ADMINISTRATIVE LAW SECTION NEWSLETTER

Vol. X, No. 3 THE FLORIDA BAR March, 1989

Chairman's Message

Our Section leaders have been busy these Past few months developing long-range goals to benefit our current members, attract new members and better serve the public. In addition to focusing on development of a certification plan in administrative and governmental law, which is discussed elsewhere in this *Newsletter*, the Executive Council has urged that The Florida Bar assist indigents in obtaining transcripts for use in administrative appeals. These transcripts could be provided through legislative enactments and appropriations alone, or in combination with funding provided by the Bar, a grant from the interest on lawyers' trust accounts program, and court reporters' voluntary contributions for this purpose.

The Section is developing legislative guidelines which, once enacted, will enable us to take positions on legislation. Although the Board of Governors may veto the Section's position if it is inconsistent with a stated Board position or not in the best interests of the Bar, these guidelines will nevertheless allow our Section to be more directly involved in legislative matters than in the past.

We have also addressed ways to increase the public's understanding of public service functions of our various state agencies. To that end, our Long-Range Planning Committee will ask television stations around the state to donate their public service time to air on-half hour interviews with various agencies.

Continuing legal education is an ongoing concern. This year our Section will sponsor a one-half day seminar at The Florida Bar's annual meeting. This seminar will address practice before selected state agencies and include a caselaw update. Our 1989 Administrative Law Conference will be chaired by Stephen Maher, an Executive Council member. Stephen is an associate professor of law at the University of Miami School of Law.

I believe that our most important long-term project relates to developing a certification plan in administrative and governmental law. By filling out the questionnaire contained in this *Newsletter*, you have the opportunity to help the Executive Council decide whether or not it will support such a certification plan. I invite Section members to contact our Florida Bar coordinator, Fay Yenyo, for further information concerning upcoming Executive Council meetings. We would like to see more Section members attend, and to share their interests and goals for the Section with us.

Deborah J. Miller

From the Editor

It has always been my belief that the issues touched upon by an active administrative law practice are professionally and intellectually stimulating, if only at times a bit tedious. From food stamps to bank charters, from landfills to a hairdresser's license — is a lot of territory.

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INSIDE:

from preceding page

Happily, this issue of the newsletter is beginning to show some of that diversity in print, ence in which the latest issues and trends are highlighted before a live audience in Tallahassee. The conference conducted this Fall, featuring Professors Bonfield and Gellhorn as well as other eminent jurists and practitioners led by Arthur England, was particularly effective, in outlining the broad context in which administrative law has evolved. Filling in some of the details then is up to us, through this newsletter, through CLE activities and other matters undertaken by the Administrative Law Section.

Forces Shaping the Profession

Keeping up with administrative law developments requires keeping up with the Florida Legislature, the executive branch of government and The Florida Bar all at one time. Many developments in the CLE area, for example, are evolving rapidly as the Bar presses toward more uniform CLE requirements while at the same time meeting the needs of an increasingly specialized legal profession. The leadership of sections, including this one, need to participate actively in those deliberations because input from the sections is increasingly significant in the larger framework of the Florida Bar.

Federal Awareness

Administrative practice before federal agencies is becoming an increasingly common experience for many whose initial encounter with the government occurs at the local or state level. The proliferation of overlapping state, federal and local government "relationships" is more the rule now than the exception. A practitioner, therefore, who "knows the ropes" with state or local agencies but hasn't a clue as to what's happening within their federal counterpart proceeds at some peril. For this reason, we are including more federal issues and procedures in our materials and activities. Walter Crumbley's contributions in this issue are greatly appreciated. We hope that you will comment on this trend and identify other areas where the federal dimensions of administrative practice should be explored.

Alternatives Explored

The idea of alternative dispute resolution seems to have moved across the country like the hula hoop. This phenomenon, I assume, starts with the fundamental diversity of value systems in a pluralistic society and proceeds methodically from values and economic interests to conflicts and disagreements and from there to litigation and the judicial process. That's where we come in. If we pay attention to the labor movement, we know that mediation and arbitration, either as bargained-for or statutorily-enacted procedures, have long been used to settle disputes outside of litigation.

Now we have the fashionable phrase "alternative dispute resolution" (ADR) which embraces a variety of desirable features and concepts. Cain might never have slain his brother Abel if they could have talked things out. Unlike some of the more adversarial legal disciplines, however, administrative law, particularly in the realm of environmental and land use components more familiar to me, has always embodied dispute resolution techniques. We are interested in whether any procedures, devices or practices from that evolving discipline can or should be incorporated into Chapter 120, DOAH rules, or elsewhere. Maybe bid dispute proceedings would be an interesting place to start. The newsletter would be happy to publish a variety of reflections from any of you out there concerning your experiences with alternative dispute resolution practices and your estimation of its potential impact on the profession.

Local Justice

Many administrative law practitioners have occasion to deal with both state and local governmental units. Moving back and forth between governmental circles governed by Chapter 120 and those which are not is something akin to commuting back and forth through Checkpoint Charlie: you know there are interesting and valuable things going on on both sides of the wall; you just wish there were better lines of communication. I am convinced that the last word has not been said on substantive and procedural due process before local governments, nor before state governments for that matter. We can all look forward to much activity over the next year in evaluating techniques at all governmental levels which contribute to fair and prompt outcomes.

Meltdown Averted

Finally, we would like to congratulate Sharyn Smith and the DOAH corps of hearing officers for their smooth transition to new quarters. I had always wondered just how the Office of Radiation Control (DOAH's old neighbor) was going to impact the administrative process. Now I don't even have to worry about it.

The Inmate Juice War: Saga of a Multi-Agency Protest

by Drucilla E. Bell

All state purchasing has a basic requirement: bidding. Any attorney in state government whose agency purchases or leases is aware of the bidding requirements for such mundane items as photocopiers, computers and more often these days, leases. A daily occurrence in this process, of course, is the bid protest, filed by any and all of the unhappy (also referred to as unsuccessful) bidders. The normal statutory procedure is found in Section 120.53(5) of the Florida Statutes and usually is detailed and complete enough to cover most any purchase protest. However, now and then there arises a purchase that is so controversial and of such monumental statewide importance that not only is the protest procedure supplemented by interlocutory appeals to the DCA, but also petitions for injunction to the circuit court.

That is the situation that was encountered in the inmate juice war. This all resulted from the famous case in (Department of) Corrections history called *Costello v. Wainwright* which required that inmates be given minimum daily requirements of vitamins and minerals, along with a minimum amount of cell space and medical treatment. Since forcing inmates to take vitamin pills would be difficult, if not impossible, Corrections decided that the most efficient way to deliver the nutrition was via their normal diet, through fruit juice.

As the system was running out of the vitamin enriched fruit juice, the bid specifications were distributed and bids were received. After the bid award was posted, of course, a bid protest was filed. The lowest bid was a fruit juice which contained nutrasweet and was a very high yield product. The next lowest bidder who used sugar decided that he should have received the bid, and protested because of the yield required in the bid specifications.

The process, however, is not this simple. Generic items that are utilized by more than one agency are bid by the Department of General Services, which had bid the fruit juice concentrate. Therefore, DGS would defend the bid protest through the Section 120.53(5) processes.

In the meantime, the inmates were still drinking the fruit juice, which means Corrections was using its supply and would be required to purchase more. But purchase more from whom? There was no state contract. Corrections took the fiscally prudent course of action and attempted to buy from the apparent low bidder. DGS reviewed the request and certified a single source purchase from the lowest bidder. The second lowest bidder protested the single source purchase and requested a formal hearing. Corrections denied the hearing request because the purchase was based on the single source authorization from DGS. Since the product had been shipped, the protester went to Circuit Court for an injunction. The Circuit Court Judge refused to get involved in the supplier dispute.

Protester then went to the District Court of Appeal for a writ of mandamus or a review of the non-final agency action, which the Court granted. The DCA issued a temporary emergency stay which prevented Corrections from using the fruit juice product that had been delivered. After responding to some orders to show cause directed at both parties, the Court eventually invalidated the single source authorization, but allowed that Corrections could purchase the product on an emergency basis, which it did.

Of course, the second lowest bidder protested the emergency purchase also, but only with a no-

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

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THE INMATE JUICE WAR

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tice of protest. Since the formal written protest was not timely filed, this was dismissed.

The lessons gleaned from this episode are numerous. First, economy is not a valid reason for a single source purchase. Second, be cautious of what your agency requests, because DGS may give it to you and you'll have to defend it. Third, if your agency gets caught in a bid protest, running out of fruit juice for thirsty inmates, purchase by emergency certification. But if you're the protester and the purchasing agency denies your protest, try the District Court of Appeal. They'll sort out all of the players, issues and products, and hopefully, keep the inmates in fruit juice at the same time.

(DGS successfully defended the initial bid award on the basis that the lowest bidder actually exceeded the bid specifications. See *Tropabest v. DGS*, 493 So.2d 50 (Fla. 1st DCA 1986).

Ms. Bell received her Juris Doctor degree from Florida State University College of Law in 1975. She has been Assistant General Counsel with the Department of Corrections since 1986 and handles purchasing, contracts, and construction matters. Ms. Bell was Assistant General Counsel at the Department of Professional Regulations from 1978-1985. She is Chairman-elect of the Administrative Law Section of The Florida Bar.

DOAH's New Quarters

by Betty J. Steffens

After two years of planning, the Division of administrative Hearings has finally arrived at its new residence. The DeSoto Building, which is located at 1230 Apalachee Parkway, Tallahassee, Florida, completed construction in record time and by February 1, 1989, all Hearing Officers and personnel were in their new quarters.

The new building consists of 45 professional offices which will house the 30 Hearing Officers and administrative staff. Most important for members of the Administrative Law Section are the well-planned and well-appointed public areas. There are six separate hearing rooms which fan out from a core area consisting of 3 waiting rooms, the law library, Clerk's office, and other public facilities. Those of us who ventured into the old building previously occupied by the Hearing Officers will be impressed with the DeSoto Building's accommodations, which include waiting areas for witnesses, a panel of telephones for public use, and comfortable hearing rooms that rival any county court facility. Best of all, the DeSoto Building has an abundance of parking.

The design of the building can be attributed to the collective efforts of many of the Hearing Officers who gave of their own time and energy to produce a building that actually works. It is rumored that Division Director Sharyn Smith's husband, Billy Sabella, a Tallahassee architect, worked behind the scenes to provide pro bono architectural services. The building itself evidences a fine understanding of the needs for

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Administrative Law Section's Annual Meeting Schedule

(Wednesday) June 14, 1989

2:00 p.m.- 5:00 p.m. — Long Range Planning Committee

(Thursday) June 15, 1989

8:30 a.m.-11:30 a.m. — CLE Seminar

12:30 p.m.- 2:00 p.m. — Luncheon co-sponsored with the Local Government Law Section

2:30 p.m.- 5:30 p.m. — Administrative Law Section's Annual Meeting and Executive Council Meeting

maximum utilization of space with a sense of creature comfort still based on a state budget.

The offices for the Hearing Officers ring the building, thereby providing each Hearing Officer with a window. There is one interior corridor set up with Hearing Officers' offices, but the preponderance of Hearing Officers have a window to the world. Each Hearing Officer is also furnished with a computer-word processor station.

For those of you who travel to Tallahassee, you will be happy to know that the new location has four motels and several restaurants within walking distance of the new facility. If you are planning a trip to Tallahassee, I encourage you to go out Apalachee Parkway and visit the new DeSoto Building. Each of the Hearing Officers appears anxious to provide a guided tour of the new building. In a City where much is said about the failings of government, the DeSoto Building is a success in which all members of the Administrative Law Section can take pride.

Ms. Steffens practices in the area of administrative law, and is a partner in the firm of Nabors, Giblin, Steffens and Nickerson, P.A., in Tallahassee. She was formerly legal counsel for Governors Rueben Askew and Robert Graham. Ms. Steffens is a member of the Executive Council of the Administrative Law Section and Chairman of the section's Legislative Committee.

Burden of Proof: Law and Reality

by M. Catherine Lannon

There are two aspects of the concept of burden of proof which need to be addressed in formal hearings. One is a procedural aspect, more accurately called the "burden of going forward with the evidence," and the other is a substantive concept: the "burden of ultimate persuasion." The procedural aspect of who must go forward with the evidence is important tactically, but is unlikely to have an overriding effect on the outcome of a case. The burden of ultimate persuasion, however, controls the bottom line. Thus, it is important to understand both the concrete requirements of the burden of persuasion and the emotional aspects which intrude.

Burden of Going Forward with the Evidence

Over the past several years, one of the duties included in my assignment as attorney for the Florida Board of Medicine has been to represent the Board in license denial proceedings before the Division of Administrative Hearings. After some attorneys for applicants for medical license, and more than one hearing officer, suggested that the Board, rather than the applicant, should have to present its case first, I decided to look past Rule 28-6.008(3), Florida Administrative Code, and really analyze the case they usually mentioned when they suggested I present the Board's case first: *Florida Department of Transportation v. J.W.C. Company, Inc.*, 396 So.2d 778 (Fla. 1981) [hereinafter, *J.W.C.*]

That case, it was simplistically suggested, stands for the proposition that the Agency may be required to make the initial presentation in a licensure or permit case. It is true that in *J.W.C.* the Department of Transportation (hereinafter D.O.T.) was required to present its case first. That was, however, because D.O.T. was the *applicant* for the permit; D.O.T. was not the Agency which was to rule on the application. The Department of Environmental Regulation [hereinafter D.E.R.] ruled on the permit application. Thus, *J.W.C.* in no way stands for the proposition that the Agency which made the preliminary ruling which led to the formal hearing has the duty to "go forward with the evidence" initially. To the contrary, the First District Court of Appeal asserted:

> As a practical matter, where a notice of intent has been issued, we can conceive of no more' orderly way for a formal hearing to be conducted than to have the' applicant (who has the ultimate burden of persuasion) first present a "prima facie case."

396 So.2d at 788.

A review of *J.W.C.* and the other environmental cases thereafter are made somewhat confusing on this issue because of the fact that there may be multiple parties. In *J.W.C.*, Florida D.O.T. applied to D.E.R. for a permit. After D.E.R. issued a letter of intent granting D.O.T.'s permit, J.W.C. Company, Inc. and other property owners challenged the letter of intent. In that circumstance, the "petitioners" were the third parties (J.W.C., et al); thus, the terms *applicant* and *petitioner* are not synonymous, as they are in the usual professional license context. Furthermore, when a third party is permitted to

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enter the proceedings, it is required to specify in the petition the areas of controversy and assert a factual basis for the contentions made. At the hearing, the applicant need only present a prima facie case of entitlement in order to shift the burden of going forward with the evidence to the petitioner. As stated in *J.W.C.*, once the applicant does that, then the petitioner must present "contrary evidence' of equivalent quality" to prove the truth of the facts asserted in the petition. *See Woodholly Associates v. Department of Natural Resources*, 451 So.2d 1002 (Fla. 1st DCA 1984).

Burden of Ultimate Persuasion

The biggest difficulty with the burden of ultimate persuasion is that, although the law is clear in this area, the application of the law is less dependable. In a disciplinary action against a professional licensee, the burden of proof is on the Agency to establish by clear and convincing evidence that the violation charged has occurred. *Ferris v. Turlington*, 510 So.2d 292 (Fla. 1987). The reason for this is that once a person has been granted the professional license, the person then has a right to that license and the license cannot be taken away without cause.

In the case of an applicant for a license, however, there is no *right* or entitlement to the license. Rather, the license is simply a privilege which the applicant hopes to be granted. Thus, as noted in *J.W.C.*, "[A]n applicant for a license or permit carries the 'ultimate burden of persuasion' of entitlement through all proceedings, of whatever nature, until such time as final action has been taken by the agency." 396 So.2d 787. *This* burden, unlike the burden of going forward with the evidence, never shifts. Accordingly, in *Astral Liquors, Inc., v. State, Department of Business Regulation, Division of Alcoholic Beverages and Tobacco*, 432 So.2d 93 (Fla. 3rd DCA 1983), the applicant for transfer of a liquor license was required to show, the *absence* of pending Agency proceedings; the Agency was not required to show their existence. The burden of proof can, however, be placed on another party by statute. *Irvine v. Duval County Planning Commission*, 466 So.2d 357 (Fla. 1st DCA 1985).

The problem is not with the law, but the practice. It is not uncommon to get into a license denial hearing in which the opposing counsel concentrates on preaching equity and truth, justice, and the American way, but is woefully short on a presentation of evidence showing the applicant's entitlement to license. In fact, there is often an undertone of the unfairness of the whole proceeding; the unfairness of making this wonderful person whose children starved while he or she went through school have to prove entitlement to licensure. Furthermore, there is a focusing on whatever aspect of the licensure criteria the applicant happens to think is in his or her favor, such as the quality of education, and a reluctance to deal with other aspects of licensure criteria which are not so much in their favor, such as the fact that they may have had a criminal conviction or that they lied on their application.

Unfortunately, such tactics sometimes work and the Hearing Officer is distracted from the overriding fact that the person does not have a right to the license. Hearing officers routinely recite that the burden of proof is on the petitioner. The job of the Agency lawyer is to be sure the Hearing Officer actually applies that standard.

I could perhaps give several examples, but there is a limit to the number of toes that I am willing to step on for the Administrative Law Section Newsletter. One vivid example, which will live with me forever, is the one in which the Hearing Officer, in the Recommended Order, chided the Agency for expecting the applicant to come forward with evidence verifying his education from the government which had allegedly placed the applicant in a concentration camp. Forgetting for the moment that there was no finding of fact as to who confined the applicant to a concentration camp, it was clear that the Hearing Officer was not only not placing the burden of proof on the applicant, even though the Hearing Officer said that he or she was, but the Hearing Officer held in low regard the Agency for having asked the person to prove his qualifications. In another part of the same order, the Hearing Officer admitted that certain documents could not have been based on the medical school records, but then asserts, "Respondent ignores the fact that other evidence *could* have formed the basis of ... the conclusion." [emphasis supplied] Respondent did not ignore it; Respondent simply naively believed that the finding of fact had to be based on what petitioner proved, not on Respondent's ability to *disprove* that there was any basis for the assertions in the hearsay document.

Another example which comes to mind is the one in which a person was denied a license for multiple reasons. One of the reasons stated was a violation of the Practice Act. The applicant for

the license testified under oath that he was not at the place where a crucial event occurred. The Hearing Officer found that the person was at that place, but that the person had not committed the act which had been alleged as a basis for denial. The finding of the Hearing Officer on that point could not have been reached, however, without a decision by the Hearing Officer that the applicant had testified falsely under oath. One of the other charges was that the person attempted to obtain a license by fraud or misrepresentation. Interestingly, the Hearing Officer found that this was not true. One has to only wonder how, if the burden of proof was on the applicant, this result could have been reached. The Hearing Officer had obviously already found that the applicant had testified falsely under oath in an effort to obtain the license, but then, paradoxically, the Hearing Officer found that the applicant had established that he had not attempted to obtain the license by fraud or misrepresentation.

One interesting aspect of looking at the two "burdens" together relates to those occasions where the Hearing Officer requires that the Agency attorney go forward initially. The requirement that an Agency attorney go first seems to be an open admission at the beginning of the hearing that the Hearing Officer is not placing the burden of ultimate persuasion on the applicant, as the law requires, but is placing it squarely on the Agency. If the record is a clean slate and no evidence is introduced, then the petitioner loses. The Agency has no duty to come forward with any evidence; it can prevail, in essence, by a default. Just because the other side is there and appears to have witnesses is no reason to start the "game" of the hearing by announcing that the petitioner is not going to be required to win the hearing, the respondent is; the petitioner is simply going to be required to not lose it.

In summary, careful reading of *J.W.C.* helps an attorney sort out the issues of the burden of going forward within the evidence and the burden of ultimate persuasion, but an understanding of the law is only the beginning point. The practicing attorney must also understand the realities of the situation and constantly make clear to the trier of fact which assertions or evidence of record go to the merits of the issue, and to constantly be sure that the trier of fact understands, in real terms, which party has the burden of ultimate persuasion and to do everything possible to be sure that burden is required to be met.

M. Catherine Lannon is the Section Chief of the Administrative Law Section and has been with the Attorney General s Office since 1982. She serves as legal counsel to the Board of Medicine and to the Occupational Therapy Council. Previously, she was a law clerk at the First District Court of Appeal for approximately four years. She received a B.S. and M.S. from Illinois State University and received her J.D. (with honors) from Florida State University in 1978.

On the Road Again . . With DOT

by David S. Dee

The Florida Department of Transportation (DOT) has been involved in several significant issues during the past few rears that have materially affected competitive bidding cases in Florida. Perhaps most significantly, DOT prevailed in *Department of Transportation v. Groves-Watkins Constructors*, 530 So.2d 912 (Fla. 1988), a bidding dispute which has important ramifications for other cases involving Florida's Administrative Procedure Act (APA)

The dispute arose in *Groves* when DOT rejected all of the bids submitted for a $54 million highway construction project and announced its intention to solicit new bids. Groves-Watkins Constructors (Groves), the lowest bidder, filed a petition for a formal administrative hearing to

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challenge DOT's preliminary decision.

DOT rejected Groves' bid because DOT believed the bid was too high, but the hearing officer found that DOT's estimate for the project was too low and that Groves' bid was reasonable. DOT offered no competent evidence to support its rejection of Groves' bid except for its erroneous analysis of the project's cost. Under these circumstances, the hearing officer found that a decision to rebid the project, instead of awarding it to the lowest bidder (Groves), "would be an unfounded and arbitrary decision." The hearing officer concluded that Groves was entitled to the contract. Nonetheless, DOT rejected the hearing officer's recommendation and may of his findings of fact.

Groves appealed to the First District Court of Appeals (DCA). Before the court reached the merits of the case, DOT solicited new bids for the same project, with slightly revised specifications. Groves sought an extraordinary writ to prevent DOT from awarding the contract to someone else, but the DCA refused to issue the writ. DOT awarded the contract, and a different construction company began work or the project.

The DCA then reversed DOT's final order. The court found that there was competent substantial evidence to support the hearing officer's findings. DOT then appealed to the Florida Supreme Court, which reversed the DCA and upheld DOT's final order.

The Supreme Court's decision is significant for several reasons. Among other things, the decision reiterated the standard that must be applied when reviewing an agency's decision to award a contract or reject all bids. Consistent with prior case law, the Court found that a hearing officer should determine "whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly," 530 So.2d at 914, even though the Court then rejected the hearing officer's finding of arbitrariness.

In *Groves*, the only question was whether DOT had acted arbitrarily by rejecting Groves' bid when there was no evidence of record to support DOT's decision. This issue was resolved by the hearing officer, who made a finding of fact that DOT's proposed action was arbitrary. The Supreme Court, however, stated "[w]e cannot agree," 503 So.2d at 914, and overturned the hearing officer's finding. The Court decided that DOT made "an honest mistake" and affirmed DOT's decision.

A close reading of the case file reveals that the Court also overturned several other findings of fact made by the hearing officer notwithstanding Section 120.68(10), Florida Statutes, and extensive case law prohibiting an appellate court from overturning findings of fact supported by competent substantial evidence of record. Unfortunately, the Supreme Court's decision does not address Section 120.68(10) nor expressly acknowledge this apparent conflict with basic APA principles.

The APA provides protection for the public from erroneous and arbitrary agency decisions by requiring the agency to be accountable in a formal hearing, which is intended to help the agency reach a correct decision on a reasoned factual basis. Under the APA, an agency cannot cling to an erroneous decision, even one caused by "an honest mistake,: as the basis for its final action. In *Groves*, DOT's initial decision may have been based on an honest mistake, but its decision to cling to its mistaken estimate in its final order, in disregard to the hearing officer's decision had been shown to be erroneous in a formal hearing and the Department's blind adherence to its preliminary decision was arbitrary — i.e., not supported by the facts. *See e.g. Agrico Chemical Company v. Department of Environmental Regulation*, 365 So.2d 759, 763 (Fla. 1st DCA 1978), *cert. denied*, 376 So.2d 74 (Fla. 1979) ("An arbitrary decision is one not supported by facts or logic, or is despotic.")

There is another fundamental problem with *Groves*. DOT's final order relies upon allegations that were not presented at the administrative hearing and thus were not subject to cross-examination or contervailing evidence. DOT's reliance on nonrecord assertions circumvented the APA process and was prohibited by well-established case law. Despite these material irregularities in DOT's final order, the Supreme Court's decision relied in part on DOT's unsubstantiated, after-the-fact justification of its action.

Some observers have suggested that the Supreme Court's decision in *Groves* proves that hard cases make bad law. They speculate that the Court may have been concerned about DOT's liability if the Court held Groves' right to the disputed contract, especially since the project was already being build by another company. If that were true, however, the Court could have addressed its concern by limiting the remedy available to Groves, rather than by undermining the APA. Other observers suggest that the Court's difficulties with the APA con-

siders very few APA cases and thus may be unfamiliar with it.

DOT has taken affirmative steps to ensure that it does not face another situation like *Groves*. In *Division of Administrative Hearings v. Department of Transportation*, 13 FLW 2648 (Fla. 1st DCA 1988), DOT challenged certain rules that had been proposed by the Division of Administrative Hearings (DOAH). Interestingly, the case was heard by a non-DOAH hearing officer because DOAH was a party to the proceeding. The hearing officer held that several proposed DOAH rules were invalid, including certain procedural rules for bid protests. The proposed rules would have required an agency (e.g., DOT) to give notice to all bidders, other than a protesting bidder, of the time, date and place of any hearing concerning a bid protest. This proposed rule was deemed arbitrary. The hearing officer's ruling was upheld on appeal.[1]

DOT also sought legislative relief during the dependency of *Groves*. DOT persuaded the legislature to modify Section 337.11(3)(b), Florida Statutes, to require anyone challenging DOT's decision in a bid protest to post a bond of $5,000 or 1% of the lowest bid for the project, whichever is less.

As a result of these events, it has become difficult to predict how the Court would view a less complicated challenge to an agency's decision to reject *all* bids for a project. Because the Court did not directly overturn any APA case law nor articulate any new standard for determining whether an agency's decision is arbitrary, the significance of *Groves* may well be an aberration limited to its facts.

Footnotes

[1] Parenthetically, a rule providing for voluntary dismissals "upon such terms and conditions as the hearing officer deems just and proper" was invalidated because it gave the hearing officer unbridled discretion. Another proposed rule provided that a second voluntary dismissal would act as a dismissal with prejudice. It was invalidated because DOAH does not have the legislative authority to adopt a rule allowing a hearing officer to "impose a sanction of dismissal with prejudice." *Id.*

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He received a Bachelor of Arts degree in 1974 from Emory University and a Juris Doctor degree with high honors in 1979 from Florida State University. Mr. Dee is a member of Phi Beta Kappa, Omicron Delta Kappa, and the Order of the Coif.

Mr. Dee is a member of the Executive Council of the Environmental and Land Use Law Section (ELULS), and he is the Chairman of the ELULS Seminars Committee.

Mr. Dee works primarily in the area of environmental law, including permitting enforcement and litigation. He has represented local governments, environmental organizations, and private developers in a wide variety of cases.

On the Federal Side. . . .

by Walter S. Crumbley

For those practitioners in the area of disability benefits and social services, a piece of major legislation came from the U.S. Congress in 1988. This legislation, entitled Veterans Judicial Review Act (Public Law no. 100-678), drastically changes the practice before the Veterans Administration. For over a decade the Veteran's programs have been viewed as the last vestige of government "privileges" programs, as compared to the "entitlement" programs of Social Security, Supplemental Security Income, Aid for Dependent Children, and the like. This new act signed into law on November 18, 1988, provides for reasonable attorney's fees and judicial review of Veteran's Administration decisions. The Veterans Administration itself was also raised to a cabinet level agency during the same congressional session.

The provision relating to reasonable attorney's fees modifies the 100 year old statutory limit of $10 which was upheld by the United States Supreme Court. Some supervision and control over attorneys fees still remains, however, in the fee agreement must be filed with the Board of Veterans Appeals, which may order a reduction if it is determined that the agreed fee is excessive or unreasonable. If the agreement provides for contingent fees to be paid directly from past due benefits, then a statutory cap of 20% is applicable, and further subject to reduction for being excessive or unreasonable.

Another major change brought about is to provide for judicial review in the Court of Appeals of the Federal Circuit. This court has exclusive jurisdiction to review and decide any

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challenge to the validity of any statute or regulation (or interpretation thereof) and to interpret constitutional and statutory provisions. The court's review of the decision of the Court of Veterans Appeals is limited to the validity of any statute or regulation, or any interpretation of a statute or regulation, other than a determination as to a factual matter. Other provisions direct that the Federal Circuit is to decide all relevant questions of law, including constitutional and statutory interpretations, and hold unlawful any statute, regulation or interpretation relied upon by the Court of Veterans Appeals which the Federal Circuit finds is:

(a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(b) contrary to any constitutional right, power, privilege or immunity;

(c) in excess of their statutory jurisdiction authority, or limitations, or in violation of any statutory right, or

(d) without observance of procedure required by law.

Besides the provisions as to judicial review and attorneys fees, several other important changes were passed.

A new Article I Court has been created, consisting of at least a chief judge and two associate judges, all to be selected by the President and confirmed by the Senate. This court will hear all appeals from Board of Veterans Appeals decision, with even broader powers than those granted to the Federal Circuit. The clear intent seems to be to put in place, within the Veterans Administration a very independent reviewing authority over the Board of Veterans Appeals. It is further noted that the President, and not the agency, will appoint the Chairman of the Board of Veterans Appeals.

The implications of these legislative changes are substantial. Congress clearly reacted to the problems of agency interference with the Social Security Judges by making the new Court of Veterans Appeals more powerful and independent. It is also apparent that this legislation will probably move veterans' benefits from "mere privileges" to the full blown entitlement status enjoyed by other social welfare and remedial programs. As regulations are promulgated and cases being to move through the system in late 1989 and 1990, a new era of due process will open to deserving veterans and their families.

Walter Crumbley has served as Administrative Law Judge for the Social Security Administration since 1975. He is also an Adjunct Professor for Golden Gate University and the Stetson College of Law. He is active in the American Bar Association, the Federal Administrative Law Judges Conferences and the American Society for Public Administration. Crumbley resides in Tampa.

A Recommendation for Administrative Law Certification

by Deborah J. Miller, Section Chairman

At The Florida Bar's Midyear Meeting, our Section's Executive Council voted to take the preliminary steps necessary to develop a certification plan in administrative and governmental law. These steps will start with polling you, our Section's members, to determine your support for a certification program.

This article is not intended to debate exhaustively the pros and cons of certification. Rather, I intend to tell you why I believe that administrative law should join the other seven sections' certification programs.

Most of us know how easy it is to become "designated" in administrative and governmental law. Designated attorneys are permitted to advertise that fact and, despite the Bar's advertisements in telephone yellow pages explaining the difference between certification and designation, I believe a majority of the public doesn't understand the difference. Most non-attorneys believe that certification and designation mean that the attorney is an expert. We know, however, that any three-year attorney with 30 hours of administrative and governmental law CLE credit who represents that he devotes 25% of his practice to administrative and governmental law and who can provide two references, may become designated. The requirements do not provide for evaluation of the applicant's skills or ability to try a complex case in the designated area. Certi-

fication, in contrast, requires a minimum of five years of practice, and at least 45 credit hours and substantial involvement in the practice area. Notably, certification involves an exam and screening of the applicant by a certification committee composed of eminent practitioners with at least 10 years experience in this field.

If our Section supports a certification program, our Executive Council, The Florida Bar and ultimately the Supreme Court will flesh out the meaning of "substantial involvement." Other sections which have a certification program require that the applicant devote from 30-40% of his practice to the specialty areas. Unlike designation, certification does not involve the rote processing of applications without an attempt to verify the applicant's skills.

Opponents of certification have argued that a certification program will impinge on the practices of otherwise well-qualified but non-certified attorneys. This may be so, but I submit the public will be better served by raising the standards for the badge of expertise, and impingement will in any event happen only to a limited extent. The use of designation is not as widespread as people believe. Designation has in fact decreased, as evidenced by the failure over the past six years of approximately 60% of designated attorneys to renew their designation.

More significantly, a non-attorney who is using the yellow pages advertisements as his only source of information to select an attorney should, I suggest, choose a certified administrative lawyer to help him in challenging a Board's denials of his professional licensure application. Non-designated attorneys will have their share of law business, as attorneys will continue to recommend counsel based on their personal knowledge of that individual's experience without regard to his certification, just as they do now.

Most administrative lawyers can recall an injustice done by a lawyer who undertook a matter in this area without the necessary experience and training. I believe that benefits of certification in providing a reasonable measure of a lawyer's experience, knowledge and interest in administrative practice is far outweighed by an adverse impact on the non-certified attorney's practice.

If a certification program is adopted for administrative lawyers, our designation program should probably be eliminated immediately. If this program is not adopted, designation will probably experience a slower death. Its demise seems inevitable if for no other reason than members' lack of interest in designation.

Like my predecessor chairman, George Waas, I believe that the object of our Section should be to serve the public in the best way possible, to improve the practice of administrative and governmental law, and to elevate the image of our specialty. I believe that certification accomplishes this goal more graphically than anything else the Section will or may do. If you want your opinion on this issue to be counted, you must fill out and return the form which is included in this *Newsletter*.

Membership Survey

Mail to:

Ms. Deborah J. Miller, Chairman
Administrative Law Section
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300

Check one:

1. Do you support a certification program in administrative and governmental law?
   Yes ___ No ___

2. Would you be interested in becoming certified if our section had a certification program?
   Yes ___ No ___

Please fill out and drop this form in the mail. Thank you for your vote.

THE FLORIDA BAR
650 APALACHEE PARKWAY
TALLAHASSEE, FL 32399-2300

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June Seminar Planned

The Administrative Law Section has planned a Seminar for The Florida Bar's Annual Meeting entitled: "Recent Developments in Practice Before Selected Administrative Agencies: Significant Appellate Court Decisions and Administrative Orders; Recently Adopted Rules; Proposed Rules; Enforcement Initiatives; and, Emerging Agency Policies." The Schedule will be as follows:

Thursday, June 15, 1989

8:30 a.m.- 9:00 a.m.
Department of Health and Rehabilitative Services
Stephen A. Ecenia, Tallahassee

9:00 a.m.- 9:30 a.m.
Department of Professional Regulation
Deborah J. Miller, Miami

9:30 a.m.-10:00 a.m.
Department of Environmental Regulation
Ralph DeMeo, Tallahassee

10:00 a.m.-10:30 a.m.
Department of Coummunity Affairs
C. Laurence Keesey, Tallahassee

10:30 a.m.-11:00 a.m.
Bid Disputes
Martha Hall, Tallahassee

11:00 a.m.-11:30 a.m.
Case Law and Statutory Law Update
C. Gary Stephens, Tampa

DESIGNATION CREDIT

(Maximum: 3.5 hours)

Administrative and Government Law: 3.5 hours
Appellate Practice: 3.5 hours
Corporation and Business Law: 3.5 hours
General Practice: 3.5 hours
Trial Practice–General: 3.5 hours

CLER CREDIT

(Maximum: 3.5 hours)

General: 3.5
Ethics: 0 hours

CERTIFICATION CREDIT

(Maximum: 2.5 hours)

Civil Trial: 2.5 hours

This course has been approved credit for recertification by the U.S. District Court of the Northern District of Florida. This course will offer a maximum of 3.5 hours credit of the required eight (8) hours necessary for recertification under Local rule 4-5(c)(1)(b).