *See* Ch. 99-225, s. 4, Laws of Fla. The law was further amended in 2002 to allow for a 21 day waiting period before a motion for fees may be filed. *See* Ch. 2002-77, s. 1, Laws of Fla., adding §57.105(4), Fla. Stat.

[7] An exception exists for agency counsel. If the losing party is an agency, the agency shall pay all awarded fees. *See* §57.105(5), Fla. Stat. (2003).

[8] *See* § 57.105(1)(a) and (b), Fla. Stat. (1999).

[9] *See* § 57.105(3), Fla. Stat. (1999).

[10] *See* Ch. 2003-94, s. 9, Laws of Fla.

[11] Fees are also available if the action or filing had the purpose of unreasonable delay. *See* §57.105(3), Fla. Stat. (2003).

[12] *See Bridgestone/Firestone, Inc. v. Herron* 828 So. 2d 414, 417 (Fla. 1st DCA 2002), citing Ch. 99-225, s. 4, Laws of Fla.

[13] *See Wendy's*, 2003 WL 22714995, at p. 2.

[14] *See Wendy's*, 2003 WL 22714995, at p. 3.; citing to *Weatherby Assocs., Inc. v. Ballack*, 783 So. 2d 1138, 1142 (Fla. 4th DCA 2001).

[15] *See Weatherby Associates, Inc. v. Ballack*, 783 So. 2d 1138, 1140, 1141 (Fla. 4th DCA 2001), which cites to the 1999 version of Section 57.105, Florida Statutes, but recites a "total or absolute lack of justiciable issues" standard of previous versions of that statute.

[16] As of the date of this article's submission, a motion for rehearing *en banc* was pending.

[17] *See Id.*, at p. 5, 6.

[18] Though this decision is made within a recommended order that has yet to undergo agency review before issuance of a final order, a decision by an ALJ awarding attorney's fees is a "final order" if the award is made pursuant to Section 57.105, Fla. Stat. *See* §57.105, Fla. Stat. This highlights a distinction between fees awarded under Section 57.105 and fees awarded pursuant to Section 120.595(1), which calls for an ALJ to make a determination of whether a party participated for an improper purpose, and reserves the authority to award fees to an agency in its final order. Less clear is whether the agency's input is required to impose fees under Section 120.569(2)(e), which simply directs the presiding officer to impose sanctions. Presumably, no further action is required by an agency to confirm such sanctions.

Seann M. Frazier *is a shareholder with the law firm of Greenberg Traurig, P.A., practicing administrative litigation in the firm's Tallahassee office. He received his J.D. and undergraduate degrees from the University of Florida. Comments and questions are welcomed at* fraziers@gtlaw.com.

APPELLATE CASE NOTES

by Mary F. Smallwood

Adjudicatory Proceedings

Golfview Nursing Home v. Agency for Health Care Administration, 28 Fla. L. Weekly 2707 (Fla. 1st DCA 2003)

Golfview appealed two final orders of the Agency for Health Care Administration, one finding Golfview in violation of certain regulatory requirements with respect to the temperature of water in the facility and the second imposing conditional licensure on the facility. Both of these proceedings arose from the same alleged violations identified during an annual survey.

Golfview disputed the factual basis for the alleged violations by challenging an administrative complaint filed by AHCA seeking the imposition of monetary penalties. The petitioner was represented by counsel in that proceeding and requested a formal administrative hearing. While the enforcement proceeding was pending, AHCA sent Golfview a notice of its intent to impose conditional licensure on the facility, with an election of rights form. The notice was sent to the administrator of the facility but was not copied to Golfview's counsel in the enforcement proceeding. The administrator, apparently without seeking advice of counsel, chose to waive Golfview's right to contest the factual allegations in the notice. On that basis, AHCA entered a final order imposing conditional licensure.

Following the formal administrative proceeding in the enforcement action, the administrative law judge issued a recommended order finding no clear and convincing evidence of the alleged violations and recommending that no penalty be assessed. AHCA entered a final order in that proceeding adopting the administrative law judge's recommendations, except that it found that Golfview had admitted the alleged violations.

Counsel for Golfview appealed the order in the enforcement action and initially filed a motion to vacate the final order of conditional licensure on the grounds that the licensing action was based on the same facts that were being contested in the enforcement action. That motion was subsequently abandoned when Golfview filed an appeal of the final order of conditional licensure. On appeal, Golfview contended that the fairness of the proceeding had been impaired because Golfview's counsel was not served with notice of the proposed licensing action.

On appeal, counsel for AHCA agreed that the findings of admissions by Golfview in the final order in the enforcement action were not supported by the record in that proceeding. Accordingly, the court remanded that matter to AHCA for entry of a final order adopting the recommended order. However, in the licensing case, AHCA argued that there were two entirely separate proceedings, noting the different standards of proof involved, and that it did not have any notice that Golfview was represented by counsel in the licensing proceeding.

Despite AHCA's arguments that the enforcement and licensing actions were separate, the court held that the proceedings were indistinguishable. It reached this conclusion on the grounds that the underlying factual basis for both actions was identical. Moreover, the court rejected AHCA's argument that it did not have to send notice of the licensing action to Golfview's counsel of record in the enforcement proceeding. The court noted that AHCA's own counsel had received notice of both the complaint and the licensing action. Relying on Section 120.60(3), Fla. Stat., the court concluded that AHCA was required to send the notice of the licensing action to the licensee's attorney of record. That two different results were reached in the final orders was held to be evidence that the fairness of the proceedings had been impaired.

Timeliness

Patz v. Department of Health, 29 Fla. L. Weekly 60 (Fla. 3rd DCA 2003)

Patz appealed from a final order of the Board of Medicine granting a motion for default by the Department of Health and imposing sanctions. Patz received an administrative complaint from the Department on December 10, 2002, advising him that he must file an election of rights form within 21 days of receipt or waive his right to a formal hearing on the charges. He did not request a hearing until February 12, 2003.

Relying on Rule 1.500, Fla. R. Civ. P., Patz argued that he should not be held in default as he had not unduly delayed filing and no hearing on the motion for default had been held.

The court affirmed the final order. It noted that the situation was governed by Rule 28-106.111, Fla. Admin. Code, not the Rules of Civil Procedure. The court concluded that the amendment of the Administrative Procedure Act in 1998 providing that a petition for hearing shall be dismissed if a timely petition is not filed overruled prior cases that allowed untimely filings where there was excusable neglect. The court further expressed the opinion that the statutory change did not overrule *Machules v. Department of Administration*, 523 So. 2d 1132 (Fla. 1988), in which the Florida Supreme Court recognized the applicability of the doctrine of equitable tolling to administrative proceedings. However, Patz had not demonstrated that equitable tolling applied to his circumstances. The court cited the case of *Cann v. Department of Children and Family Services*, 813 So. 2d 237 (Fla. 2d DCA 2002), with approval. In particular, the court expressed its concern that it was required by the provisions of Section 120.569(2)(c), Fla. Stat., to affirm dismissal even though that seemed inconsistent with judicial doctrines on default in civil cases which encourage setting aside a default and holding a hearing on the merits.

Standing

NAACP, Inc. v. Florida Board of Re-

gents, 28 Fla. L. Weekly 815 (Fla. 2003)

The NAACP sought review by the Florida Supreme Court of a decision of the First District holding that the NAACP did not have associational standing under the test set forth in *Florida Home Builders Ass'n v. Department of Labor & Employment Security*, 412 So. 2d 351 (Fla. 1982), to challenge an agency rule. The NAACP and individual petitioners had filed a challenge to certain proposed rules of the Board of Regents that would have eliminated affirmative action policies of the State University System (SUS). The administrative law judge held that the petitioners had standing to challenge the rules. On appeal, the First District reversed, concluding that the NAACP did not demonstrate that any of its members would be adversely affected and that the impact of the proposed rules on its members was no different than the potential impact on all other Florida citizens. Judge Browning dissented, and, on rehearing, the court certified the following question to the Supreme Court:

> DO APPELLANTS/CROSS-APPELLEES HEREIN HAVE STANDING TO MAINTAIN CHALLENGES TO THE SUBJECT RULES?

The Court accepted jurisdiction, reversed and remanded. It noted that the reasoning behind its decision in the *Florida Home Builders* case had been to give effect to the legislative intent behind the Administrative Procedure Act to expand public access to the administrative process. The Court held that there was ample evidence that many members of the NAACP were students who could be expected to apply for admission to the SUS in the future. It agreed with Judge Browning that clearly African-Americans and other minority members of the NAACP would be affected differently than non-minority citizens. Finally, it rejected any construction of the standing test that would require the petitioner to demonstrate actual harm, i.e., rejection of an application for college admission, to establish standing under the associational standing test.

Judge Wells dissented. He would have held that the case should be dismissed as moot as a result of the adoption of Art. IX, § 7 of the Florida Constitution which gave the Board of Regents responsibility for management of the entire SUS. He noted that a central argument before the administrative law judge had been related to the authority of the Board of Regents to regulate student admission policies under prior law.

Appeals

O'Donnell's Corp. v. Ambroise, 28 Fla. L. Weekly 2552 (Fla. 5th DCA 2003)

O'Donnell's Corporation appealed an order by the Department of Agriculture and Consumer Services remanding a petition for relief from an unlawful employment practice to the administrative law judge for a formal hearing. On appeal, the court dismissed for lack of jurisdiction. It held that the order being appealed was a non-final order in that it did not dispose of the case. Moreover, the appeal did not meet any of the applicable requirements for review of non-final orders.

Attorney's Fees

Daniels v. Department of Health, 29 Fla. L. Weekly 209 (Fla. 3d DCA 2004)

Daniels appealed from the denial of her request for attorney's fees under the Florida Equal Access to Justice Act, Section 57.111, Fla. Stat. The administrative law judge had denied her request on the grounds that the Department had filed an administrative complaint against her personally rather than her corporation.

In affirming the final order below, the court cited with approval a number of cases decided by the First District Court. However, it certified conflict with decisions to the contrary in the Fourth District.

Agency for Health Care Administration v. HHCI Limited Partnership, 29 Fla. L. Weekly 237 (1st DCA 2004)

HHCI Limited Partnership owned and operated several nursing homes throughout the state. AHCA filed an administrative complaint seeking to revoke the licenses of each of these nursing homes based on a new statutory provision which stated that AHCA must deny or revoke a nursing home license where the interest operating the nursing home has been cited for two Class I deficiencies within a 30-month period at another nursing home within its control. HHCI argued that AHCA was inappropriately applying the statute retroactively. In an attempt to avoid revocation of the licenses, HHCI sought injunctive relief in circuit court, which was denied. It further engaged in lobbying of the agency and other governmental entities, including the Governor's office. Finally, it filed administrative actions challenging the proposed revocation and asserting that AHCA was applying an invalid non-rule policy by retroactively applying the new statute.

HHCI was successful in the non-rule challenge and sought attorney's fees pursuant to Section 120.595(4)(a), Fla. Stat. In awarding the entire amount of fees requested by HHCI, the administrative law

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

Donna E. Blanton, Tallahassee (dblanton@radeylaw.com) ..... **Chair**
Robert C. Downie, II, Tallahassee (robert.downie@dot.state.fl.us) ..... **Chair-elect**
Deborah K. Kearney, Tallahassee (deborah.kearney@laspbs.state.fl.us) .. **Secretary**
Patrick L. (Booter) Imhof (imhof.booter@flsenate.gov) ..... **Treasurer**
Elizabeth W. McArthur, Tallahassee (emcarthur@radeylaw.com) ..... **Editor**
Jackie Werndli, Tallahassee (jwerndli@flabar.org) ..... **Program Administrator**
Colleen P. Bellia, Tallahassee (cbellia@flabar.org) ..... **Layout**

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judge concluded that HHCI was entitled to fees incurred in all of its attempts to avoid revocation of its licenses, reasoning that none of the fees sought would have been incurred if AHCA had not applied the unlawful non-rule policy.

On appeal, the court reversed. It held that attorney's fees statutes must be construed strictly under Florida law because the award of fees continues to be in derogation of the common law. While the court noted that Section 120.595 did not preclude the award of fees for related actions, it did not specifically authorize such an award. In fact, the court concluded that the reference in Section 120.595(4)(a) to "Challenges to Agency Action Pursuant to Section 120.56(4)" limited the recovery of fees to those related to the non-rule challenge efforts. The matter was remanded to the administrative law judge with directions to make a determination as to what amount of fees related to the non-rule challenge.

Statutory Construction
Department of Education v. Cooper, 28 Fla. L. Weekly 2539 (Fla. 1st DCA 2003)

Cooper, the parent of a child who had received a failing score on the FCAT test, sought access to the test document as a "student record" pursuant to Section 228.093(2)(e), Fla. Stat. The trial court determined that the test was a student record, despite the position of the Department of Education to the contrary; but it set certain limitations on Cooper's access, including restricting the length of time he could review the document, prohibiting copying of the test, and requiring that review of the document be supervised. The District Court reversed, concluding that this result violated a number of canons of statutory construction.

The court noted first that a statute must be given its plain meaning. In this case, the statutory provision classified various test "scores" as student records but did not accord the same status to the tests themselves. Second, the court held that the trial court failed to read the student records provision in pari materia with the statutory provisions requiring that test documents be confidential. The court found that it was not sufficient to impose restrictions on access to the test where such confidentiality was required. Finally, the court noted that the construction of the agency charged with implementation of a statute must be given great weight where there is any ambiguity about the statute's construction.

D'Alto v. Department of Environmental Protection, 28 Fla. L. Weekly 2542 (Fla. 1st DCA 2003)

D'Alto had applied to the Department of Environmental Protection in 1988 under the Early Detection Incentive Program ("EDI") seeking inclusion of his property in the state-funded petroleum cleanup program. D'Alto used an EDI Program Notification Application to file this request. A virtually identical Discharge Reporting Form was subsequently formally adopted by the Department for use in filing EDI applications. D'Alto's EDI application was rejected by the Department as a number of the details requested by the form, such as the type of petroleum discharged and the number of gallons discharged, were answered as unknown. D'Alto did not challenge that determination of ineligibility.

Subsequently, D'Alto applied for participation in the Petroleum Cleanup Participation Program ("PCPP"), whereby cleanup is funded jointly by the Department and the applicant. The Legislature, in creating PCPP, provided that an applicant could rely on an EDI application previously submitted rather that submitting a new application. The Department rejected D'Alto's PCPP application on the grounds that the EDI application contained insufficient information to constitute a discharge notification form.

On appeal, the court reversed. It noted that generally an agency's interpretation of a statute is given great deference, but seemed to conclude that the plain meaning of the statute was contrary to the Department's interpretation. It found that there was no prejudice to the agency resulting from the missing information. The EDI application had clearly identified the source of the petroleum discharge as a former gasoline station on the site. Moreover, the presence of contamination was subsequently verified. The matter was remanded to the Department for a determination of eligibility on other grounds.

Slusher v. Martin County, 28 Fla. L. Weekly 2652 (Fla. 4th DCA 2003)

Slusher challenged the issuance of a permit to Martin County by the South Florida Water Management District (SFWMD) for a well when water withdrawals resulted in the drainage of a fish pond on his property. SFWMD's rules provide that an applicant for a permit must demonstrate that the proposed project will not interfere with "existing legal uses." Rule 40E-2.301(f), Fla. Admin. Code. SFWMD's Basis of Review document, incorporated by reference as a rule, defined existing use as a "water use that is authorized under a District water use permit or is existing and exempt from permit requirements." Section 1.8, Basis for Review for Water Use Applications Within the South Florida Water Management District. SFWMD adopted the ALJ's findings and conclusions that the permit was properly issued, because the definition of existing use should be interpreted to mean a use that was expressly exempt from permitting. It further relied on section 3.6 of the Basis of Review which required denial of a water use permit application where the "designed use" of a water impoundment is impaired. In this case, SFWMD concluded that the original use of the impoundment was to obtain on-site fill material to create a building pad for the house, not to create a fish pond. In reaching this conclusion, the SFWMD rejected the testimony of the original owner of the house that he had excavated the impoundment specifically to create a fish pond.

On appeal, the court reversed. It rejected SFWMD's argument that its interpretation of its own rules with respect to what constituted an existing use was entitled to deference. The court held that the meaning of the definition was clear and unambiguous on its face; therefore it rejected the SFWMD's reading of the provision to require an "express" exemption from permitting. In addition, the

court held that the testimony of the SFWMD's expert that the designed use of the impoundment was to obtain fill was immaterial since it was clear that the present designed use was as a fish pond.

Sledge v. Department of Children and Families, 28 Fla. L. Weekly 2805 (Fla. 5th DCA 2003)

Sledge appealed a final order of the Department finding that he was disqualified from employment as a home health aide due to a 1992 conviction for importation of cocaine. The administrative law judge concluded that the provisions of Section 435.03, Fla. Stat., setting forth employment screening standards for certain employees, applied to crimes committed after the effective date of that act (October 1, 1995). The judge reached that conclusion based on the provisions of the act which stated that "this act shall take effect October 1, 1995, and apply to offenses committed on or after that date." Ch. 95-228, § 64, Laws of Florida.

In its final order, the Department rejected the administrative law judge's conclusion of law. The Department noted that Chapter 95-228 had both created new offenses and incorporated existing offenses into the screening standards. The Department interpreted the language cited by the judge to apply only to the new offenses created by the act. Sledge appealed.

On appeal, the court affirmed. It concluded that the Department's interpretation of the statute was more reasonable than the administrative law judge's construction. It noted that the interpretation taken in the recommended order would lead to a number of internal inconsistencies in the law.

Steward v. Department of Children and Families, 28 Fla. L. Weekly 2858 (Fla. 1st DCA 2003)

Steward appealed a final order of the Department denying his request for financial assistance in removing pile carpet from his home and replacing it with hard surfaced flooring. Steward, a ten-year old child, had previously been determined to be eligible for benefits under the Developmental Disabilities Home and Community-Based Waiver Program (DDHP). He was developmentally disabled, incontinent, and confined to a wheel chair. A home assessment concluded that Steward was unable to independently move his wheel chair from room to room because of the carpeting. Both a doctor and nurse practitioner had expressed the opinion that removal of the carpet was medically necessary.

At the administrative proceeding, the Department took the position that the applicable Medicaid handbook did not allow financial assistance for Environmental Accessibility Adaptations (EAAs) which included replacing carpeting. The attorney for Steward conceded this point but argued that the Department could issue a waiver.

On appeal, the court reversed. It cited the language of the Handbook referring to excluded coverage for EAAs that are of "general utility and are not of direct medical or remedial benefit to the beneficiary, such as carpeting, …." The court held that this language was clear and unambiguous in allowing coverage in Steward's circumstances since replacement of the carpeting in his home would have a direct medical and remedial benefit.

Thomas v. Southwest Florida Water Management District, 29 Fla. L. Weekly 29 (Fla. 5th DCA 2003)

Thomas sought an informal hearing challenging the denial of his application for a water use permit to increase his water use on property located in Pasco County. The Southwest Florida Water Management District (SWFWMD) denied the permit on the grounds that it would adversely affect water users outside Pasco County. Thomas argued that he was entitled to a permit under the provisions of Section 373.1961, Fla. Stat., which provided that SWFWMD could not deprive a resident of any county reasonable beneficial use of the water withdrawn from that county. At the hearing, Thomas presented evidence of legislative history from 1974 indicating that the purpose of that provision was to protect the water rights of citizens of Pasco County. SWFWMD rejected that position, concluding that the provision had been superseded by the passage of Part II of Chapter 373.

On appeal, the court affirmed SWFWMD. It noted that Section 373.217, Fla. Stat., specifically provided that it superseded other laws, rules, or ordinances to the extent they were in conflict with that section. The court held that the precepts of statutory construction supported SWFWMD's conclusion that Section 373.1961 had been superseded. In particular, Section 373.217 was the more recently enacted statute.

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* Mary.Smallwood@Ruden.com.

ARE YOU CONNECTED???

The Administrative Law Section's website is available at *www.flaadminlaw.org*. The site contains information that administrative law practitioners should find interesting and useful.

Administrative Law Section Executive Council Meeting - January 9, 2004

MINUTES
Not yet reviewed or approved by Executive Council.

Call to Order: Chair Donna Blanton called the meeting to order at 9:00 a.m.

Present: Donna Blanton, Mary Ellen Clark, Paul Flounlacker, Allen Grossman, Elizabeth McArthur, Booter Imhof, Clark Jennings, Debby Kearney, Cathy Lannon, Chris Moore, Li Nelson, Judge Rigot, Larry Sellers, Judge Stampelos, Dave Watkins, and Jackie Werndli. Dave Jordan of the Department of Community Affairs joined us.

Absent: Andy Bertron, Bobby Downie, Rick Ellis, Seann Frazier, Natalie Futch, Cathy Sellers, and Bill Williams.

Approval of the minutes of the October 24, 2003 long-range planning meeting of the Executive Council was deferred until the next meeting.

The Treasurer reported that the Section was financially sound.

The Chair conveyed to the members the request of Administrative Law Chief Judge Bob Cohen for us to provide input regarding a revised DOAH website. It was decided that, rather than meeting to make recommendations from the Section as a whole, members will respond individually to Judge Cohen or to Judge Rigot.

CLE Committee: The CLE committee reported that the reception hosted by the Section at the Central Panel conference in November was very well received. Both Florida attendees and those from out of state were impressed that our Section was so supportive.

Li Nelson made a recommendation that we provide training for new lawyers in practicing before DOAH. DOAH has offered their courtrooms for training and also will provide the assistance of some ALJs to help us. The response was favorable. We discussed whether other sections might want to co-sponsor this. Spring looked like the best time to schedule this training.

Publications: It was reported that the "agency snapshots" feature in the newsletter was very well-received. Elizabeth McArthur said that she could use some newsletter feature articles, and urged everyone to encourage submissions.

Legislative: Things are looking good so far. Li Nelson reported on the Physician Discipline Work Group meeting. Li Nelson is a member of this working group, which also consists of representatives of the medical board, dental board, osteopathic board, and the FMA. The group listened to presentations. Li described a unique procedure used by New York where board members sit to conduct fact finding and an ALJ makes procedural determinations. The process takes no more than 8 months, start to finish. It was explained to the Working Group that physicians would like to meet with their peers on the probable cause panel. Accountants do this. They feel that many matters can be resolved in this manner. The Working Group considered whether to recommend repeal of the requirement that some boards must be DOAH.

Website: Paul Flounlacker and Jackie Werndli met with some alternate webmasters and reported the results. The board agreed to have Paul and Jackie go forward to hire The Black Group as our new webmaster.

Budget: The budget was adopted as proposed with one objection. There was a motion to delete the funds for lobbyists; however that motion died for a lack of a second.

The remainder of the meeting consisted of a work session on the uniform rules update project.

Respectfully submitted,
Debby Kearney, Secretary

Practice Before the Division of Administrative Hearings

May 20-21, 2004
Tallahassee

Day 1:

- Getting Your Case to DOAH: The Requirements of a Petition
- Evidentiary Issues in Administrative Proceedings
- Motion Practice and Prehearing Statements
- Helping Your Court Reporter Prepare a Good Record
- Opening and Closing Statements and Dealing with "Preliminary Issues" (Premarked Exhibits, etc.)
- Witnesses: Who You Need, When to Use Experts and How to Find Them
- Preparing Your Witnesses and Conducting Direct Examination
- Cross Examination
- Expert Witnesses

Day 2:

Mock Hearing Presentation
Track 1: Licensure Discipline
Track 2: Land Use

- Opening Statements
- Fact Witness: Direct, Cross and Redirect
- Expert Witness: Direct, Cross, Redirect
- Closing Arguments
- Ethics in Administrative Law: Dealing with Motions for Sanctions
- Preparing a Useful Proposed Recommended Order

Mark your calendar and plan to attend this in-depth seminar. Seating is limited to 80 attendees. Registration information will be available in mid-April at www.flaadminlaw.org.

Agency Snapshots

Florida Department of Agriculture & Consumer Services

The Florida Department of Agriculture and Consumer Services was created by the Legislature and is headed by the Commissioner of Agriculture, an elected member of the Florida Cabinet.

Head of the Agency:
Charles Bronson, Commissioner of Agriculture
The Capitol, Plaza Level 10
Tallahassee, FL 32399
(850) 488-3022

Agency Clerk:
Harry Bosman
Room 509
(850) 488-5321

General Counsel:
Richard D. Tritschler
(850) 245-1000

Hours of Operation:
8:00 am to 5:00 pm EST

Physical Address:
The Mayo Building
407 S. Calhoun Street
Tallahassee, FL 32399
(850) 488-5321

Mailing Address:
The Capitol
Tallahassee, FL 32399-0800

Richard obtained both his undergraduate degree and JD from FSU. Born and raised in Tallahassee, Richard has kept his career focused in Tallahassee, with time in private practice and several different public practice settings, including a position with the Senate Rules Committee and a position with the Department of Insurance, before joining the Department of Agriculture and Consumer Services. He finds his work as General Counsel the most rewarding and fulfilling with the opportunities it brings to aid a Cabinet Agency with the broad mission of providing service to over 14 million consumers.

Number of Lawyers on Staff: 8

Kinds of Cases: The Department manages the most broad range of regulation of any state agency, as established by Chapter 570, Florida Statutes.

APA Interaction: Substantial

Tip: Most Department administrative complaints are initiated by division staff within the Department. To learn more about a particular complaint, contact the individual staff involved, according to the contact information provided either on the complaint or the Election of Rights form.

Florida Department of Transportation

Head of the Agency:
Secretary Jose Abreu
(850) 414-4100

Agency Clerk:
Jim Myers
Room 550
(850) 414-5393

General Counsel:
Pam Leslie
(850) 414-5265

Hours of Operation:
8:00 am to 5:00 pm EST

Physical and Mailing Address:
605 Suwanee Street
Tallahassee, FL 32399-0450

Number of Lawyers on Staff: 25 in Central Office, 50-60 in District Offices around the state.

Kinds of Cases: Bid protests, Billboard regulation, Water management permit challenges, Airport licensure and inspection, Railroad and driveway connection cases, PERC proceedings, and Rule challenges.

APA Interaction: Substantial

Spotlight On: The Department of Transportation's Pam Leslie

by Lisa S. Nelson

Talking with Pam Leslie, General Counsel of the Department of Transportation, is a trip down memory lane for me. Pam and I were not only classmates in law school, we roomed together for the Florida bar examination and spent our first years in practice at the Florida Supreme Court. As you will see, Pam brings a blend of intelligence, common sense and practicality to her job that represents the best in public service.

Pam graduated from Florida State University College of Law in 1983 (although she went to her first year of law school at the University of Florida). She worked in judicial education at the State Office of the State Courts Administrator for over three and a half years before moving to the Department of Business Regulation where she spent two and a half years handling time share, condominium, mobile home and land sales regula-

tion. She then changed agencies to what has become her "home," the Department of Transportation. She has been General Counsel for the agency since 1996, after serving as deputy general counsel and chief of DOT's administrative law section.

The Department of Transportation is a gubernatorial agency headed by Secretary Jose Abreu, who was appointed by Governor Bush in March 2003. By statute the agency is decentralized, with eight district offices around the state. Like the rest of the agency, the legal staff is also decentralized. The central office in Tallahassee has 25 lawyers, while there are 50-60 lawyers in the district offices. Lawyers in the district offices report to district general counsels, who in turn report to the general counsel.

Chapter 120 cases are handled by the central office, including rule challenges, bid protests, outdoor advertising sign cases, water management permit challenges, airport licensure and inspection cases and PERC proceedings. DOT has relatively few regulatory functions as compared to some other state agencies, but those they do perform are critical. Receipt of federal funds for highways is in part contingent on, of all things, regulating billboards. Chapter 120 plays an important role in proceedings where DOT decides to open or close at-grade rail crossings that intersect the State Highway System or to permit driveway connections to the system. On the production side of things, the Department has had public contracts from $1-1.3 BILLION annually the last few years, which naturally leads to a certain number of bid protests.

Pam tells me that the Department has had relatively few rule challenges during her tenure: "Working closely with our private partners and regulated industries as we develop rule policy has made things run quite smoothly." Likewise, in terms of changes to the APA, she would like to see fewer changes. "It seems that folks feel the need to tweak the process every year and I think that leads to uncertainty on both the government and private side and I think that has the potential for being costly for everyone. Rather than try to 'change' case law or plug holes year in and year out, I think letting things have an opportunity to find their level is not a bad approach. After a period of time, if something in the process really is broken, then try to get it fixed."

Pam named two "best parts" of her job. One is the opportunity to work with what she referred to as a fantastic bunch of engineers at DOT. She saluted their commitment to excellence and innovation, and to delivering a quality product. The other was "the opportunity to work with one of the finest groups of legal professionals you could ask for." Pam saluted both the lawyers and supporting staff, and noted that the average years of experience for the lawyers is over twenty years, which must be unique in this era of state government. She also saluted their commitment to public service through pro bono work, noting that Bruce Conroy, Chief of the Administrative Law Division, won the pro bono award for the Second Judicial Circuit last year. "I can't imagine a more fun place to work."

Lisa "Li" Shearer Nelson *is the director of the Tallahassee office of the Holtzman Equals law firm and immediate Past Chair of the Administrative Law Section. She can be reached at* lnelson@heqlaw.com.

FROM THE CHAIR

from page 1

Chris and several other members of the Executive Council approached lawyers in the Governor's general counsel's office about the project. Because the Governor's office serves as staff to the Administration Commission, we considered the involvement of the Governor's staff to be crucial. We have been encouraged by the Governor's staff to go forward, and a lawyer in the Governor's general counsel's office attended the drafting committee's first meeting.[1]

The first recommendations of Chris's committee were considered by the full Executive Council at a meeting in January. Meetings also are scheduled for February and March to discuss proposed revisions. The hope is that the Executive Council will submit recommendations to the Governor's staff sometime this spring.

We have actively sought input from administrative law practitioners about any suggested changes to the uniform rules. Although the committee is far along in its work, any additional suggestions are always welcome.

Endnote:

[1] Before the uniform rules were originally adopted in 1997, the Governor's office asked our section's Executive Council to prepare a draft of the proposed rules. A committee within the section prepared the draft, which was approved by the full Executive Council and then sent to the Administration Commission for formal rulemaking. The Administration Commission then held a public workshop, where the section's drafting committee answered questions. *See* Linda M. Rigot and Ralph A. DeMeo, *Florida's 1996 Administrative Procedure Act*, 71 Fla. B.J. 13, 14-15 (March 1997). Some members of the section's original drafting committee, including Administrative Law Judges Linda Rigot and Charles Stampelos, are serving on the current committee considering revisions to the rules.

Donna E. Blanton *is chair of the Administrative Law Section and a shareholder at Radey Thomas Yon & Clark, P.A.*

The Florida Bar
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Tallahassee, FL 32399-2300

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