ADMINISTRATIVE LAW SECTION NEWSLETTER

Vol.XI, No. 3 M. Catherine Lannon, C. Gary Stephens, Co-Editors March 1990

Chairman's Column

Send the Rules to the Administrative Conference!

Every state agency has to encounter the trauma of rulemaking; some agencies such as the Division of Administrative Hearings do it occasionally and on a cataclysmic scale; others like Health and Rehabilitative Services and the Boards of the Department of Professional Regulation tackle it on a continuing basis. This process, the ideal and the Florida progeny, its origin and metamorphesis will be analyzed, nostalgized and perhaps eulogized, at our upcoming Sixth Administrative Law Conference to be held on St. Patricks Day, March 16th (close enough for government work) at the Center for Professional Development in Tallahassee.

Just like thousands of other law students, I took an APA course in law school. It was taught by Pat Dore, but it was before the APA was actually adopted by the legislature. It seemed too nebulous to apply and was clearly untried and yet to be rejected by any state agency. Two years after graduating, I was forced to deal with the then new APA when I went to work for the newly reformed Department of Professional Regulation, where I was hired to adopt new rules for the Boards because all of theirs were "sunsetted" by the Legislature. My first assignment was to rescue the Board of Cosmetology from operating without rules, which meant adopting interim emergency rules. I decided to update my knowledge of the APA by attending Professor Dore's evening APA class. At my first class, she opened with the critical question: "What in the world is the danger to the health, safety and welfare of the people of the state of Florida that requires the Board of Cosmetology to adopt emergency rules?"

Executive Council member and Associate Professor of Law at University of Miami School of Law Stephen Maher has prepared a dynamic program lead by nationally known and respected administrative law professors. Arthur Bonfield, of the University of Iowa College of Law, Harold Levinson of Vanderbilt University School of Law, and Pat Dore of FSU College of Law will start the day's program analyzing the Florida rulemaking procedure, comparing it to the Model APA and other state procedures. The afternoon will see small group discussions of the rulemaking procedure's devel-

continued . . .

Course Brochures in *News*

CLE Course brochures will be found in your copy of The Florida Bar *News*, commencing with the January 15 issue. They will be on a separate sheet inserted into the *News*. No individual brochures will be mailed after January 15, so be sure to check your Bar *News*!

INSIDE:

opment and changes over the years lead by originators of the APA such as Curt Kiser, Buddy MacKay, Robert Hector, Arthur England, Murray Dubbin, Ted Grissett and McFerrin Smith. These people will explain their visions of how rulemaking would operate, how it would keep the public informed of the mysterious inner workings of government agencies. Has the vision been fulfilled? Are other states procedures more effective and less cumbersome? How does the Florida rulemaking process compare to the model APA? Has the process gone awry?

In order for this to be an effective conference, and for a thorough and meaningful analysis of the rulemaking process to occur, we need to have a broad cross section of agency representatives who are involved in rulemaking. If you know of such a person, especially a non-attorney, please urge that person to attend the conference. Better yet, give them this newsletter and circle the date above. See you at the Seventh Administrative Law Conference in March!

—Drucilla E. Bell

Seventh Administrative Law Conference

by Stephen T. Maher

The Seventh Administrative Law Conference will be held March 16-17, 1990, at the Florida State Conference Center. It is the major event sponsored by the Administrative Law Section of The Florida Bar. This year, the Conference will focus on Rulemaking, and will feature five academics who specialize in administrative law. Professor Harold Levinson of Vanderbilt will attend and share his thoughts on the rulemaking sections of the Act. As you probably know, he was instrumental in the drafting of the Act 15 years ago, and he has written and spoken about the Act since that time. He is probably best known as co-author, with Arthur England, of *The Florida Administrative Practice Manual.* Professor Levinson will be joined by Professor Arthur Bonfield of Iowa. Professor Bonfield has written extensively on administrative law topics and is the author of *State Administrative Rulemaking*, perhaps the definitive text in this area of the law. He is a past chairman of the American Bar Association's Administrative Law Section. Professors Levinson and Bonfield served as co-reporters for the 1981 Model State Administrative Procedure Act, and they are probably the two leading state administrative law scholars in the United States today. Three Florida academics will also participate. Professor Patricia Dore of Florida State, who is recognized as one of the leading authorities on the Act, and Professor Johnny Burris of Nova, who has become active in this area, will join me in providing an academic commentary on Rulemaking at the Conference.

Academic commentary will only be the beginning of what we have planned. The program will move quickly from commentary to small group discussion, and it is in that part of the Conference that the participation of those who have had experience with the rulemaking process will be most important. The Conference seeks to encourage participants to discuss their experiences and views on the rulemaking process so we can more fairly evaluate the benefits and shortcomings of the Act's procedural requirements. This is an opportunity for those involved in rulemaking to voice their concerns in a forum where those views will be heard.

An outstanding group has been assembled to lead the small group discussions. All were involved in the drafting or adoption of the Act 15 years ago, and they should bring a valuable perspective to our discussions. Murray H. Dubbin was a legislator who was active in the Act's adoption. Arthur J. England, Jr., who is perhaps better known as former Chief Justice of the Supreme Court of Florida, and as co-author of the leading treatise on Florida administrative law, was the Reporter for the Law Revision Council, which prepared a draft act. W.E. "Ted" Grissett was a member of the Law Revision Council. Robert C. Hector was a legislator active in the Act's adoption. Senator S. Curtis Kiser was then a State Representative active in the Act's adoption. Professor Levinson was the chair of the committee of the Law Revision Council that prepared the draft act. Kenneth H. "Buddy" MacKay was a legislator active in the Act's adoption. Chief Judge McFerrin Smith III was the Executive Director of the Law Revision Council.

These individuals will not only lead the small group discussions, they will also serve as the commentators when we reassemble as a large group. We hope that the group's experiences will inform their understanding of the purposes of the Act, and that the commentary and discussion that follows before the assembled

group will aid our understanding of the strengths and weaknesses of current procedural requirements. We hope to study those remarks and to generate a series of papers for publication that reflect and critique the current state of Rulemaking practice in Florida.

We expect the Conference to be attended by judges, legislators, agency heads, government attorneys, private attorneys and others interested in Rulemaking. Your attendance is particularly important. Please sign up for the conference today. The Conference is not only relevant and informative, it is reasonably priced ($50 for 12 CLE credits and lunch) and conveniently located (Florida State Conference Center).

A reception is planned on March 15, 1990, at 6:00 p.m., at the Conference Center to kick off the event. It is free to all registered participants. As part of the celebration of the 15th Anniversary of the Act, we have planned a reunion dinner on Friday, March 16, at 7:00 p.m., at the Conference Center. The dinner requires payment of an additional fee. Please contact Peg Griffin at the Bar (904) 561-5621 for further information.

When is an Agency Required to Explicate Its Policies in Rules Adopted in Accordance with Section 120.54, Florida Statutes?

by G. Steven Pfeiffer

This would have been a timely topic in July, 1974, after the Legislature adopted the Administrative Procedure Act and Governor Askew signed it. It would have been a timely topic at the time that Judge Robert Smith's much debated but clearly historic decision in *McDonald v. Department of Banking and Finance*, 346 So.2d 579 (1st DCA, Fla. 1977) was rendered. It would have been a timely topic in ensuing years when thorny issues regarding implementation of the A.P.A. were decided during Governor Graham's terms in office. Now, during the administration of Governor Martinez, with a banquet honoring fifteen years of experience under the A.P.A. scheduled in conjunction with the Administrative Law Conference, the article can still be written.

We have resolved many difficult problems that have arisen under the A.P.A. The standing of parties to initiate or participate in formal hearings, while occasionally dicey, rarely leads to heated debate anymore. The procedural requirements for rulemaking have been ironed out. Even the extent to which a Hearing Officer's findings of fact are binding upon an agency is known quantity in most instances. Despite the best efforts of judges, scholars, legislators and practitioners, however, we do not have a clear answer to the question of when an agency must initiate rulemaking procedures.

The issue has not gone unresolved due to inattention. Considerable energy has been applied to it. One of the motivations for adopting the A.P.A. was the existence of "closet government". *Straughn v. O'Riordan*, 338 So.2d 832 (Fla. 1976). Under the A.P.A., agencies would be required to adopt policies as rules, and the rules would be available for everyone to see. See: Maher, "Rulemaking in Florida: An Opportunity for Reflection," Vol. 64, No. 1, p. 48, Florida Bar *Journal*, (1990).

Courts quickly recognized that agencies could not have rules that were not adopted in accordance with the rulemaking process, and sanctioned the administrative rule challenge procedure as a means for invalidating unpromulgated rules. *Department of Administration v. Harvey*,

continued . . .

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from preceding page

356, So.2d 323 (Fla. 1st DCA 1977).

Courts also recognized that slavish adherence to a principal that all policies of must be adopted as rules would cause precipitous rulemaking, and could render effective action impossible. *McDonald* set the stage for agency policy-making that would sometimes be through adoption of rules, and other times through individual adjudications that could flush out weaknesses in developing policies that have not crystallized. The decision did not, however, lead to resolution of the issue. Since *McDonald*, courts have sometimes responded to agency policies that were not adopted as rules in a manner suggesting that the decision of whether to engage in rulemaking is for the agency alone. See: *Public Service Commission v. Indiantown Telephone System, Inc.*, 435 So.2d 892 (Fla. 1st DCA 1983). At other times the principal seems to be that policies are rules, rules must be adopted in accordance with the A.P.A., and if policies are not adopted in this manner they are invalid. See: *Department of Transportation v. Blackhawk Quarry Company of Florida, Inc.*, 528 So.2d 447 (Fla. 5th DCA 1988).

The recent First District decision, *Public Service Commission v. Central Corporation*, ___So.2d___, 14 F.L.W. 2777, 11 FALR 5919 (Fla. 1st DCA 1989) reflects different judicial approaches. The majority recognized alternative means for setting policy through rulemaking or adjudication, but struck portions of a Commission directive regarding rates charged by alternative operator services. The Court concluded that the Commission did not allow its policies to be tested either as rules or through adjudication, and therefore affirmed the Hearing Officer's determination that the policies were invalid because they had not been promulgated as rules. A theory of the case that would have vested the agency with more discretion is set out in Judge Ervin's dissent.

Perhaps the most interesting recent decision is *Charlotte County v. Department of Community Affairs*, 12 FALR 79 (DOAH 1989). The facts are of interest primarily to those immersed in land use and growth management issues. The effort by Hearing Officer Robert Meale to synthesize post-*McDonald* decisions, however, is of broad interest. Meale has not seen the judicial decisions as vacillating from extreme to extreme, but instead perceives coherent distinctions between decisions invalidating policies as unpromulgated rules and decisions upholding them.

He stated: (at p. 94)

> The cases in which courts have invalidated nonrule policy in Section 120.56 challenges fall into two categories: 1) The agency has failed to promulgate rules when statutorily required to do so and 2) The agency has adopted nonrule policies constituting rules without engaging in rulemaking. In the first case, courts have invalidated the nonrule policy because it is not a rule; in the second case, courts have invalidated the nonrule policy because it is a rule. In both cases, the agency has improperly avoided rulemaking.

Meale concluded that nonrule policies are regarded as rules if the policies are of general applicability and impose immediate requirements not otherwise required by rule or statute. He regarded the failure of an agency to allow nonrule policies to be tested in rulemaking proceedings or adjudicatory proceedings as the agency sin that mandates invalidation. *Id.* at p. 97. His analysis is worth further study.

The Legislature may be wearying from lack of resolution. Proposed Committee Bill GO 90-29 from the House Governmental Operations Committee is an effort to specify when policies must be adopted as rules. The proposal would state a clear legislative preference for policy-making through adoption of rules. When a party is substantially affected by an unadopted agency policy, he can recover attorney's fees if it was reasonable to expect the agency to adopt the policy as rule. The conclusion that the policy should have been promulgated as a rule would not change the result of the case, but the party would at least recover attorneys' fees. Proposed criteria for determining when it is reasonable to expect an agency to adopt policies as rules are feasibility and practicability. "Feasibility" relates to whether the agency has had time to accumulate data and gain necessary knowledge and experience, and includes consideration of the resources at the agency's disposal and its good faith efforts to utilize workshop processes to develop rules. "Practicability" requires an examination of the level of detail and precision that should reasonably be embodied in agency rules. The proposal includes a procedure for recovery and payment of attorney's fees.

GO 90-29 is an effort to resolve the long-standing controversy. The Committee staff worked through a Citizens Resource Group that assured contributions from a range of administrative law practitioners. Primary criti-

cisms have been that the proposal, by legislatively sanctioning "nonrule policy" will encourage it, to the detriment of the stated preference for rulemaking; that awarding attorney's fees will serve only to take money from agency programs; that awarding attorney's fees regarding an issue about which the courts have not been entirely consistent will lead to unjust results; and that awarding attorney's fees under circumstances where a party does not prevail in the proceeding will create an awkward relationship between attorneys and clients.

The quandary remains: When must an agency explicate its policies through rules that are adopted in accordance with the A.P.A.? The absolutist view that there are no policies unless they are adopted as rules is unhelpful. Virtually any action an agency may take, including every final order it enters in an adjudicatory proceeding, can be characterized as a policy of general applicability. After all, adjudications have precedential impact, and should guide agency decisions in future instances when the similar facts arise. Yet surely, an agency need not adopt every final order as rule. On the other hand a view that leaves it solely to an agency to decide when to adopt rules can do violence to rulemaking requirements.

There are three ways to address the quandary. The first is continued litigation. Perhaps *Charlotte County v. Department of Community Affairs, supra.*, can lead to a weaving of decisions into a logical fabric. The second is legislation. The Committee proposal is an effort in that direction. The third is development of a consensus of opinion among practitioners that will eventually lead to judicial or legislative resolutions.

The Seventh Administrative Law Conference scheduled in Tallahassee on March 16, 17, provides an excellent forum for discussion, debate, and, who knows, perhaps synthesis of opinion that will be helpful to agencies, courts, and the legislature. Do not miss this opportunity.

Letter to the Editor

February 2, 1990

Charles G. Stephens, Esquire
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Dear Gary:

I am writing to you in your capacity as Secretary of the Administrative Law Section of the Florida Bar. As you know the United States District Court for the Southern District of Florida has a minimum trial experience requirement for members to be admitted to the Trial Bar of the court. The requirements are set forth in Rule 2.C., of the court's Special Rule Governing the Admission and Practice of Attorneys' (copy enclosed). The courts requirement is somewhat similar to the requirements of the U.S. District Court for the Northern District of Florida, except that the Southern District does not recognize formal administrative hearings conducted pursuant to section 120.57, Florida Statutes, for trial credit. The Northern District Court does properly recognize such proceedings for trial practice experience.

I bring this to your attention because I recently noticed an item in the January 15, 1990 Florida Bar *News* stating that the Southern District Court is accepting comments concerning possible revision to the local rules. This is a good opportunity for the Administrative Law Section to suggest to the court that it consider recognizing formal administrative hearings conducted pursuant to the Florida APA for trial credit. I believe this would be a benefit to the members of the Section particularly those who practice in the Southern District. I would appreciate your bringing this to the attention of the Executive Council of the sections, requesting endorsement of this initiative. A recommendation to the court coming from the Executive Council of the Administrative Law Section certainly would carry more weight than if it came from an individual attorney.

By copy of the letter to Terry Lewis, Chairman of the Environmental and Land Use Law Section, I am requesting that the Environmental Law Section also support this initiative.

Please call me if you are interested in discussing this matter further. Best regards.

Very truly yours

Alfred J. Malefatto

The Florida Bar Continuing Legal Education Committee and the Administrative Law Section present

Administrative Law Overview

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

One Location Only--April 27, 1990

Econo Lodge East, 1355 Apalachee Parkway, Tallahassee, FL 32301, 904/877-3171

LECTURE PROGRAM

8:00 a.m.- 8:25 a.m.	Late Registration
8:25 a.m.- 8:30 a.m.	**Opening Remarks** *Vivian F. Garfein, CLE Chairman, Administrative Law Section*
8:30 a.m.- 9:20 a.m.	**Practice Before the Division of Banking and Finance** *Charles L. Stutts, Holland & Knight, Tampa*
9:20 a.m.-10:20 a.m.	**Effective Practice Before the Department of Community Affairs** *G. Steven Pfeiffer, Department of Community Affairs, Tallahassee*
10:20 a.m.-10:30 a.m.	Coffee Break
10:30 a.m.-11:00 a.m.	**Recent Trends in Administrative Law: Case and Statutory Law Update** *Vivian F. Garfein, Fine, Jacobson, Schwartz, Nash, Block & England, Tallahassee*
11:00 a.m.-11:50 a.m.	**Practice Before the Department of Professional Regulation** *Mark A. Dresnick, Dunn, Dresnick, Lodish & Miller, Miami*
11:50 a.m.-12:40 p.m.	**Practice Before the Department of Environmental Regulation** *William L. Hyde, Roberts, Baggett, LaFace & Richard, Tallahassee*

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Course No. C6659

Policy does not permit double credit within any one of the credit programs listed above. Any combination of the hours indicated may be used providing the total does not exceed the maximum for the course or the total for the area. EACH LAWYER SHOULD MAINTAIN A RECORD OF CREDIT HOURS EARNED.

Register me for "Administrative Law Overview" Seminar.

April 27, 1990, Econo Lodge East, Tallahassee (89).

Registration is by check only.

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Executive Council Urges Law Week and Public School Participation

The Executive Council of the Section, at its January meeting, urged members of the Section to participate in Law Week activities in their communities this year. The council discussed the importance of such activities to the image of the legal profession, and some noted that participation by administrative lawyers was of particular importance because many nonlawyers associate the practice of law primarily with court proceedings. This year, the Law Week theme will be "Generations of Justice." For further information about how you can get involved, contact Marty Gridley at Bar Headquarters in Tallahassee, (904)561-5834.

Discussion at the meeting also focused on the benefits that result when Section members take time to visit the public schools to talk with students about their practice. Council members agreed that school visits were a type of public service that Section members would probably find rewarding and should support. For further information about how you can get involved, contact Annette Pitts, Executive Director of Florida Law Related Education, in Tallahassee, (904) 386-8223.

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