Administrative Law Section Newsletter

Vol. XXVI, No. 3 **Elizabeth W. McArthur, Editor** **March 2005**

More APA: What *Might* The 2005 Legislative Session Bring?

by Lawrence E. Sellers, Jr.

At the Pat Dore Conference in November, many attendees and speakers wondered: What changes to the Administrative Procedure Act might the Legislature consider during the upcoming Regular Session that begins on March 8? Here are a few issues that the Legislature *might* be asked to consider this year:

Provide for Excusable Neglect.

Two appellate courts have suggested that the Legislature amend the APA to adopt an "excusable neglect" standard to excuse untimely requests for administrative hearings.[1] This could prove to be a challenging task. Many who practice in this area are generally sympathetic to this suggestion, but no precise definition of the term "excusable neglect" appears in the rules or the case law.[2] And unlike "equitable tolling," there is no well-recognized definition of "excusable neglect" that both clearly describes those circumstances where the time should be extended and maintains the balance the Legislature sought to achieve in 1998 between those who wish to request a hearing and those who desire to proceed without further delay. Nonetheless, the Legislature may take up the suggestion to revise Section 120.569(2)(c) to address this matter.

Provide for Equitable Tolling.

Several recent appellate decisions, *in dicta*, also have suggested that the

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From the Chair

by Robert C. Downie, II

As anyone who has read Isaac Asimov's *Foundation* series of novels will agree, it is difficult to write today about what will happen tomorrow, much less next week or next month. As I pen this column in mid-January, I am aware that it will not be read by the membership until some time in March. Thus, it is with some trepidation that I relate what is supposed to happen between this writing and two months from now. But here goes.

First, let me provide an update and look ahead on the topic of certification. On Friday, January 14, 2005, the Executive Council met and discussed the issue of legal certification in governmental and administrative law. At the conclusion of the discussion, the Council adopted the position that the Council supports a proposal for a Florida Bar Certification Program in Administrative and Governmental Practice, and the Council wants to be a full participant in the process of creation of such a Certification Program. The Council has a Draft Proposal for Florida Bar Certification Program in Administrative and Governmental Practice, prepared by the Government Lawyers' Section (GLS), under consideration at this time.

Between January and March, 2005, the anticipated schedule is that at the Bar's mid-year meeting, the Board of Legal Specialization and Education has an agenda item to in-

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troduce the concept of certification in administrative and governmental law. The Board will not be taking action on the concept, but will schedule consideration of a proposal for a future meeting, either in March or June. By March, the Executive Council will have considered and commented upon the Draft Proposal from the GLS. Beyond that, I dare not speculate.

Another topic of the future is the report and recommendation of the Bar/Section Budget Task Force. On January 22, 2005, the Council of Sections will consider (and likely approve) a proposal from the Task Force which essentially will require all Bar Sections to contribute an additional per-member amount to make up for certain expenses the Bar currently subsidizes for the Sections. This Council of Sections action will be advisory only to the Bar, but it is expected that some proposal similar to this will ultimately be enacted by the Board of Governors. Due to recent improved profitability of CLE programs, over the last few years the per-member contribution would have been negligible ($00.29 in 2002-03), if any ($00.00 in 2003-04). In spite of this, however, the Executive Council has voted to increase Section dues to $25.00, up from $20.00. The increase will provide necessary revenue in case the contribution is assessed as it would have been in the three fiscal years from 1999-2002, at an average of approximately $4.50 per member. Even at this increased amount, our Section's dues remains near the lowest.

One final bit of prognostication is that the Atlanta Falcons will win the Super Bowl. In contrast to my earlier soothsaying, this prediction stems from pure heart-felt addiction to the underdog. No one thinks Atlanta can do it, so I want them to. Maybe not exactly the way Asimov would have done it, but on some topics I'm a bit mule-headed.

Happy Springtime!

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APPELLATE CASE NOTES

by Mary F. Smallwood

Licensing

Cone v. Department of Health, 29 Fla. L. Weekly 2413 (Fla. 1st DCA 2004)

The Board of Osteopathic Medicine entered a final order revoking Cone's license to practice osteopathic medicine in Florida, citing Section 456.072, Fla. Stat., which provided that having a license to practice any regulated profession revoked in another state for a violation that would also constitute a violation under Florida law was grounds for revocation of the Florida license. Cone's license to practice allopathic medicine had been revoked by the State of California.

On appeal, Cone argued that the administrative complaint was inadequate as it did not specify any Florida law that would have been violated. The Board argued that Section 456.072, which contains general disciplinary provisions, should be read *in pari materia* with Section 459.015(1)(b), which contains provisions specifically related to the practice of osteopathic medicine. The latter section provides that revocation of a license to practice osteopathic medicine in another state is a basis for revocation of the same type of license in Florida.

The court rejected this argument and reversed and remanded. It held that Section 459.015 was not a basis for revocation of Cone's license since the license revoked by California related to allopathic medicine, not osteopathic medicine. It agreed with Cone that under Section 456.072, the Board must establish that the violation serving as the basis for the revocation in California would also have been a violation in Florida.

Sheils v. Florida Engineers Management Corp., 29 Fla. L. Weekly 2604 (Fla. 4th DCA 2004)

The Florida Engineers Management Corporation filed an administrative complaint against Sheils, a professional engineer, alleging that he violated Section 471.033(1)(g), Fla. Stat., and Rule 61G15-19.001(6)(b), Fla. Admin. Code, by issuing an opinion as to the integrity of a residential roof. Sheils had been retained by the roofing contractor after a dispute arose over the quality of the work between the homeowner and the contractor.

The administrative law judge found that the report issued by Sheils contained contradictory statements regarding the roof's integrity. Initially his report suggested that there were problems with the roof installation. The judge further found that Sheils' report stated that the roof would withstand winds of 70 miles an hour and "a major storm" even though he knew that the design wind speed was 100 miles per hour over a specified period. The reference to a major storm event was found to be misleading as it was unquantified. The judge concluded that the building department was misled by the report as it failed to take any action to withdraw the certificate of completion.

The Board of Professional Engineers adopted the recommended order and imposed sanctions, including a fine, probation, and a reprimand. Sheils appealed, arguing that he had not engaged in fraud or deceit and that his report had not actually misled any parties.

The court affirmed. It found that the final order was supported by competent, substantial evidence. Moreover, it noted that Sheils had engaged in "misconduct" as that term was defined by rule by including misleading information or omitting relevant information from a report.

Rulemaking

Florida Democratic Party v. Hood, 29 Fla. L. Weekly 2418 (Fla. 1st DCA 2004)

The Florida Democratic Party appealed the adoption of an emergency rule by the Secretary of State governing how recounts would be handled for counties using touchscreen voting. The Department of State (DOS) had previously proposed a rule amendment which was challenged in a formal administrative hearing. That rule was held to be an invalid exercise of delegated legislative authority by the administrative law judge on August 27, 2004. The DOS argued that an emergency existed as a result of the invalidation of the proposed rule as a recount procedure needed to be in effect for the November general election. The Democratic Party, on the other hand, argued that the upcoming election was not an unforeseeable or sudden event constituting an emergency. It relied upon *Golden Rule Insurance Co. v. Department of Insurance*, 586 So. 2d 429 (Fla. 1st DCA 1991), for the proposition that the entry of the final order in the rule challenge proceeding did not create an emergency.

On appeal, the court denied the petition for review but certified the question to the Florida Supreme Court. It distinguished the Golden Rule case and held that an emergency can arise from the issuance of a court order. Judge Padovano dissented. He would have held that the emergency was one of DOS's own making since it could have initiated rulemaking several years earlier. Moreover, Judge Padovano would have held that the process used by DOS violated requirements of fundamental fairness. He noted that DOS waited 30 days after initially requesting comments from interested parties to adopt the rule, one day before the beginning of early voting. That delay, in his opinion, essentially prevented an effective appeal of the order.

Attorney's Fees

Casa Febe Retirement Home, Inc. v. Agency for Health Care Administration, 29 Fla. L. Weekly 2521 (2d DCA 2004)

The Agency for Health Care Administration ("AHCA") filed an administrative complaint against Casa Febe, alleging a violation of Rule 58A-5.0185(7), F.A.C., which requires that a facility "make every reasonable ef-

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fort to ensure that prescriptions for residents who receive assistance with self-administration or medication administration are refilled in a timely manner." AHCA had begun an investigation of the facility after a resident who was dismissed from the hospital with a urinary tract infection had to be readmitted. The investigator reported that a prescription for an antibiotic written by the physician at the hospital had been in the resident's file.

After a formal hearing, the administrative law judge found that no such prescription existed. He also concluded as a matter of law that AHCA had exceeded the scope of the rule as it applied only to refills of prescriptions, not the initial filling thereof. Casa Febe sought attorney's fees pursuant to Section 57.111, Fla. Stat. The administrative law judge rejected that request, finding that a reasonable basis in both fact and law existed for the administrative complaint.

The court reversed. It noted that attorney's fees were to be awarded where the agency's action was not substantially justified. The action was substantially justified where "a solid though not necessarily correct basis in fact and law" existed. *McDonald v. Schweiker*, 726 F.2d 311 (7th Cir. 1983). In this case, the court agreed with the administrative law judge that AHCA had a solid basis in fact, even though the judge ultimately found the investigator's testimony was not credible. However, the court concluded that AHCA had no solid basis in law as the rule that it relied upon clearly did not extend to the initial filling of a prescription.

Department of Health v. Thomas, 30 Fla. L. Weekly 64 (Fla. 1st DCA 2004)

Thomas, a physician, successfully challenged a disciplinary action filed against him, and it was eventually dismissed with prejudice. He sought attorney's fees under Section 57.111, Fla. Stat., as a prevailing small business entity. The administrative law judge awarded fees, and the Department appealed.

On appeal, the Department argued that its action in filing an administrative complaint was substantially justified. The court agreed and reversed. The court held that the probable cause panel was justified in relying on one expert's testimony that Thomas did not meet the standard of care, even though two other experts testified otherwise. It concluded that a decision to prosecute that turns on a credibility assessment has a reasonable basis in fact and law.

Bid Protests

Helicopter Applicators, Inc. v. South Florida Water Management District, 29 Fla. L. Weekly 2531 (Fla. 4th DCA 2004)

Helicopter Applicators was one of two entities responding to a request for proposal for aerial services. The District posted a notice on May 16, 2003, stating that it would enter into negotiation with both companies. On August 11, 2003, Helicopter filed a notice of protest alleging that there were material defects in the other company's proposal. The District dismissed the protest as untimely, and Helicopter appealed. On appeal, it argued that it had not become aware of the defect until 72 hours before filing the notice of protest.

The court affirmed. The court found that the competing proposal had actually become public 10 days after it was submitted, or more than two months before the notice of protest was filed. Accordingly, it agreed that the protest was untimely.

Public Records and Government-in-the-Sunshine

Microdecisions, Inc. v. Skinner, 29 Fla. L. Weekly 2685 (Fla. 2d DCA 2004)

Skinner, the Collier County Property Appraiser, attempted to require a commercial user of public records created by his office to pay a licensing fee, arguing that the records were copyrighted. The Property Appraiser had prepared Geographic Information Systems ("GIS") maps in the course of his official duties. Microdecisions sought copies of the GIS maps to use as part of a real estate data system for south Florida which it marketed on its website. Microdecisions filed a mandamus action seeking access to the documents and Skinner asserted certain affirmative defenses. The circuit court granted summary judgment against Microdecisions agreeing with Skinner that the matter was moot as he had provided a copy of the documents to Microdecisions after the lawsuit was filed and that the copyright issues should be decided by a federal court.

On appeal, the court reversed. First, it noted that while Skinner had furnished the maps to Microdecisions, he had included with the documents a licensing agreement and a letter stating that the documents could not be used for any commercial purpose unless the agreement was executed. Since there were clearly remaining issues to be resolved between the parties, the court held that the matter was not moot.

The court also concluded that the issues raised by the complaint did not arise from copyright law but were based on Florida public records law. It noted that Skinner had attempted to remove the matter to federal court but that court remanded the case to state court. Recognizing that the Legislature had specifically enacted statutes in a number of situations authorizing a state agency to obtain a copyright for certain types of documents, the court found that there was no such authorization here. It held that no public official could prevent access to public records in Florida on the grounds that the documents were copyrighted without express authorization from the Legislature.

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.*

Agency Snapshots
Florida Department of Transportation

Central Office

The Florida Department of Transportation is a statutorily created gubernatorial agency.

Head of the Agency:
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Hours of Operation
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Number of Lawyers on Staff: 25

Kinds of Cases: Construction, Contract, Employment, Admiralty, Tort, Eminent Domain, Inverse Condemnation, Environmental, and Administrative.

APA Interaction: Substantial

Florida Department of Transportation – District One

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Number of Lawyers on Staff: 10

Kinds of Cases: Eminent domain and related property law.

APA Interaction: Substantial

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Kenneth S. Davis

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Number of Lawyers on Staff: 7**

Kinds of Cases: Eminent domain and related property law.

APA Interaction: Substantial

**Three attorneys are located at the Jacksonville Urban Office, 2250 Irene Street, MS 2819, Jacksonville, FL 32204.

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Number of Lawyers on Staff: 3

Kinds of Cases: Eminent domain and related property law.

APA Interaction: Substantial

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Number of Lawyers on Staff: 9

Kinds of Cases: Eminent domain and related property law.

APA Interaction: Substantial

Florida Department of Transportation – District Five

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Number of Lawyers on Staff: 9

Kinds of Cases: Eminent domain and related property law.

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APA Interaction: Substantial

Florida Department of Transportation – District Six

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Kinds of Cases: Eminent domain and related property law.

APA Interaction: Substantial

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Kinds of Cases: Eminent domain and related property law.

APA Interaction: Substantial

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Kinds of Cases: Eminent domain and related property law.

APA Interaction: Substantial

Special thanks to our Chair, Bobby Downie, and to DOT law clerks Katie L. Sellers and LeChea Parson, for assembling this information.

THE FLORIDA BAR

L·O·M·A·S

THE LAW OFFICE MANAGEMENT ASSISTANCE SERVICE OF THE FLORIDA BAR

MISSION

Recognizing that many practicing lawyers lack fundamental training in business and practice management principles, the Law Office Management Assistance Service (LOMAS), through an experienced staff of practice management advisors, provides advice, assistance and support to members of The Florida Bar through a variety of services. Focused on management principles such as trust accounting rules, docket control, prevention of client conflict, and the integration of high-tech equipment into the law practice, LOMAS strives to aid attorneys avoid malpractice or grievances through the application of sound business procedures, best practices, and exists to provide Florida attorneys with this type of assistance.

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- To investigate, accumulate, and evaluate practice management information and technologies.
- To publish and distribute, in a cost-effective manner, information and techniques relating to practice management.
- To increase awareness of professional liability and risk management procedures.
- To anticipate trends and problems in law office management and to advise The Florida Bar regarding them.

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doctrine of equitable tolling may be applied to extend the administrative time limit in certain cases.[3] However, two commentators have questioned the application of equitable principles in light of the Legislature's clear expression that untimely petitions for hearing may not be considered.[4] Accordingly, some legislative clarification of this issue would be appropriate. The courts have established a fairly well understood definition of the doctrine of "equitable tolling;" the term is commonly defined to include those cases where the petitioner "has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum." The Legislature may wish to revise Section 120.569(2)(c) to make clear that the time for filing a petition will be extended in these circumstances.

Limit Required Contents of Petition in Enforcement and Disciplinary Cases.

Judge Cope of the Third District has recommended that the Legislature amend the provisions in the APA governing the sufficiency of a petition when the administrative action is initiated by the filing of an administrative complaint by the agency.[5] In particular, Judge Cope has suggested that it should be sufficient for the respondent to submit a document that sets forth those paragraphs of the administrative complaint that are admitted, denied, or as to which the respondent is without knowledge, along the lines allowed by Florida Rule of Civil Procedure 1.110(c). A similar approach arguably is reflected, at least for license revocation and suspension actions, in the Uniform Rules of Procedure (which expressly apply in administrative proceedings). Some have wondered whether these rules are authorized by the APA, while others would broaden the rules to other types of agency enforcement and disciplinary actions. Accordingly, the Legislature may wish to revise Section 120.54(5)4. to make clear that these detailed pleading requirements do not apply to persons requesting hearings in response to enforcement or disciplinary actions brought by an agency.

Revise Agency Authority to Reject or Modify Conclusions of Law.

In 1996, the Legislature revised Section 120.57(1)(d) to limit the agency's authority to reject or modify conclusions of law not within the agency's substantive jurisdiction (such as evidentiary rulings). This revision subsequently raised questions as to the proper procedure to be used by an agency in seeking review of an adverse ruling by the administrative law judge (ALJ). In *Barfield v. DOH,* the court suggested that the Legislature identify a specific appellate remedy for an agency that considers itself aggrieved by an ALJ's conclusions of law that are beyond the agency's substantive jurisdiction.[6] Versions of the 2003 APA legislation would have repealed the 1996 change and would have sought to discourage the agency's improper rejection or modification of such conclusions of law by requiring a reviewing court to award attorney's fees to the prevailing appellant if the court finds that the agency improperly rejected or modified a conclusion of law or an interpretation of an administrative rule over which the agency does not have substantive jurisdiction.[7] However, this issue proved very controversial, so these provisions were deleted from the bill. It may be time for the Legislature to take another look at this issue.

Make More Use of Summary Hearings.

One of the frequently-heard complaints about the APA is that it has become too complex or complicated for resolving the "garden variety" dispute. Another complaint is that the administrative hearing process has become too time-consuming and expensive. In 1996, the Legislature amended the APA to establish the summary hearing process, which is now codified in s. 120.574. The summary hearing process is designed to facilitate a more rapid and less complex resolution of disputes and, in particular, to streamline the hearing process where discovery is not required. It appears the process has been little used, no doubt because it requires the agency to agree that the ALJ (rather than the agency) will issue the final order.[8] Two changes have been suggested: (1) the Legislature should *require* that certain types of cases be conducted pursuant to the summary hearing process;[9] and (2) the Legislature should require each agency (and DOAH) to identify the types of disputes in which the agency is involved that would be amenable to the summary hearing process.

Clarify Agency Authority to Remand to DOAH.

No particular provision in the APA expressly authorizes an agency head to remand a case to the ALJ for additional proceedings.[10] Perhaps the APA should be revised to address this issue.

Provide Specific Standards for Immediate Final Orders.

Agencies appear to be making increased use of immediate final orders.[11] Presently, the APA provides few specific safeguards.[12] Two commentators have suggested these provisions governing IFOs should be amended to: (1) require IFOs to satisfy tests similar to those for *ex parte* injunctions (including providing an informal pre-issuance hearing or documenting evidence of why such a hearing is not being provided); (2) provide a prompt, meaningful post-issuance adversarial procedure to challenge an IFO on the merits; (3) make clear that no exhaustion of administrative remedies is required; and (4) require agencies to document evidence supporting the IFO.[13]

Provide for Direct Judicial Review of the Merits of Emergency Rules.

Direct appeals of the merits of agency rules were generally limited in 1992 in favor of administrative challenges provided by Section 120.56.[14] Judge Padovano's dissent in *Florida Democratic Party v. Hood*[15] raises the question of whether such direct appeals from the adoption of an *emergency* rule should be allowed when the basis for the challenge involves purely a legal issue—such as whether the emergency rule is autho-

rized by statute or is unconstitutional on its face—that may be resolved by the appellate court without the need for detailed factual findings.

Clarify Standard of Review of Agency Interpretations:* De Novo *or Deference?

The appellate courts have held that the standard of review of agency interpretations of statutes and rules is *de novo*,[16] but they also often defer to the agency's interpretation. Some courts have even held that a reviewing court must give "great deference" or "great weight" to an agency's construction of a statute or rule that the agency is charged with enforcing.[17] Other courts have held that an agency's interpretation will not be overturned unless the interpretation is "clearly erroneous."[18] Florida courts also have developed exceptions to this judge-made rule of deference.[19] Nothing in the APA expressly requires a court to defer to the agency's interpretation, and the plain language of the APA does not limit the reviewing court's authority to reverse or remand to those cases in which the agency's interpretation is "clearly" erroneous. Perhaps Section 120.68 should be amended to clarify whether the standard of review is *de novo* or deference – or both?

Clarify Whether the Automatic Stay Rule Applies in APA Cases.

Should the automatic stay provided for public bodies and public officers by Florida Rule of Appellate Procedure 9.310(b)(2) apply in cases where judicial review is sought pursuant to Section 120.68 of the APA?[20] Rule 9.190(e)(1) says it does, but Section 120.68(3) seems to say otherwise: "The filing of the petition does not itself stay enforcement of the agency decision." Perhaps the Legislature should conform the statute to the Rule (or the Court should conform the Rule to the statute). Of course, this raises an interesting question: may the Legislature decide who is entitled to a stay pending appeal – as it already has done in Section 120.68(3) – or is this a rule of "practice and procedure" that is the sole province of the Florida Supreme Court under Article V, Section 2, of the Florida Constitution?[21]

Clarify What "Notice" Must Be Published Following the Final Public Hearing on the Proposed Rule.

Section 120.54(3)(d)1. requires an agency to file and publish certain notices after the final public hearing on the proposed rule, depending on whether the rule has been changed from the rule as previously filed with the committee. If the rule has not been changed or contains only technical changes, the adopting agency must file a notice to that effect with the committee at least seven days prior to filing the rule for adoption. On the other hand, if a change other than a technical change is made in a proposed rule, the adopting agency must provide a copy of the notice of change to certain persons and must file the notice with the committee, along with the reasons for such change, at least 21 days prior to filing the rule for adoption. The adopting agency also is required to publish "the notice" in the *Florida Administrative Weekly* at least 21 days prior to filing the rule for adoption. Unfortunately, it is not altogether clear whether *only* the notice of change must be published in the *Weekly*, or whether the agency *also* must publish notice that there has been no change. The Legislature may wish to revise this paragraph to clarify whether one or both notices should be published, particularly as this publication requirement provides the last "window" of time for challenging a proposed rule.

Clarify Applicability of Last "Window" for Challenging Proposed Rule.

Section 120.56(2)(a) establishes four "windows" of time for challenging a proposed rule.[22] The fourth of these provides that a rule challenge may be filed within 20 days after the date of publication of "the notice required by s. 120.54(3)(d)." As noted above, Paragraph (3)(d)requires publication of the "notice" in the *Florida Administrative Weekly* at least 21 days prior to filing the rule for adoption. If the notice that must be published is the notice of change (and not the notice that there was no change), then should any challenges filed during this last "window" be limited to challenges to the changes themselves (and *not* the unaffected and unchanged provisions)?

Clarify the Challenged "Rule" for Purposes of the Time Limitation for Filing.

Section 120.54(3)(e)2. imposes time limitations by which rulemaking must be completed. Generally speaking, filings must be made no less than 28 days nor more than 90 days after the publication of the rulemaking notice. There are certain exceptions. For example, the filing of a rule challenge petition tolls the 90-day period during which a rule must be filed for adoption until the final order is filed with the clerk. At the time a rule is filed, the agency must certify that the time limitations have been complied with *and* that there is no administrative challenge pending on the rule.[23] If only a part (say a paragraph or subsection) of a proposed "rule" is the subject of a rule challenge, must (or may) the agency file the unchallenged balance of the "rule" nonetheless?

Require Legislative Review of Agency Rules.

In 1996 and in 1999, the Legislature imposed limits on agency rulemaking authority.[24] HB 465, by Representative Bob Allen, would further limit agency rulemaking authority by providing that an agency may adopt only rules that have been reviewed and approved by the Legislature.[25]

Create an APA for local governments.

Over the years, some have wondered whether local government should be subject to the APA. More recently, it has been suggested that a Part II of Chapter 120 should be created to codify established and constitutionally-required due process requirements that would apply to the exercise of the quasi-judicial function.[26]

Clarify Who is a "Small Business Party" Under FEAJA.

The Florida Equal Access to Justice Act[27] authorizes an award of attorney's fees and costs to a prevailing "small business party" in any adjudicatory proceeding or administrative proceeding pursuant to Chapter 120 initiated by a state agency, un-

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less the actions of the agency were substantially justified or special circumstances exist that would make the award unjust.[28] The courts have split on whether an individual is a "small business party" eligible for attorneys fees under s. 57.111.[29] The Florida Supreme Court is presently considering the question.[30] Perhaps the Legislature should revise the statute to resolve this dispute.

* * *

That's a brief overview of *some* of the issues that the Legislature *might* be asked to consider; check back after the legislative session to find out what *really* happened.

Endnotes:

[1] *Cann v. Department of Children and Family Services,* 813 So. 2d 237 (Fla. 2d DCA 2002); *Patz v. Department of Health,* 864 So. 2d 79 (Fla. 3d DCA 2003). *See also* Lawrence E. Sellers, Jr., *Excuse Me? The Courts Suggest the Legislature Amend APA Provisions Governing Requests for Hearing,"* 78 FLA. B. J. 80 (Oct. 2004).

[2] *Carter v. Lake County,* 840 So. 2d 1153 (Fla. 5th DCA 2003) (generally, the courts do not find excusable neglect in the attorney's misunderstanding or ignorance of the law or rules of procedure; on the other hand, the courts are much more inclined to find excusable neglect when the error occurs due to a breakdown in the mechanical or operational practices or procedures of the attorney's office equipment or staff). "Excusable neglect" is defined by one legal dictionary as follows: A legitimate excuse for the failure of a party or his/her lawyer to take required action (like filing an answer to a complaint) on time. This is usually claimed to set aside a default judgment for failure to answer (or otherwise respond) in the period set by law. Illness, press of business by the lawyer (but not necessarily the defendant), or an understandable oversight by a lawyer's staff ("just blame the secretary") are common excuses which the courts will often accept. However, if the defendant loses the complaint or fails to call his/her attorney, the courts will be less lenient. In any event, the defendant must also show he/she has some worthwhile defense. *Law.com Dictionary.*

[3] *E.g., Machules v. Department of Administration,* 523 So. 2d 1132 (Fla. 1988); *Appel v. Florida Department of State, Division of Licensing,* 734 So. 2d 1180 (Fla. 2d DCA 1999); *Cann,* 813 So. 2d at 239; *Patz*, 864 So. 2d at 80-81 n.3.

[4] Ross Stafford Burnaman, *Equitable Tolling in Florida Administrative Proceedings,* 74 Fla. B.J. 60 (Feb. 2000); John S. Yudin, *Equitable Tolling in Administrative Proceedings: Where is the Authority?,* XXIV Administrative Law Section Newsletter 3 (September 2002).

[5] *Brookwood Extended Care Center of Homestead, LLP v. Agency for Health Care Administration,* 870 So. 2d 834 (Fla. 3d DCA 2003); *see also* Samuel J. Morley, *Brookwood Extended Care Center of Homestead, LLP v. Agency for Health Care Administration, Responding to Administrative Complaints (or How Not To),* XXV Administrative Law Section Newsletter 1 (December 2003).

[6] 805 So. 2d 1008, 1013 (Fla. 1st DCA 2001). *See also G.E.L. Corp. v. Department of Environmental Protection,* 875 So. 2d 1257 (Fla. 5th DCA 2004). For a discussion of the *Barfield* case, see Lisa S. Nelson, *Insulated From Review:* Barfield v. Department of Health, Board of Dentistry, 23 Admin. L. Section Newsletter (March 2002); Robert P. Smith, *Be Not Amazed! At the Lessons of* Barfield v. Department of Health, Board of Dentistry, 23 Admin. L. Section Newsletter (June 2002).

[7] Lawrence E. Sellers, Jr., *The 2003 Amendments to the Florida APA,* 77 FLA. B. J. 74 (Oct. 2003).

[8] Section 120.574(2)(f), F.S. (the ALJ's decision shall be final agency action subject to judicial review). For a brief description of the summary hearing process under the APA, *see* James P. Rhea and Patrick L. "Booter" Imhof, *An Overview of the 1996 Administrative Procedure Act,* 48 FLA. L. REV. 1, 85-86 (1996); Carol A. Forthman, *Resolving Administrative Disputes,* 71 FLA. B. J. 77, 85-86 (March 1997).

[9] A similar approach is taken in Florida's expedited permitting process. *See* s. 403.973(13), F.S. For a brief description of the summary hearing process in the context of this expedited permit review, *see* Carolyn Raepple, *Florida's Expedited Permit Review Process: Streamlining the Development of Florida's Economy,* 25 FLA. ST. U. L. REV. 301, 308-09 (1998). The summary hearing process also is mentioned in the Florida Construction Materials and Mining Activities Administrative Recovery Act, but it provides for a summary hearing only upon the agreement of the parties. *See* s. 552.40(6), F.S.

[10] In at least two cases, courts have avoided the question of whether the agency has some inherent authority to remand to the ALJ to reopen the record. *E.g., Florida Department of Transportation v. J.W.C. Co.,* 396 So. 2d 778 (Fla. 1st DCA 1981); *Humana, Inc. v. DHRS,* 492 So. 2d 388 (Fla. 4th DCA 1986). In another case, the court found that the hearing officer (now ALJ) acted properly in denying the agency's effort to remand. *Henderson Signs v. Florida Department of Transportation,* 397 So. 2d 769 (Fla. 1981). However, when the agency rejects the hearing officer's conclusion of law, it may not make its own "supplemental findings of fact," but instead should remand the case to the hearing officer to supply the necessary findings of fact. *Friends of Children v. DHRS,* 504 So. 2d 1345 (Fla. 1st DCA 1987).

[11] E.g., *Haire v. Dep't of Agric. & Consumer Servs.,* 870 So. 2d 774 (Fla. 2004); *Tiajoloff v. Dep't of Agric. & Consumer Servs.,* __ So. 2d __ (Fla. 3d DCA 2005); *Robinhood Group, Inc. v. Fla. Office of Ins. Regulation,* 885 So. 2d 393 (Fla. 4th DCA 2004); *Bertany Ass'n for Travel & Leisure, Inc. v. Fla. Dep't of Fin. Servs.,* 877 So. 2d 854 (Fla. 1st DCA 2004); *Unimed v. State,* 884 So. 2d 963 (Fla. 1st DCA 2004); *Premiere Travel Int'l, Inc. v. State Dep't of Agric. & Consumer Servs.,* 849 So. 2d 1132 (Fla. 1st DCA 2003).

[12] Section 120.569(2)(n), F.S. (if an agency head finds an immediate danger to the public health, safety, or welfare requires an immediate final order, it shall recite with particularity the facts underlying such a finding in the final order, which shall be appealable or enjoinable from the date rendered.

[13] Daniel C. Brown and Alan Harrison Brents, *Immediate Final Orders: Are Current Hearing and Review Procedures Sufficient?,* 70 Fla. B. J. 66 (May 1996).

[14] Ch. 92-166, Laws of Fla. (1992), creating Fla. Stat. §120.68(15) [now §120.68(9)]. For a discussion and critique of this 1992 change, *see* Stephen T. Maher, *The 1991 and 1992 Amendments to the Florida Administrative Procedure Act,* 20 FLA. ST. U. L. REV. 367, 430-35 (1992) (describing this change as "Adam Smith's Revenge").

[15] 848 So. 2d 1148 (Fla. 1st DCA 2004) (Padovano, J., dissenting), *rev. denied, Florida Democratic Party v. Hood,* __ So. 2d __ (Fla. Nov. 10, 2004).

[16] *E.g., Asher G. Sullivan, Jr, St. Augustine Trust Dated May 16, 1996 v. DEP,* __ So. 2d __ (Fla. 1st DCA, Dec. 29, 2004).

[17] *E.g., Id.; Smith v. Crawford*, 645 So. 2d 513, 521 (Fla. 1st DCA 1994); *DER v. Goldring*, 477 So. 2d 532 (Fla. 1985).

[18] *E.g., Chiles v. State*, 711 So. 2d 151, 155 (Fla. 1st DCA 1998).

[19] For example, a reviewing court will not defer to an "unreasonable" interpretation of the agency's rule. *See, e.g., Southpointe Pharmacy v. HRS*, 596 So. 2d 106, 110 (Fla. 1st DCA 1992). Likewise, a reviewing court will afford great weight to an agency's interpretation of a statute or rule only when it involves a matter of agency expertise. *P.W. Ventures v. Nichols*, 533 So. 2d 281, 283 (Fla. 1988). The courts will not defer to an agency's interpretation if the wording of the statute does not require any particular agency expertise. *Zopf v. Singletary*, 686 So. 2d 680, 682 (Fla. 1st DCA 1996). Finally, deference cannot be accorded when the agency exceeds its authority. *Tampa Elec. v. Garcia*, 767 So. 2d 128 (Fla. 2000). Indeed, if there is a reasonable doubt about the lawful existence of a particular power that is being exercised, the further exercise of that power should be arrested. *Radio Tel. Communications v. Southeastern Tel.*, 170 So. 2d 577, 582 (Fla. 1965).

[20] Judge Padovano recently said this about the purpose of the rule:

> The original purpose of the [automatic stay] rule was to enable the state to maintain the status quo while avoiding the unnecessary expense of providing a supersedeas bond. A litigant who obtains a money judgment against the state should have no fear that the judgment will be uncollectible if the state loses the appeal. The state will always be subject to the jurisdiction of the court and bond is not required because the state is a solvent litigant. These considerations, which prompted the adoption of the automatic stay provision in Rule 9.310(b)(2), are not even remotely applicable to [this] proceeding.

State v. Mitchell, 848 So. 2d 1209, 1213 (Fla 1st DCA 2003) (Padovano, J., dissenting). The *Mitchell* case involved the question of whether the automatic stay provision should apply to an involuntary commitment proceeding under the Jimmy Ryce Act. *Question certified, Mitchell v. State*, Case No. SC03-1210 (jurisdiction accepted, February 1, 2005). *See also State v. Ducharme*, __ So. 2d __, 29 FLW D1921 (5th DCA Aug 20, 2004) (certifying question), *rev. dismissed*, __ So. 2d __ (Fla. Nov. 24, 2004).

[21] Justice Atkins sought to describe "practice and procedure" in this fashion:

> Practice and procedure encompass a course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as machinery of the judicial process as opposed to the product thereof. . . . As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.

In re Rules of Criminal Procedures, 272 So. 2d 65, 66 (Fla. 1972) (Atkins, J. concurring).

[22] For a brief discussion of the three new "windows" added in 1996, see Lawrence E. Sellers, Jr., *The Third Time's the Charm: Florida Finally Enacts Rulemaking Reform,* 48 FLA. L. REV. 93, 121-123 (1996).

[23] Section 120.54(3)(e)3., F.S.

[24] *E.g.*, Lawrence E. Sellers, Jr., *The Third Time's the Charm: Florida Finally Enacts Rulemaking Reform,* 48 FLA. L. REV. 93 (1996); David M. Greenbaum and Lawrence E. Sellers, Jr., *1999 Amendments to the Florida Administrative Procedure Act:* Phantom Menace *or* Much Ado About Nothing?, 27 FLA. ST. L. REV. 499 (2000).

[25] Legislative review and approval of administrative rules is not a new concept in Florida. *E.g.,* Lawrence E. Sellers, Jr., *1994 Proposals for Rulemaking Reform,* 22 FLA. ST. U. L. REV. 327, 331-32, n. 24 (Fall 1994); Dan R. Stengle & James Parker Rhea, *Putting the Genie Back in the Bottle: The Legislative Struggle to Contain Rulemaking by Executive Agencies,* 21 FLA. ST. U. L. REV. 415, 427-28 (Fall 1993).

[26] *See* Robert Lincoln, *A Prescription for Improved Local Decision Making: Let's Have a Local Government APA,* posted at http://www.flalandlaw.com/landblog/ (January 25, 2005).

[27] Section 57.111, F.S. (2004).

[28] Section 57.111(4)(a), F.S. (2004).

[29] *Florida Real Estate Comm'n v. Shealy,* 647 So. 2d 151 (Fla. 1st DCA 1994) (requiring that a licensee hold a professional license in the same capacity in which he practices a profession); *Albert v. Dep't of Health, Board of Dentistry,* 763 So. 2d 1130 (Fla. 4th DCA 1999) (an individual licensee is not automatically disqualified from recovering attorney's fees under FEAJA simply by forming a corporation for her professional practice).

[30] *Daniels v. Department of Health,* Case No. SC04-230. This case involves a petition to review a *per curiam* affirmance of a DOAH order denying Daniels' amended petition for attorney's fees based on the ALJ's finding that she is an individual, not a "small business party" as defined by section 57.111(3)(d), F.S. 868 So. 2d 551 (Fla. 3d DCA 2004).

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