ADMINISTRATIVE LAW SECTION NEWSLETTER

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Veronica E. Donnelly, M. Catherine Lannon, Co-editors

From the Chair

by Gary Stephens

Even if you had not known her, you would have understood from the solemn gathering in the Florida Supreme Court Chambers that here had passed some special kind of person. Even if you had not known her, you would have learned from the moving and insightful testimonials of her students, friends and colleagues that here had passed some special kind of person. If you had not known her, you would have learned from the gathering of judges, university presidents, legislators and cabinet members that she was some special kind of person whose counsel they also sought.

In 1973, Pat Dore was just getting her feet wet as a teacher at the FSU College of Law, the Law Revision Council was considering major and fundamental changes to Chapter 120, and yours truly was commencing law school at Florida State. This coincidence has had major bearing on the course of my professional life, including my current role with the Administrative Law Section. The sense of intrigue about whether an agency decision should be characterized as a rule or an order or whether an agency head should be barred from rejecting the hearing officer's findings of fact have energized, at least for me, two decades of dialogue and professional involvement. For this reason, Pat Dore's teaching career as well as her informative but enormously productive role as advisor to legislators and bureaucrats, far surpassed the confines of a single course of subject matter. Instead, her career addressed the tenor and form of governmental activity in Florida, a subject equally rich in ramifications for quality of life as well as for bureaucratic in fighting. The fact that Pat Dore saw administrative law in the context of constitutional law and saw constitutional law as a hallmark of justice also has not been lost on many who knew her. This ability, this passion, to see the mundane in the broader context of political strife and social justice has vitalized the field of administrative law and the experience of legal training since before 1974. For that, we can give Pat Dore virtually all of the credit.

I share with all members of the Executive Council this extraordinary association with one law professor who has placed an entire discipline on the map and who has served as mentor for two decades worth of lawyers who have made their way into or out or government service. We share a deep sense of loss at her passing and are grateful for the extraordinary presence and influence which she had. The Administrative Law Section is also seeking to determine a larger way in which to honor Pat and to memorial-

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INSIDE:

A Tribute to Pat Dore

Patricia Dore was on the law faculty at Florida State University from 1970 until her untimely death early this year. She was a key advisor to the legislature when it adopted the modern APA in 1974 and had continued to be one of the key persons whose views were sought whenever any changes in Chapter 120 were considered.

In addition to her work in administrative procedures, she taught constitutional law, both state and federal and served as a consultant to the Florida Constitution Revision Commission in 1977-1978.

As Martin Dykerman wrote in his column in the St. Petersburg Times, *"She made a difference." Because she made such a difference, the Administrative Law Section of The Florida Bar offers this tribute to her memory.*

—M. Catherine Lannon

Ave Patricia . . .

Robert P. Smith, Jr. was a judge on the First District Court of Appeal during the formative years of the APA. Currently in private practice at the Hoping, Boyd, Green & Sams in Tallahassee, Florida.

She was chief priest of Chapter 120 and we are its votaries. Pleased, we were, with her any approving comment, and her any criticism though garbed in humor always gave us pause. No judge or agency head or hearing officer or lawyer within the community called administrative law has not measured his or her achievement by the standard of Patricia Ann Dore.

England and Levinson were major prophets. Kiser was foremost in the councils that made it law. Like any powerful mystery Chapter 120 has grown to sustain many sages and scholars; they burn their candles, now, all up and down the peninsula. But Pat Dore was chief celebrant, defender of the faith.

Do you doubt that metaphor, think it extravagant? All the qualities of mystery and of verity are there. Some think it mysterious, to say the least, that nonrule policy still emerges. But in these terms we still speak of the possibility of administrative justice, and we speak without any trace of cant. The thing still seems to work. Still from time to time it transforms government. Still we are expectant.

Pat Dore attended to our expectations.

I first met Pat late in 1977, I think, when a First DCA law clerk, one of her former students, thought it time for the author of *McDonald* and *Willis*, by then on the streets for a few months, to give account. I was fetched over to the FSU law school where Pat was holding court with a few students at the end of a hallway. "A-Ha!, she exclaimed with that suppressed laughter of hers. "A-Ha!" she cried, "The mountain has come to Mohammed!"

Then she read me book and page on the primacy of rulemaking, and bade me repent from incipience.

Later I came to see why Pat Dore succeeded so in that delicate craft that few attempt and fewer achieve—to be both a detached commentator and a passionate actor in the public life. No one whom Pat Dore undertook to correct ever felt she thought him a fool. The dean's remarks in the memorial ceremony awoke my recognition of that. After telling how Pat had charitably and earnestly, but finally unsuccessfully, tried to change the faculty's mind on a matter of some importance, the dean's story ended on a note of affection, respect and

marvel: "And then she sued us," he said.

From such a person, assent has the force of verification. I never had a more treasured comment on my judicial efforts than Pat Dore's, on *McDonald*, years later. She said one day, "How did you *know* that?"

The breadth and rich diversity of Pat Dore's friendships in this world were on display, unmistakably, in that memorial ceremony in the courtroom of the Supreme Court. The setting bespoke Pat's easy but respectful relationship to that institution; and as speakers from across the public spectrum rose one after another to address the overflowing chamber, they attested, plainly, how Pat like very few of us had walked and talked easily and fruitfully with all sorts and conditions of people.

They were all there, her friends the scholars and students, her friends the judges, the power politicians including one old lion, retired, her friends the steady practitioners, the visionaries, the pluggers. Her friends the changers of society, and its sustainers, and those of us who only stand and wait. Her friends her mother, her sister.

Now across my desk on an overcast February morning comes news of the annual legislative impatience with Chapter 120. SB 1674 would make DOAH orders final in 120.57(1) proceedings, supplanting the constituted agencies. Let's build a new little dabbling court system, make all government judicial, kill our Article V courts by adding supervision they cannot do well.

One wonders how such carelessness will now be held in check. No battle-tested institution is gored by injury to Florida's distinctive APA. Who now will speak for its rich heritage, its special texture?

Ah, Patricia, you did so well.

—Robert P. Smith

All of us in any way connected with administrative law were shocked and grieved at the untimely passing of our friend Pat Dore. To list the contributions Pat made, to even list her contributions just in the area of administrative law, is to invite the usage of more space than I was allotted. But who will ever again consider an administrative law conference complete? Pat was an institution. She was active in the development of the law—a virtual encyclopedia of the year-to-year development of the APA. Pat was always available to and freely advised members of the Legislature and other public officials as to our bright and sometimes not-so-bright ideas for changes to the APA. She provided the state with a force of lawyers well-versed in administrative law.

The most fitting tribute to Pat Dore would be for each of us to try, just a little more, to honor the obligations that arise from our abilities, our training and our exclusive right to practice law. Have a debate on the issue of hearing officer final order authority just for fun. Finally, whenever it is that we are able to address some much-needed revisions to the APA, one of the revisions I would propose is to amend the title of the act so that it be known as the "'pore Act' in memory of Pat Dore, professor of law and adviser to all on questions of administrative law".

—Buddy MacKay
Lieutenant Governor of Florida

In Memory of Pat Dore

We in the judicial branch of Florida state government were deeply saddened by the news of Professor Pat Dore's untimely passing. We were indebted to her for her many contributions to the law and the legal profession. Her presence and her voice will be sorely missed.

As a constitutional law scholar, Pat Dore made significant contributions to the Florida constitutional revision process of 1978-80. As an expert legal analyst, she was instrumental in the development of our state's administrative agency procedures. As a teacher of law, she guided and shaped a generation of law students through whom her influence can be seen throughout the legal and governmental systems of the state.

In addition to the many concrete accomplishments that can be attributed to Professor Dore, she was also known to many in the legal profession as an energetic colleague and a steadfast friend. I join the Administrative Law Section of The Florida Bar in this tribute to the memory of Pat Dore.

—Leander J. Shaw, Jr.
Chief Justice, Supreme Court of Florida

I welcome the opportunity to make some comments about Professor Pat Dore and

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what she meant to me, but it will be difficult to face the fact that we no longer have her in our midst.

For almost 20 years I have relied on her sound counsel and advice regarding Florida's Administrative Procedures Act and Florida's State Constitution. I will always treasure the many discussions and meetings I have had with Professor Dore regarding Chapter 120 and our Constitution, specifically the Right to Privacy Act, as I was one of the prime sponsors of that legislation and relied on her extensive knowledge and wisdom.

Her friendship and advice were of the utmost importance to me as I went about my legislative duties. I knew I could always count on Pat for a swift and accurate analysis of a particular thorny problem and I knew that if I followed her advice, I could not go wrong.

Pat Dore was a resource that the State of Florida will miss and remember. She will always be one of the most important people in my life and I know she had that same impact on many others. Florida is a better place because Pat contributed her efforts, energies, and wisdom for the benefit of the people, but most important to me, she was a close and trusted friend.

—Senator Curt Kiser,
State Senator

(Senator Kiser is the legislative expert on the APA.)

All of us who knew Pat Dore are deeply saddened by her untimely passing. It is difficult to imagine how someone so strong and vibrant could be gone so quickly.

Almost twenty years have passed since Pat and I first met. The Legislature was rewriting the APA and Pat was involved with both Law Revision Council and legislative efforts to strengthen the Act. I was an Assistant Attorney General responsible for drafting opinions concerning the APA. A few years later, our paths crossed again during Constitution Revision. Because of Pat's unique background and extraordinary grasp of state and federal constitutional law, she spent the majority of her time working on the Declaration of Rights article to the Florida Constitution. Significantly, her efforts led to the first attempts to place basic individual rights such as privacy, and open records and meetings requirements, in the State Constitution. Many years later, Pat remarked that even though the constitution revision attempt failed, the work that she did on these proposals was among the most important events in her life.

After Constitution Revision, Pat's considerable talents were refocused on administrative law. Through the years, she earned the admiration and respect of those who both agreed and disagreed with her positions on this subject. She became the undisputed academic authority on APA issues throughout Florida and acquired a national reputation in her field as well. It was an extraordinary tribute to her abilities that public and private attorneys, long since graduated from law school, enrolled at FSU to monitor her APA class.

This year marks the first in almost twenty that the Legislature has been in session without Pat at the Capitol helping shape the future of our State. Now that she is no longer with us, what remains are wonderful memories of times and places when Pat's insight and gift of persuasion almost always carried the day.

On a personal level she was kind, thoughtful, loyal and dependable. It was a privilege to have Pat Dore as my friend.

—Sharyn L. Smith, Director,
Division of Administrative Hearings

FROM THE CHAIR

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ize the values she embodied. We will be considering suggestions for that purpose at the upcoming Executive Council meeting on March 20, 1992, and would be pleased to consider your suggestions. I also hope that you will share the challenge of going forward in a field of professional inquiry which touches more lives every day, a field which although strong and vital, will miss the presence of Pat Dore.

Attorneys Fees and Costs in Administrative Proceedings

by Marguerite H. "Ditti" Davis
Katz, Kutter, Haigler, Alderman, Eaton, Davis, Marks & Rutledge P.A.
Tallahassee, Florida

Florida law is a testament to the labyrinth often created by attorney's fee statutes. For the administrative law practitioner, simply discovering what attorney's fee options are available under the circumstances can be both time consuming and confusing. As the American rule states, each party to a proceeding pays his own legal fees, unless a party contract or statutory provision provides otherwise. Provisions available to the administrative lawyer include Sections 57.111, 120.535(6), 120.57(1)(b)5., 120.57(1)(b)10., 120.59(6)(a), and 120.69(7). This article highlights the prerequisites of each of these provisions as well as some of their procedures in an attempt to point the reader in the proper direction for obtaining those most-valued and client-welcomed administrative attorney's fees.

Section 57.111 is the "Florida Equal Access to Justice Act." Unless special circumstances exist which make the award unjust, Section 57.111 authorizes attorney's fees and costs, not exceeding $15,000[1], to any small business party who has prevailed in an action *initiated by a state agency* in which the agency was not substantially justified in bringing the action.[2] An exception to this provision exists when the agency was merely a nominal party to the proceedings or when the proceedings involved the establishment of a rate or rule or any action sounding in tort.[3]

Modeled after the Federal Equal Access to Justice Act, Section 57.111's stated purpose is to assist certain persons who may otherwise be deterred from seeking review of, or defending against, unreasonable governmental action because of the expenses associated with civil and administrative proceedings.[4] While expressing a laudable goal, Section 57.111 is riddled with numerous contingencies and possible hang-ups for the administrative lawyer. The terms "prevailing," "small business party," "initiated by a state agency," "substantially justified," and "attorney's fees and costs" are defined in detail by Section 57.111. Furthermore, Florida Administrative Code Rule 221-6.035 implements the Act by setting forth pleading requirements for obtaining or defending against the attorney's fees. Thus, before a final order awarding attorney's fees under Section 57.111 is issued, an attorney should be prepared to overcome agency resistance, as the agency will most likely assert, on numerous grounds, that Section 57.111 is inapplicable to your client.

Prerequisites of Section 57.111

The state agency "initiates" an action when it either: (1) files the first pleading in any state or federal court in Florida, or (2) files a request for an administrative hearing pursuant to chapter 120, or (3) is required by law or rule to advise a small business party of a clear point of entry after some recognizable event in an investigatory or other free-form proceeding of the agency.[5]

To qualify as a "small business party," the party, at the time the action is initiated by the agency, must be either: (1) a sole proprietor of an unincorporated business whose principal office and domicile is in Florida[6] and whose business practice has no more than 25 full-time employees, and whose net worth, including both personal and business investments, does not exceed $2 million; or (2) a partnership or corporation which has its principal office in Florida and not more than 25 full-time employees or a net worth exceeding $2 million. Without regard to net worth or number of employees, a litigant may be considered a small business party if he is contesting the legality Of any assessment of tax imposed for the sale or use of services.[7] A small business party, however, does not include an individual who is an employee of a business or of the state.[8]

A small business party is deemed "prevailing" when the party either obtains a final order entered in its favor which is not

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reversed on appeal, or a settlement favorable to it on a majority of the issues, or a voluntary dismissal by the state agency of its complaint.[9]

Initially a nonagency party petitioning for fees has the legal burden and must establish by a preponderance of the evidence that it is a small business party as defined under Section 57.111, that it was the prevailing party, and that the proceeding was initiated by the state.[10] If this initial burden is met, the burden shifts, and an award of attorney's fees is mandatory unless the agency resisting the award can establish that its action initiating the proceeding was substantially justified.[11]

A proceeding is "substantially justified" if it has a reasonable basis in law and fact *at the time it was initiated* by the state agency.[12] Therefore, the state must be able to establish in the initial proceedings that it had substantial justification to bring the proceeding, and the fact that a state agency later secures justification does not cure its earlier failure to do so.[13] Similarly, Section 57.111 does not provide for an inquiry into whether the agency persisted in its prosecution longer than it should have after reasonably concluding that it could not possibly succeed.[14] Rather, "the statutory inquiry is a narrow one,"[15] for it is not necessary to review the entire record to determine whether agency action was substantially justified.[16] As many commentators have pointed out, if the agency follows the proper statutory procedures and conducts a fair investigation prior to its action, typically (even though it loses), its actions will be found substantially justified.[17] Section 57.111 "does not reach questions of whether the Department's investigation could have been carried out more carefully, whether the opinions of the consultants obtained by the Department could have been stated more elegantly, or whether additional opinions would have been helpful to the probable cause panel in deciding whether or not to initiate a prosecution by finding probable cause."[18]

Despite seemingly broad discretion on the part of the agency, the courts have noted occasions when the agency's burden was lacking. For instance, the actions of a state agency may not be found substantially justified when the agency initiates an action relying solely on unsubstantiated, insupportable, vague, or even conflicting allegations.[19]

Procedure Under Section 57.111, Florida Statutes

According to Florida Administrative Code Rule 221-6.035, a party seeking attorney's fees and costs pursuant to Section 57.111 must file a petition with DOAH within 60 days of becoming a prevailing small business party.[20] Such petition must substantially comply with the requirements of Rule 221-6.035. In addition to requirements necessary to show that a party is entitled to fees by meeting the prerequisites of Section 57.111, the prevailing small business party's attorney must submit an affidavit which states the nature, extent, and monetary value of services, as well as all associated costs.[21]

In response to the petition, the state agency may file counter-affidavits disputing the extent of the fees. It may also challenge Section 57.111's applicability to the petitioning party and respond by alleging that its actions were substantially justified. The state agency has twenty days to file its response, but some flexibility has been given.[22] Following a response, if the state agency has not already done so, the petitioning party may, within ten days, request an evidentiary hearing. If no hearing has been requested, the hearing officer may issue a final order based on the pleadings and supporting documents.

Attorney's fees and costs available under Section 57.111 include up to $15,000 for "reasonable and necessary attorney's fees and costs incurred for all preparations, motions, hearings, trials, and appeals in a proceeding."[23] The amount of the fee to be awarded is usually determined by applying the standard in *Florida Patient's Compensation Fund v. Rowe*, as modified by *Standard Guaranty Insurance Co. v. Quastrom* and *State Farm Fire and Casualty Co. v. Palma*.[24]

Section 120.59(6), Florida Statutes

Another statutory provision available to prevailing parties in administrative proceedings is Section 120.59(6). This section entitles a prevailing party in a Section 120.57(1)

proceeding to an award of attorney fees and costs against any nonprevailing adverse parties if it is determined that the nonprevailing adverse party participated in the proceeding for an improper purpose. The provision explicitly exempts state agencies from its reach, and a motion against an agency which cites Section 120.59(6) will often be treated by the hearing officer as a motion for attorney fees under Section 57.111.

"Improper purpose" and "nonprevailing adverse party" are defined by the provision, while curiously "prevailing party" is not.

Improper purpose is defined as "participation in a proceeding primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of an activity."[25] Improper purpose has also been interpreted as participating in a proceeding when there was "no justiciable issue of law or fact" from the inception of the claim.[26]

Procedurally, a hearing officer is required in all Section 120.57(1) proceedings to determine whether the proceeding has been used for an improper purpose.[27] To assist the hearing officer in this determination, Section 120.59(6) (c) has established a rebuttable presumption test for use against parties who litigate for the purpose of destroying competing businesses or projects. Section 120.59(6)(c) states that the hearing officer should consider in determining an improper purpose:

> whether the nonprevailing adverse party has participated in two or more other such proceedings involving the same nonagency prevailing party and the same project as an adverse party and in which such two or more proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings.[28]

In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose.[29] This presumption functions, however, only to facilitate the required determination that a party participated in a proceeding for an improper purpose. It is not a limitation to a "three strike" situation where the statute is only applicable when the same opposing party has litigated the project on two prior occasions.[30]

Section 120.59(6)(b) states in pertinent part that "a final order shall award costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined *by the hearing officer* to have participated in the proceeding for an improper purpose." This language, taken together with the language of subsection (6) (c), strongly indicates that the hearing officer's determination of whether there existed an "improper purpose" should be treated as a finding of fact: only reversible by the agency if it can show by a review of the complete record that the finding was not based on competent substantial evidence.[31] This view was recently upheld in *Burke v. Harbor Estates Associates*,[32] wherein the first district held that a hearing officer's determination that a party participated in an administrative proceeding for an improper purpose is a factual finding even if direct evidence does not exist and inferences must be made.

A nonprevailing adverse party is one which failed to substantially change the outcome of the proposed or final agency action which is the subject of a proceeding.[33] But it does not include any party that has intervened in a previously existing proceeding to support the position of an agency.[34]

While a motion for attorney fees pursuant to Section 120.59(6) must be "timely filed", there is no statutory mandate on the motion's timing. Before the agency in its final order can award attorney's fees, the hearing officer must determine whether there existed an "improper purpose" in the proceeding.[35] Therefore, in the client's best interest, a practitioner should submit a motion for fees before the hearing officer has begun his recommended order. A motion filed after the recommended order has been completed and submitted to the agency for a final order has been held untimely.[36]

Although Section 120.59(6) has been described as "unclear," "ambiguous," and too uncertain to "offer an effective recovery means,"[37] that perspective is questionable. A situation where Section 120.59(6) was recently asserted involved repeated requests for hearings by environmentalists challenging discrete, but interrelated permits for a large developmental project they opposed.[38] Section 120.59(6) was "designed to penalize intervenors who participate in a series of proceedings to harass or otherwise delay their opponents,"[39] and where there is a com-

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plete absence of justiciable issues in law or fact in a case, the administrative practitioner should urge the hearing officer to conclude that the case was brought for improper purposes.

Section 120.57(1)(b)5, Florida Statutes

A third avenue available to administrative law practitioners for pursuing their attorney's fees is Section 120.57(1)(b)5., a provision influenced by the considerations of Rule 11, Federal Rules of Civil Procedure.

Under Section 120.57(1)(b)5., a party signing an administrative motion, pleading, or other paper, vouches that:

> to the best of his knowledge, information, and belief formed after reasonable inquiry, [such paper] is not interposed for any *improper purpose*, such as to harass or to cause unnecessary delay or for frivolous purpose or needless increase in the cost of litigation. If [such paper] is signed in violation of these requirements, the hearing officer, upon motion or his own initiative, *shall* impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.[40]

The seminal case construing Section 120.57(1)(b)5. is *Mercedes Lighting & Electrical Supply, Inc. v. Department of General Services*.[41] There the court noted that Section 120.57(1)(b)5. is similar to Rule 11, but with a significant difference.[42] The court held that, unlike Rule 11, the Florida provision *only* requires that the paper not be interposed for an improper purpose[43]; it does not require that the paper be well grounded in fact or warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. This part of Rule 11, the court stated, was intentionally omitted by the Florida Legislature from Section 120.57(1)(b)5.[44]

In considering what constitutes an improper purpose under Section 120.57(1)(b)5., Mercedes states that the hearing officer "should not delve into a good faith-bad faith analysis," willfulness is not a requirement under Section 120.57(1)(b)5.[45] Instead,

> if a reasonably clear legal justification can be shown for the filing of the paper in question, improper purpose cannot be found . . . . As an example . . . improper purpose may be manifested by excessive persistence in pursuing a claim or defense in the face of adverse rulings, or by obdurate resistance out of proportion to the amounts or issues at stake.[46]

Pursuant to this reasoning, frivolous purpose, used as an example of an improper purpose in Section 120.57(1)(b)5., has been defined as a purpose "which is of little significance or importance in the context of the goal of administrative proceedings."[47] Examples of improper purposes recognized in Mercedes include litigation which ties-up a competitor's certificate of need application leaving your business free to continue running as a monopoly for the length of the litigation or creating administrative delays and costs over a permit so as to bankrupt a competing developer.

Despite Mercedes narrow view of improper purpose, an argument can be made (as has been made under Section 120.59(6)) that when a party asserts a vacuous factual allegation or a legal argument having no basis, an improper purpose must be inferred. As noted by the hearing officer in *Department of Health & Rehabilitative services v. M.E.R.*,[48] once information develops in a case, "[c]ontinuing to allege spurious allegations constitutes a frivolous pleading which increases the cost of litigation . . . . "[49]

In addition to these improper purposes, the Fourth District Court of Appeal in *Good Samaritan Hospital v. Department of Health & Rehabilitative Services*,[50] recently held that an improper purpose may be found when an agency files an administrative action attempting to enforce a letter policy through adjudication rather than through rule-making as required by law.[51] Section 120.57(1)(b)5., the court stated, should be interpreted "in a way which protects from and discourages abuse of [agency] power.[52]

Aside from the differences, as noted in *Mercedes*, federal case law on Rule 11 has been found persuasive on the issue of attorney's fee sanctions under Section 120.57(1)(b)5.[53] Unlike other statutes such as Sections 120.59(6) and 57.111, Section 120.57(1)(b)5. does not require a party to be "prevailing."[54]

Just as for Rule 11, a party seeking attorney's fees in the form of a sanction pursuant to Section 120.57(1)(b)5. should give notice to the hearing officer and opposing party "promptly upon discovering a basis to do so.[55] "[A]t the earliest stage at which a violation of the [provision] can be determined," the hearing officer is obligated to act.[56] Furthermore, a voluntary dismissal will not remove jurisdiction to sanction a party thereafter for what was filed before the dismissal.[57]

In an ideal situation, a separate evidentiary hearing on the merits of the sanction is unnecessary. Such a hearing is not mandated by statute. Typically, the hearing officer already has full-knowledge of what has transpired between the parties and can incorporate the sanction within his final order.[58] Where an evidentiary hearing may be necessary, the hearing officer may retain jurisdiction and make a finding of fact in a later order.[59] Before sanctioning under Section 120.57(1)(b)5., however, all doubts should be resolved in favor of the signer.[60]

Although Section 120.57(1) (b)5. is aimed more at deterrence than fee shifting, and thus will seldom provide a party with full attorney's fee compensation, it should be a helpful provision in those instances where an opponent is abusing its legal power in a manner warranting punitive action.

Section 120.57(1)(b)10. Florida Statutes

Section 120.57(1)(b)10. provides for attorney's fees on appeal from an agency issued final order.[61] A prevailing party on appeal is entitled to attorney fees under Section 120.57(1)(0)10. upon a showing that either (1) the appeal was frivolous, meritless, or an abuse of the appellate process or (2) the agency action which precipitated the appeal was a gross abuse of the agency's discretion.[62] These two standards are quite different and should be distinguished in argument.

The only standard for an award under Section 120.57(1) (b) 10. against a nonagency party appellant is whether the appeal was frivolous, meritless, or an abuse of the appellate process. Pursuant to this standard the agency is entitled to attorney's fees only for the appellate portion of the proceedings.[63]

The gross abuse of discretion standard is applied in an award against an agency whose final order is appealed. If a gross abuse of discretion is found, the prevailing nonagency party may collect attorney's fees and costs for all three phases of the litigation.[64] Pursuant to Section 120.57(1)(b) 10., a hearing officer's findings of fact are presumed correct, unless the agency can show that such findings were not based on competent substantial evidence. It is the duty of an.agency within its final order to state with particularity which findings of fact it has dismissed as unsubstantiated. Disregarding this duty has been found to be an abuse of discretion by the agency which warrants Section 120.57(1)(0)10. attorney's fees.[65] In *Johnston, M.D. v. Department of Professional Regulation*,[66] the court held that the Board of Medical Examiners erroneously rejected the findings of the hearing officer which were supported by competent substantial evidence without setting forth a reasonable basis of underlying medical reasons that warranted the special insight and expertise of the Board. The physician appealing the final order of the Board of Medical Examiners was awarded attorney fees and costs for all three phases of the litigation: the administrative phase, the litigation phase, and attorney's fee phase. Similarly, in *Purvis v. Department of Professional Regulation*,[67] a veterinarian appealed a final order issued by the Board of Veterinary Medicine. The First District Court of Appeal found that the Board erred in rejecting the hearing officer's findings without establishing on the record the appropriate standard of care or that the veterinarian deviated from that standard. The first district awarded fees and costs.

Generally, prior to the effective date of Section 120.535, Florida Statutes, if an agency did not document its policies by rule, it had to create a record foundation for its policy decisions on a case-by-case basis or through expert testimony or documentary opinion. Therefore, when the agency failed to show a sufficient record foundation of support for a particular policy, use of that so-called "policy" by the agency in its final orders was held to be an abuse of discretion.[68]

Procedure Under Section 120.57(1)(b)10.,Florida Statutes

A timely filed pleading stating entitle-

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ment to attorney's fees on appeal is necessary to give adequate notice of a party's intention to request an award. In *Stockman v. Downs*,[69] the Florida Supreme Court held that a claim for attorney fees pursuant to statute or contract must be pled prior to the final judgment or it is waived. Rule 9.400(b), Florida Rules of Appellate Procedure, states that a motion for attorney's fees may be served any time before the time for service of the reply brief. However, the question of what constitutes timely filing remains a matter of confusion.

The usual practice is that the district court determines whether a Section 120.57(1)(b)10. award is merited. Subsequent to finding that attorney's fees and costs are appropriate, the district court typically remands the attorney's fees aspect of the case to DOAH for a finding of fact as to the exact amount of awardable costs and attorney's fees. The hearing officer is normally directed to file his report with the district court which will order the taxing of costs and fees.[70]

Section 120.535(6), Florida Statutes

Effective March 1, 1992,[71] rulemaking will no longer be a matter of agency discretion.[72] Under some circumstances, where an agency has failed to properly adopt as rule an incipient agency policy, administrative law practitioners may petition for attorney's fees and costs if their clients through an action by the agency have been substantially affected by the agency's nonrule policy.[73] Section 120.535(6), states in pertinent part:

> subsequent to a determination that an agency statement violates subsection (1), if an agency relies upon the statement or any substantially similar statement as the basis for agency action, and the substantial interests of a person are determined by the agency action, that person is entitled to payment by the agency of reasonable costs and attorney's fees incurred by the person, if the person successfully demonstrates that the agency is not permitted to rely upon the statement as a basis for agency action . .

An agency must follow the adopted rulemaking procedures as soon as feasible, and is given 180 days after a hearing officer has determined that the agency statement violated section 120.54 rulemaking procedures to adopt rules which address the statement.[74] If the agency has not acted within 180 days, a presumption is created that the agency did not act expeditiously and in good faith to adopt rules.[75] At this point, a person who was affected by the non-rule statement may petition pursuant to Section 120.535(6). The courts have not yet interpreted this provision. No doubt, the case law on this provision will eventually come.

Section 120.69(7), Florida Statutes

The last provision to be discussed by this article is Section 120.69(7). In the enforcement of an agency final order, section 120.69(7), provides a mechanism for the collection of "all or part of the costs of litigation and reasonable attorney's fees and expert witness fees, whenever the court determines that such an award is appropriate."[76] The party eligible to collect costs and fees pursuant to section 120.69(7) is the prevailing party. Presumably, only the costs and fees expended in the enforcement proceeding are collectable. While section 120.69(7) is a discretionary provision, a court should not hesitate to utilize it. In *Doyal v. School Board of Liberty County*,[77] *the court held that, under the facts, it was an abuse of discretion for the trial court not to award attorney's fees to the appellant for the enforcement of an order issued by the Public Employees Relations Commission. The appellant had sought attorneys fees pursuant to Sections 57.105, 120.69(7), and 448.08.*

Conclusion

This article has outlined the attorney fee provisions most applicable in Chapter 120 litigation. With this information as a starting point, the administrative law practitioner should research the substantive area of law addressed for additional attorney fee award provisions.

Footnotes

[1] § 57.111(4) (d)2., Fla. Stat. (1991).
[2] § 57.111(4) (a), Fla. Stat. (1991).
[3] § 57.111(4) (d)1. & (6) (a), Fla. Stat. (1991).
[4] § 57.111(2), Fla. Stat. (1991).

[5] § 57.111(3) (b), Fla. Stat. (1991). In Home Health Care of Bay County, Inc. v. Department of Health & Rehabilitative Servs., 10 F.A.L.R. 5167 (DOAH 88-1353F, Final Order June 29, 1988), HRS denied that it initiated the action by issuing a state Agency Action Report and the accompanying letter advising the applicant of HRS's intent to deny the CON. such actions have been characterized as "preliminary agency action" and "free-form agency decision." The hearing officer concluded that the action of HRS was a clear point of entry, and therefore the action was initiated by HRS. Id.

[6] Jory v. Department of Professional Regulation, 16 F.L.W. D1826 (Fla. 1st DCA 1991). Licensed physician domiciled and practicing in Georgia did not meet statutory residency requirement under the definition of small business party.

[7] *See*, Chapter 212, Florida Statutes for the tax provisions and penalties applicable under this provision.

[8] *See, e.g.*, Department of Professional Regulations v. Toledo Realty, Inc., 549 So.2d 715 (Fla. 1st DCA 1989); Thompson v. Department of Health & Rehabilitative Servs., 533 So.2d 840 (Fla. 1st DCA 1988); see also Brumley v. Department of Revenue, 13 F.A.L.R. 646 (DOAH 90-5656F Final Order Jan. 25, 1991) (the petitioner was not a small business party where he claimed that he was the alter ego of the corporate entity).

[9] § 57.111(3)(c), Fla. Stat. (1991). See Ruffin v. Department of Professional Regulation, Division of Real Estate, 8 F.A.L.R. 1312 (DOAH #85-4465F, Final Order Feb. 7, 1986). Ruffin claimed that she prevailed on a majority of the issues. However, Section 57.111(3)(c)1. applies this criteria only to a settlement of the claim. Because the matter was not settled nor did the agency seek voluntary dismissal, Ruff in was held not to be a prevailing party. Furthermore, the hearing officer stated that even if Ruff in was a prevailing party pursuant to 57.111, no evidence was presented to indicate that the agency's action was not substantially justified; Assad v. Dept. of Professional Regulation, 9 F.A.L.R. 4076 (DOAH 86-4720F, June 12, 1987). In a settlement agreement, petitioner stipulated to four of six pending penalties, thus disposing of two of the agency's charges. The hearing officer noted that this settlement was unfavorable and that, therefore, the petitioner could not be prevailing. Similarly, because the agency was able to obtain an agreement as to four of the penalties, the action was determined to be substantially justified.

[10] Department of Professional Regulation v. Toledo Realty, Inc., 549 So.2d 715, 717 (Fla. 1st DCA 1989).

[11] Ray v. Department of Transportation, 12 F.A.L.R. 1537, 1539 (DOAH 89-3736F, Final Order Feb. 26, 1990); Rudloe v. Department of Environmental Regulation, 33 Fla. Supp.2d 203 (DOAH 88-3421F, Final Order Nov. 8, 1988) (the agency has the burden to prove that exceptions exist).

[12] § 57.111(3)(e), Fla. Stat. (1991); *see* Morariu v. Dept. of Professional Regulation, Board of Medicine, 11 F.A.L.R. 4480 (DOD 89-0319F, Final Order Aug. 14, 1986). Petitioner asserted the' right to prevailing party attorney's fees in a proceeding where she prevailed on three of the four alleged violations. The hearing officer noted that the standard was one of reasonableness and not whether the agency prevailed on the underlying issue. Therefore, he declined to award fees, holding that the agency's position was substantially justified. See also, supra, note 9.

[13] Romaquera, M.D. v. Department of Professional Regulation, 10 F.A.L.R. 929 (DOAH 87-3604F, Final Order Jan. 4, 1988).

[14] Arias, M.D. v. Department of Professional Regulation, 13 F.A.L.R. 2648, 2657 (DOAH 90-3932F and 90-3933F, Final Order July 1, 1991).

[15] Arias, M.D. v. Department of Professional Regulation, 13 F.A.L.R. 2648, 2657 (DOAH 90-3932F and 90-3933F, Final Order July 1, 1991).

[16] Department of Professional Regulation v. Toledo Realty, Inc., 549 So.2d 715 (Fla. 1st DCA 1989).

[17] *See* Hauser, Attorney's Fees in Florida, Chapter 14 (1988).

[18] Arias, M.D. v. Department of Professional Regulation, 13 F.A.L.R. 2648, 2657 (DOAH 90-3932F and 90-3933F, Final Order July 1, 1991).

[19] Ann and Jan Retirement villa, Inc. v. Department of Health & Rehabilitative Servs., 13 F.A.L.R. 2209, 16 F.L.W. D1323 (Fla. 4th DCA 1991), 13 F.A.L.R. 2663 (Post-Mandate Final Order June 21, 1991) (the actions of the state agency were not substantially justified, when the agency relied on an unsubstantiated abuse report by Aging and Adult Services, and upon its own investigation HRS voluntarily dismissed the charges.); Mills, M.D. v. Department of Professional Regulation, 13 F.A.L.R. 4254 (DOAH 91-4754F, Final Order Oct. 4, 1991) (fees awarded when an expert witness' letter was relied upon to establish probable cause in the face of contrary facts in the medical records and an attending nurse's statement which refuted the statements of the expert); Taylor v. Department of Professional Regulation, 13 F.A.L.R. 2461 (DOAH 91-1495F, Final Order June 14, 1991) (the state agency's actions were not substantially justified when a disciplinary action was brought against a social worker based on unsubstantiated, insupportable, and vague allegations by a client who filed charges). But see Caughey v. Department of Insurance, 13 F.A.L.R. 246 (DOAH 90-4473F, Recommended Order Dec. 27, 1990), 13 F.A.L.R. 3100 (Final Order June 8, 1990) (fees denied and substantial justification established by a complaint against Caughey containing hearsay allegations which, if believed, would demonstrate statutory violations had occurred).

[20] § 57.111(4)(b)2., Fla. Stat. (1991); Fla. Admin. Code Rule 221-6.035(1). Notice that the 60 day requirement is embedded in the statute and not just the rule, unlike the 20 day response requirement which is only part of the rule.

[21] § 57.111(4)(b)1., Fla. Stat. (1991); Fla. Admin. Code Rule 221-6.035(3).

[22] In Department of Environmental Regulation v. Puckett Oil Company, 577 So.2d 988 (Fla. 1st DCA 1991), the court held that DOAH went beyond its statutory authority if its intent in Rule 221-6.035(5) (a) was to establish a jurisdictional time limit for an agency's response to an attorney's fee petition under Section 57.111. The court reasoned that:

> Rule 221-6.035(5) (a)'s use of the mandatory term 'shall' does not mean that if a response is not filed within the time specified in the rule, the hearing officer no longer possesses jurisdiction to consider a response to a petition for costs and fees. If a provision, though mandatory in terms, is designed simply to further the orderly conduct of business, such provision is generally deemed directory only . . . . Rule 22I-9.035(5)(a) neither establishes a jurisdictional time limit . . . nor provides authority for imposition of sanctions in the event' of a late-filed response.

continued . . .

Id. at 991 & 993. The court concluded, however, that under appropriate circumstances an agency may be presumed to have waived its right to respond. Id. at 993.

[23] § 57.111(3) (a), Fla. Stat. (1991); The Administrators Corp. v. Dept. of Insurance and Treasurer, and Zalis v. Dept. of Insurance, 13 F.A.I.R. 641, (DOAH 90-5943F, 90-5944F Final Order January 24, 1991). The $15,000 cap pertains to each petitioner. Therefore, in this case, the prevailing small business parties each received $15,000 for a total award of $30,000. This case is presently on appeal to the first district.

[24] 472 So.2d 1145, 1150-51 (Fla. 1985). Florida Supreme Court adopted the federal lodestar approach for computing reasonable attorney fees. See also, Rule 4-1.5, Rules Regulating the Florida Bar listing factors for the determination of a reasonable fee. *See, e.g.*, Doctors' Osteopathic Medical Center, Inc. v. Department of Health & Rehabilitative Servs., 498 So.2d 478 (Fla. 1st DCA 1986). For further discussion and case law concerning the calculation of attorney's fees in an administrative law context, see Ganson v. Department of Administration, 554 So.2d 522 (Fla. 1st DCA 1989); Department of Administration v. Ganson, 566 So.2d 791 (Fla. 1990). Under the lodestar approach, the number of reasonable hours expended by the attorney are multiplied by a reasonable hourly rate. The best evidence of the time expended by an attorney is detailed contemporaneous time records. A reasonable hourly rate is determined by the market rates of the particular location. Once the lodestar is calculated the "results obtained" may justify a downward adjustment if not all areas of the claim are successful. In a case taken under a contingency fee agreement a contingency risk multiplier of between 1.5 and 2.5 may be used to enhance the lodestar amount. This methodology used by the court in arriving at a reasonable amount is more art than science. In Ganson, the court adopted the recommendations in the hearing officer's report and applied the multiplier of 2.

See also, Standard Guaranty Insurance Co. v. Quanstrom, 555 So.2d 828 (Fla. 1990); State Farm Fire and Casualty Co. v. Palma, 555 So.2d 836 (Fla. 1990). Attorney fees were available pursuant to Section 627.428. The court held that evidence presented must justify a "lodestar multiplier"; Warren v. Department of Administration, 14 F.A.I.R. 1, 16 F.I.W. D3004 (Fla. 5th DCA 1991). The first district approved the amount representing reasonable hours multiplied by the reasonable rate, but the court disapproved the "lodestar" multiplier of 1.5 because the record did not contain evidence to justify the enhancement.

[25] § 120.59(6)(e)1., Fla. Stat. (1991).

[26] In Residents of Key Largo Ocean Shores v. Dolphins Plus, 13 F.A.I.R. 4278 (DOAH 91-0253, Final Order Oct. 8, 1991), the Secretary of the Department of Environmental Regulation denied respondent, Dolphin Plus' request for an award of attorney fees and costs pursuant to Section 120.59(6) and rejected the hearing officers conclusions of law (mislabeled as findings) that no justiciable issue of law or fact existed. However, the Final Order stated that the hearing officer did not err in equating "frivolous" with "lacking any justiciable issue of law or fact." cf. Marexcelso Compania Naviera, S.A. v. Florida National Bank, 533 So.2d 805 (Fla. 4th DCA 1988); Schwartz v. W-K Partners, 530 So.2d 456, 457 (Fla. 5th DCA 1988). But see Mercedes lighting & Electrical Supply, Inc. v. Department of Gen. Servs., 560 So.2d 272 (Fla. 1st DCA 1990) (construing "improper purpose" as defined in Section 120.57(1)(b)5.).

[27] § 120.59(6) (c), Fla. Stat. (1991).

[28] *Id.*

[29] *Id.*

[30] *See* Harbor Estates Associates, Inc., 12 F.A.I.R. 2392 (DOAH 89-2741 Final Order May 18, 1990), reversed on other grounds, Burke v. Harbor Estates Associates, Inc., 17 F.I.W. D101 (Fla. 1st DCA 1991).

[31] *See* Terri Saltiel v. Leon County School Board, 13 F.A.I.R. 3886, (DOAH 89-2752 Final Order Sept. 23, 1991); *see also* §120.57(1)(b)10., Fla. Stat. (1991).

[32] 17 F.I.W. D101 (Fla. 1st DCA 1991).

[33] § 120.59(6)(e)3., Fla. Stat. (1991).

[34] *Id.*

[35] § 120.59(6) (b), Fla. Stat. (1991).

[36] Harvey v. Trans Pac. Inc, 12 F.A.L.R. 4378 (DOAH 90-3679, Final Order Oct. 19, 1990).

[37] The Corporation of the President of the Church of Jesus Christ of Latter Day Saints v. St. Johns River Water Management District, 13 F.A.L.R. 1014, 1017-18 (DOAH 90-5864, Final Order Feb. 8, 1991).

[38] *See, e.g.*, South Florida Water Management District v. Canoe Creek Property Owners Association, Inc., 13 F.A.L.R. 3972 (DOAH 90-1734 Recommendation Issued July 31, 1991) (presumption of improper purpose was rebutted because the action was brought by the Water Management District and Canoe Creek could not be penalized for defending itself).

[39] *Id.* at 3987.

[40] § 120.57(1)(b)5., Fla. Stat. (1991) (emphasis added).

[41] 560 So.2d 272 (Fla. 1st DCA 1990).

[42] Mercedes Lighting & Electrical Supply, Inc. v. Department of General Services, 560 So.2d 272, 276-77 (Fla. 1st DCA 1990).

[43] *Id.* at 277.

[44] *Id.* at 277-78.

[45] *Id.* at 276 & 278.

[46] Good Samaritan Hosp. v. Department of Health & Rehab. Servs., 16 F.L.W. D1732, D1733 (4th DCA July 3, 1991) (quoting from Mercedes, 560 So. 2d at 278); see also Jesus Christ of Latter Day Saints, 13 F.A.L.R at 1021.

[47] Mercedes, 560 So. 2d at 278.

[48] 13 F.A.L.R. 243 (DOAH 90-4548F, Final Order December 14, 1990).

[49] Department of Health & Rehabilitative Servs. v. M.E.R., 13 F.A.L.R. 243, 245 (DOAH 90-4548F, Final Order Dec. 14, 1990); *see also* Allen v. Martinez, 11 F.A.L.R 4462 (DOAH 89-2675F, Final Order Aug. 8, 1989). *Allen* reveals that even a motion for attorney's' fees is subject to Section 120.57(1)(b)5. After concluding a hearing on the validity of a proposed rule, petitioner, Allen, moved for attorney's fees pursuant to the Equal Access to Justice Act. Noting that Section 57.111 is explicitly inapplicable to proceedings involving the establishment of a rule and that Allen was obviously not a business, the hearing officer dismissed his motion and sanctioned petitioner pursuant to Section 120.57(1)(b)5. *Id.* at 4464. Allen serves as an example that despite Section 120.57(1) (b)5.'s lack of a "basis in law requirement," should a party file a motion without a reasonable basis in law, sanctions will still lie where the hearing officer concludes that a motion devoid of legal backing must have been filed for an improper

purpose, a purpose such as to increase the cost of litigation or harass the opposing party.

[50] 582 So.2d 722 (Fla. 4th DCA 1991).

[51] Good Samaritan, 582 So.2d at 724.

[52] Good Samaritan, 582 So.2d at 724.

[53] *See, e.g.*, Jesus Christ of Latter Day Saints, 13 F.A.L.R at 1019.

[54] *Id.*

[55] Mercedes, 560 So.2d at 277; *see also* Harvey v. Trans Pac, Inc., 12 F.A.L.R. 4378, 4379 (DOAH 90-3679, Final Order Oct. 19, 1990).

[56] Mercedes, 560 So.2d at 279.

[57] Jesus Christ of Latter Day Saints, 13 F.A.L.R. at 1019.

[58] *Id.* at 1019-20.

[59] *See, e.g.*, Department of Health & Rehab Servs. v. H.E.R., 13 F.A.L.R. 243, 244 (DOAH 90-4548F, Final Order Dec. 14, 1990); *see also* Florida Audubon Society v. Remington, 12 F.A.L.R. 3400, 3405 (DOAH 90-2715, Final Order Aug. 2, 1990). *But see* Harvey, 12 F.A.L.R. at 4379, which must be an anomaly. In Harvey, four days after the recommended order was filed, a party filed a motion with DER to remand the case for a determination of possible improper purposes under Sections 120.57(1)(b)5. and 120.59(6). The Secretary of DER, in issuing its final order, refused to permit the remand on the grounds that the request was untimely filed. While the Secretary may have been legally correct as to the timing of motion, he arguably has no jurisdiction to decide that issue. Section 120.57(1)(b)5. specifically grants the hearing officer power to decide sanction motions. In Florida Audubon, upon rejecting a parties exceptions to the hearing officer retaining jurisdiction over the issue of Section 120.57(1)(b)5. sanctions,. the same Secretary writes:

Under Section 120.57(1)(b)5., however, the Hearing Officer does have jurisdiction to issue the Final Order on sanctions. The Department has no authority to disturb the Hearing Officer's decision on that issue.

See also Chipola Basin Protective Group, Inc v. Department of Env. Reg., 11 F.A.L.R. 467 (DOAH 88-3355, Final Order Dec. 20, 1988) wherein the same Secretary in the final order responded to another motion for attorney's fees pursuant to Section 120.57(1)(b)5. The Secretary writes:

At any rate, I do not read [Section 120.57(1)(b)5. as authorizing me, as agency head, to award attorneys *[sic]* fees. It is clear that the subsection applies only to proceedings before hearing officers; and that the sanctions contained therein can only be imposed by hearing officers. [Since I am not] a hearing officer, the law is inapplicable to me. The motion is therefore rejected.

Thus, the lesson is that to be awarded attorney's fees or a sanction pursuant to Section 120.57(1)(b)5., an attorney should file with the hearing officer and not with the agency.

[60] Jesus Christ of Latter Day Saints, 13 F.A.L.R. at 1021.

[61] Section 120.57(1) (b)10. was numbered 120.57(1) (b)9. in 1975. In 1986, the Legislature added subparagraph 5 to Section 120.57(1)(b) and renumbered Section 120.57(1)(b)9. as 120.57(1) (b)10.

[62] § 120.57(1) (b)10., Fla. Stat. (1991).

[63] University Community Hospital v. Department of Health & Rehabilitative Servs., 493 So.2d 2 (Fla. 1st DCA 1986); RHPC, Inc. v. Department of Health & Rehabilitative Servs., 509 So.2d 1267 (Fla. 1st DCA 1987).

[64] Johnston, M.D. v. Department of Professional Regulation, 456 So.2d 939 (Fla. 1st DCA 1984); Purvis v. Department of Professional Regulation, 461 So.2d 134 (Fla. 1st DCA 1984).

[65] *Id.*

[66] 456 So.2d 939 (Fla. 1st DCA 1984).

[67] 461 So.2d 134 (Fla. 1st DCA 1984).

[68] Ganson v. Department of Administration, 554 So.2d 516 (Fla. 1st DCA 1989).

[69] Stockman v. Downs, 573 So.2d 835 (Fla. 1991).

[70] *See, e.g.*, Ganson v. Department of Administration, 554 So.2d 521 (Fla. 1st DCA 1989).

[71] *See* Laws 1991, Chapter 91-191, providing an effective date for HB 1879.

[72] § 120.535(1), Fla. Stat. (1991).

[73] § 120.535(6), Fla. Stat. (1991).

[74] § 120.535(5), Fla. Stat. (1991). This time period may be tolled until the final order is issued if a rule challenge pursuant to Section 120.54(4) has been entered.

[75] § 120.535(5), Fla. Stat. (1991).

[76] § 120.69(7), Fla. Stat. (1991).

[77] 415 So.2d 791 (Fla. 1st DCA 1982).

Marguerite H. "Ditti" Davis is a partner in the law firm of Katz, Kutter, Haigler, Alderman, Davis & Marks, P.A. Prior to her entry into private practice, she gained extensive appellate practice experience as a senior legal counsel to the Florida Supreme Court for 14 years. For several years during that time, Ditti Davis served as executive assistant to the Chief Justice of the Florida Supreme Court.

Annual Meeting of The Florida Bar

Section Activities

Thursday, June 25, 1992

6:30 p.m.-7:30 p.m. Reception

(Held jointly with Environmental & Land Use Law Section)

Friday, June 26, 1992

8:30 a.m.-11:30 a.m. Executive Council Meeting

Letters to the Editor

Some of the articles in the last newsletter educed responses from section members. Remember, this is your newsletter and all comments are welcomed. We look forward to reader participation that augments the legal analysis completed by those who contribute to this publication. Each of the following letters have been reproduced with the permission of the author.

Dear Ms. Donnelly:

Your biographical sketch of DOAH hearing officers was very informative. Perhaps the Section should consider publishing it periodically, with pictures.

By the way, I enjoyed the opportunity to speak at the recent hearing officers' conference. The questions you and the others raised on the proposed APA amendments were very thoughtful; it will be interesting to see what, if anything, is enacted.

Very truly yours,

Lawrence E. Sellers, Jr.
Holland & Knight
Tallahassee, Florida

* * *

Dear Gary:

I was shocked to see the article "Why Inmates Should be Exited From Rule Challenges" in the December 1991 issue of the Administrative Law Section *Newsletter*. Shocked, because of the obvious bias on behalf of the agency seeking the exemption.

I feel there should have been a counterpoint article, showing why the exemption is a bad idea. Indeed, I would have been glad to have written it myself. Just maybe, the agency's position is the result of having lost some significant rule challenge cases, ones we handled *and* ones handled by pro se inmates. For an excellent example of a successful pro se case see *Cribbs v. Department of Corrections*, 13 FAIR 3829 (DOD #90-5031R, Final Order entered 9/11/91).

If this is the direction the Section is now taking (i.e., an apologist for any agency which feels it has been "done wrong") count me out as head of the task force on "Forums and Procedures for Citizen Involvement in policy Disputes", Or even as a member of the task force. I'll probably be too busy "addressing legitimate concerns" for our many inmate clients.

Sincerely,

Richard A. Belz, Esq.
Executive Director
Florida Institutional Legal Services, Inc.
Gainesville, Florida

Editors' Note: Mr. Belz was given the opportunity to submit a counterpoint article in this edition of the newsletter. His schedule did not allow him to respond at this time.

* * *

Dear Mr. Grossman

I read your article on collegial bodies in the Administrative Law Section Newsletter and I really enjoyed it. It is great to see your name in print and believe it or not, I learned quite a few things from the article. Thanks for taking the time to write this article. It is much appreciated.

Sincerely,

Robert S. Turk
Valdes-Fauli, Cobb, Petrey & Bischoff

The Administrative Law Section would like to thank **Peg Griffin** for all of her outstanding support and dedication as Section Coordinator over the years. We would also like to extend a warm welcome to Mr. **Gene Stillman** as the new Administrative Law Program Coordinator!

Res Judicata and Collateral Estoppel

by K. N. Ayers, Hearing Office, Division of Administrative Hearings, Tallahassee, Florida

The recent article in the Florida Bar Journal entitled "Limiting Repetitive Litigation In Administrative Proceedings" by Andrew Kenneth Levine, appears to offer solutions incompatible with Florida law.

Mr. Levine does not mention collateral estoppel or estoppel by judgment in his article, yet res judicata actually is very limited in administrative proceedings. The classic case where res judicata would seem to be applicable, but is not, is a situation where an applicant for licensure or re-licensure brings a proceeding to contest the denial; and the hearing officer, after an evidentiary hearing, finds that the applicant has not proved he meets the qualifications for licensure. Since many of these applicants are deemed not qualified by reason of a criminal conviction or other evidence of immoral conduct, the farther back the conviction occurred, the better chance the applicant has of demonstrating that he has been rehabilitated. For example, if a school teacher had his or her certificate revoked, by reason of a criminal conviction, for possession of a controlled substance in 1984, applies in 1986 for recertification, and an administrative hearing is held to determine the applicant's qualification for recertification, the applicant would have a nearly impossible task of demonstrating full rehabilitation in such a short period. Whereas, if the teacher applied for recertification some five years after the incident and presented evidence of exemplary conduct during those five years, the teacher would likely be deemed qualified for certification.

The first determination that the teacher had not demonstrated qualifications for certification, because of the short interval between the conviction and the application, should not bar the teacher from reapplying at a later date. The reason res judicata would not bar the second application is because different facts are involved which were not litigated in the initial hearing, nor could they have been litigated.

Where issues are litigated in a judicial proceeding and a party attempts to relitigate the same issues in an administrative proceeding, the doctrine of res judicata is not applicable because the causes of action are different. Estoppel by judgment may bar the second proceeding.

In *Gordon v. Gordon*, 59 So.2d 40, 44 (Fla.) cert. den. 344 U.S. 878, 73 S.Ct. 165, 97 L.Ed. 680 (1952), the court explained:

> The difference which we consider between res adjudicata and estoppel by judgment is that under res adjudicata a final decree or judgment bars a subsequent suit between the same parties based upon the same cause of action and is conclusive as to all matters germane thereto, that were or could have been raised, while the principle of estoppel by judgment is applicable when the two causes of action are different, in which case the judgment in the first suit only estops the parties from relitigating in the second suit issues that is to say points and questions common to both causes of action which were actually adjudicated in the prior litigation.
>
> * * *
>
> A corollary to the doctrine of collateral estoppel is the doctrine of mutuality of parties which holds that strangers to a prior litigation—those who were neither parties nor in privity with a party—are not bound by the results of that litigation. See *Yovan v. Burdines*, 81 So.2d 555 (Fla. 1955) and cases cited therein.

In *F.D.I.C. v. Hammerce and Sun Island Realty, Inc.*, 16 FLW D2727 (Fla. 4th DCA 1991), the court stated:

> Though similar to res judicata, [the estoppel by judgment] doctrine applies where two suits are based on a common question, [then] estoppel by judgment will prevent a defendant from maintaining the later one.

Estoppel by judgment bars only those matters actually litigated and determined in the initial action. *City of Bartow v. P.E.R.C.*, 382 So.2d 311 (Fla. 2nd DCA 1980).

continued . . .

Trucking Employees of North Jersey Welfare Fund v. Romano, et al., 450 So.2d 843 (Fla. 1984), involved an attempt by the limited partners to use the criminal conviction of the general partners of appellant in a civil case alleging fraud on the part of the general partners. The trial court held that the general partners were estopped by the criminal judgment from relitigating the issue of fraud in the civil suit, brought against them by the limited partners. The appellate court reversed, and on appeal to the Supreme Court the court stated at p. 845:

> Collateral estoppel or estoppel by judgments, like its near relative res adjudicata, serves to limit litigation by determining for all time an issue fully and fairly litigated between parties.

The court then went on to quote from *Gordon*, supra, and held that since the limited partners were not parties to the criminal case, the general partners were not estopped to defend the charges of fraud in the civil case.

The issue of collateral estoppel again arose in *Ward v. Zeidwig*, 521 So.2d 215 (Fla. 4th DCA 1988). Ward was a defendant in a federal criminal trial and was found guilty by the trial court. Ward's first conviction was reversed, but, after retrial, his second conviction was affirmed on appeal. After his second conviction was affirmed, Ward filed a motion to vacate, modify or set aside his sentence pursuant to 28 U.S.C §2255 on grounds of ineffective assistance of counsel. At this post conviction relief proceeding, the court took evidence and made specific factual findings negating Ward's allegations of ineffective assistance of counsel at his trials.

Ward then brought suit against Zeidwig alleging legal malpractice on the part of Zeidwig in inadequately defending Ward on those criminal charges. At the trial, Zeidwig contended that the order entered by the district court in the habeas corpus proceeding and affirmed on appeal estopped Ward from maintaining this civil action because the malpractice claim had been considered by the district court, and Ward could not relitigate this issue. The trial court agreed and Ward appealed. The appellate court reluctantly reversed the trial court on the authority of Romano, supra, but certified to the Supreme Court the question

> Whether identity or mutuality of the parties or their privies is a prerequisite in Florida to the defensive application of the doctrine of collateral estoppel in the criminal-to-civil context.

In *Zeidwig v. Ward*, 548 So.2d 209 (Fla. 1989), the Supreme Court noted that the *Romano* case involved use of the collateral estoppel doctrine in the offensive context, while here the use was defensive in a criminal-to-civil context. In holding that collateral estoppel could be used defensively by Zeidwig to preclude Ward from pursuing his malpractice claim, the court noted that the federal courts and other jurisdictions had eliminated the mutuality of partied requirement in cases where the plaintiff in the second suit could not have been joined as a party in the earlier suit in which the issues were litigated. *Parklane Hosiery v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979).

The court quoted Section 85 (2) (a) of the restatement (Second) of Judgments that with respect to issues determined in a criminal prosecution:

> (2) A judgment in favor of the prosecuting authority is preclusive in favor of a third person in a civil action:
>
> (a) Against the defendant in a criminal prosecution as stated in s. 29.

The court then cited comment (e) as reason for the rule.

> e. Judgment for prosecution: Preclusion in favor of third party . . . . At an earlier period in the development of res judicata doctrine, the "mutuality" requirement was an obstacle to applying issue preclusion in favor of such a third party. That is, since the third party would not have been bound in his civil action if the prosecution had resulted in an acquittal, under the mutuality rule it would follow that the third party could not take advantage of the issue determined in a conviction. However, long before the mutuality rule was repudiated in civil cases, well reasoned decisions had extended the rule of preclusion to operate in favor of third persons where the first action is criminal and the second is civil . .
>
> . . . The clearest situation is where the person who was convicted of an offense brings

an action against the third party to assert a claim that rests on factual premises inconsistent with those established in the criminal prosecution.

The court cited similar cases in other jurisdictions where defendants convicted in criminal proceedings brought malpractice claims against their attorneys after the competence of counsel had been adjudicated in the criminal proceedings adverse to the defendants.

The court then held that *defensive* collateral estoppel should be applied in this criminal-to-civil context. In so holding, the court did not overrule *Romano*, supra, that a third party, who was not a party in the criminal proceeding, could not use collateral estoppel *offensively* to preclude a defendant from defending a case brought by the third party against the defendant on the same issues that were actually litigated in the criminal proceedings.

A typical situation in the administrative law context in which this issue arises is the case where A has been convicted of child abuse in a criminal proceeding, and he/she requests an administrative hearing to challenge a proposed finding of abuse by the Department of Health and Rehabilitative Services (DHRS). In that proceeding, DHRS has the burden of proving the alleged abuse by a preponderance of the evidence. Accordingly, if DHRS contends that A is precluded from relitigating the same abuse found in the criminal trial by reason of collateral estoppel, then this is an *offensive* use of the doctrine. Under the *Parklane*, supra, rule DHRS would be allowed to assert the doctrine of collateral estoppel because it could not have been joined as a party in the criminal proceedings, but not under the Florida rule announced in *Romano* and *Zeidwig*, supra. DHRS could not claim to be privy to a party in that criminal proceedings where "privy" is "defined as one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase." *Zeidwig*, supra, at 214.

The doctrine of collateral estoppel may be used to preclude a respondent in an administrative child abuse proceeding from relitigating issues determined in a prior dependency hearing. Where DHRS and Respondent are parties in both the dependency hearing and in the subsequent administrative hearing alleging child abuse, collateral estoppel could apply. Since the causes of action are different, res judicata does not apply. In order for collateral estoppel to apply, the issues determinative of child abuse must have been litigated and adjudicated in the dependency hearing. cf. *Karamatis v. Schacknow*, 553 So.2d 741, 744 (Fla. 5th DCA 1989). Many dependency hearings are uncontested; therefore, the facts upon which the alleged abuse rests are not adjudicated in these uncontested proceedings, and the defendant is not estopped to litigate the issue at the abuse hearing. *City of Bartow v. P.E.R.C.*, supra.

The doctrine of res judicata could also arise in a proceeding involving an application for a permit to do something for which a permit is required. If an application for such a permit is denied, res judicata would bar the applicant from reapplying for the same permit under the same allegations. However, if the applicant amended his subsequent application to provide additional

continued . . .

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

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Gene E. Stillman . . . . . Section Coordinator
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grounds for granting his application, the doctrine of res judicata would not apply.

Summary

Neither res judicata nor estoppel by judgment will arise with significant frequency in an administrative hearing. The former because there will seldom be an occasion where the second application will fail to allege different facts; the latter because its primary application would be in an offensive posture, i.e., be asserted by the party having the burden of proof; and under current Florida law, collateral estoppel cannot be so used.

The views expressed are purely those of the writer. The Division of Administrative Hearings does not have a Division view on this particular topic.

Licensure Exam Challenges: Do Statutory Rights Mean What They Say?

By Vytas Urba
Department of Professional Regulation
Tallahassee, Florida

Lately it appears that licensure exam challenge candidates are raising issues at hearings involving the Department of Professional Regulation which are outside the scope of our Legislature's intent. Specifically, there are a growing number of candidates insisting on hearings to prove that they answered one or two additional multiple guess questions correctly, thereby entitling them to a passing licensure exam score. The award of such points was not contemplated by the legislature nor was the Department vested with such authority other than to ". . .ensure that the examinations adequately and reliably measure an applicant's ability to practice the profession regulated. . .", Section 455.217, Florida Statutes.

Florida's Legislature recognized that there needed to be some avenue for exam candidates to seek redress when receiving exam grades which were arbitrary or devoid of logic. It therefore enacted Section 455.217, Florida Statutes. However, this section was not intended to permit all candidates to challenge all exams for all reasons. The statutory section clearly and unequivocally states in paragraph (1) (a) that all exams shall be adequate and reliable and provides a post-examination method for the Board to assure compliance. Furthermore, paragraph (1)(b) unambiguously provides that in the event of a practical exam is necessary, the respective Board shall promulgate rules for examiner selection criteria, grading criteria, and the relative weight to be assigned in grading each criterion. There is no statutory reference to the word "criteria" regarding non-practical exams.

There is also no mention whatsoever regarding the award of additional points to candidates or the amending of grades for any reason. After the administration of a non-practical exam, the Board is permitted to reject any "unreliable" question as the Board's sole remedy. However, regardless of the Board's sole remedy, hearing officers continue to award additional points to candidates' grades without those candidates having to prove that the non-practical exam was inadequate or unreliable. This practice is not consistent with legislative intent.

Over the years the Legislature has made deliberate and specific attempts to eliminate as much subjectivity from practical exams as possible and has directed the Boards to promulgate rules to that effect. Such rules have been drafted and filed.

While acting pursuant to their own rules, the Boards have been challenged time and again regarding their practical exams. Some boards have attempted to redress the subjectivity by regrading the practicals. Those regrades have been upheld by hearing officers as well as courts since the specialized knowledge required was not so unique as

to defy ordinary methods of proof.

As recommendations have been made to award candidates additional points for practical exams, additional candidates who have taken non-practical, objective, multiple-choice exams have requested the same relief. These additional candidates have framed and argued their petitions praying for awards of additional points and for passing grades on exams and have not attacked the adequacy and reliability of these exams. Such remedies were not contemplated by the Legislature or included in the statute since the statutory language clearly states that Boards are limited to rejecting questions of non-practical exams after administration of those exams, Section 455.217 (I) (a), Florida Statutes.

The Division of Administrative Hearings should be vested with the authority to dismiss candidate petitions which allege facts seeking remedies outside the scope of statutory rights/remedies. In the event a candidate fails a non-practical exam and then challenges it for reasons other than the exam's inadequacy or unreliability, that candidate's petition should be dismissed without prejudice to amend. The candidate should then be permitted to pursue the non-practical exam challenge to prove an exam's inadequacy or unreliability, thereby forcing the Department to administer an exam to all candidates for that profession which complies with the statutory mandate. Alternatively, the candidate should challenge any rule of the Department or the Board if the rule is beyond the agency's legislatively delegated authority.

The remedy of awarding additional points for non-practical exams is significantly different from that contemplated by the Legislature regarding practical exams. Practical exams are by definition subjective. Those exams involve independent grading by qualified examiners as opposed to automated/mechanical grading of multiple choice exams.

Additionally, Florida's appellate courts have not addressed the statutory remedies and applied them to non-practical exams since no licensure exams have been determined to be inadequate or unreliable. Even in practical exams, Florida courts have held that board members are appointed to ensure competency of its professionals and that a "court will be extremely reluctant to substitute its judgment for that of the duly

continued . . .

Health Law Section Membership Application

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

To join, make your check payable to "THE FLORIDA BAR" and return your check in the amount of $25 and this completed application card to HEALTH LAW SECTION, THE FLORIDA BAR, TALLAHASSEE, FLORIDA 32399-2300.

NAME _____ ATTORNEY NO. _____

OFFICE ADDRESS _____

CITY _____ STATE _____ ZIP _____

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Admin. Law 3/92

authorized board," regarding matters involving licensure. *Topp v. Board of Electrical Examiners*, 101 So 2d 583, 586 (Fla. 1st DCA 1958) The courts will not disturb the judgment of Boards for grading of exams unless a candidate clearly shows the grading to be devoid of logic and reason. *Harac v. Department of Professional Regulation, Board of Architecture*, 484 So.2d 1333, 1338 (Fla. 3rd DCA 1986).

Multiple-choice, non-practical exam grading should not be held devoid of logic and reason since a presumption exists that all candidates for any given exam are graded in a manner consistent with one another unless proven otherwise. In the event a candidate challenges such grading and prevails, that candidate, along with all others who sat for the same non-practical exam, should be permitted to take another exam at no extra charge. The new exam would then be one which is adequate and reliable and graded in a manner consistent with logic and reason.

Adequacy and reliability are presumed with multiple-choice, non-practical exams because Section 455.217 (1)(b), Florida Statutes, includes the term "criteria" only with reference to practical exams. The statutory authority for ensuring adequate and reliable non-practical exams makes, no reference to the term "criteria". The specific reason for excluding criteria from nonpracticals is because criteria are irrelevant as long as the questions are within the general areas of competency and as long as every candidate is graded consistently pursuant to logic and reason. Candidates may then challenge the rules of the Board and/or the Department regarding their grades or the adequacy and reliability of the exam.

No statute permits a licensure exam candidate to challenge only one or two nonpractical exam questions in order to gain an additional point or two. Similarly, no statute permits any Board to amend any nonpractical exam grade other than to reject questions which are unreliable. Furthermore, no court has awarded any candidate additional points on any non-practical exam. In the event that statutory language means what it says, candidates for non-practical exam challenges should only be permitted to pursue rule challenges or to challenge an exam's adequacy and reliability. Absent presenting substantial competent evidence that a nonpractical exam is inadequate or unreliable, candidates should be limited to a single remedy: Retake the next regularly scheduled exam.

Vytas Urba has been with the Department of Professional Regulation since 1990. He is currently Assistant General Counsel with DPR.

Case Notes

by John A. Radey
Aurell, Radey, Hinkle & Thomas
Tallahassee, Florida

A petition to determine the validity of emergency rules promulgated by the Department of Business Regulation, filed at DOAH, was sent to *circuit court* by the Florida Supreme Court in *DBR v. Ruff*, 16 FLW S778 (Fla. Case No. 78,279, December 19, 1991). The court said this tax case had constitutional issues "so intertwined with the administrative rule issues that all the issues should be resolved in one judicial proceeding." The unanimous court directed the circuit court judge to consider "all of the issues" with citation to the Supreme Court's supervisory and transfer authority in article V, section 2, of the Florida Constitution. The court referred to "the unique circumstances of this case" as if this would discourage future use of this decision.

In *Short v. FDLE*, 16 FLW D2885 (Fla. 1st DCA, Case No. 90-3097, November 12, 1991), the court disapproved the imposition of a more severe penalty by the Criminal Justice Standards and Training Commission than the penalty proposed in the DOAH recommended order. The Commission could determine that revocation was an available penalty contrary to the DOAH recommended order, but could not impose that penalty where the Commission's new conclusion of law did not provide a basis for changing

the recommended penalty. The court remanded to DOAH for consideration of the penalty to be imposed in view of the court's conclusion that revocation was within the range of available penalties. See, also, *Turner v. DPR*, 17 FLW D21 3 (Fla. 4th DCA, Case No. 91-0984, January 8, 1992).

Due process clauses of the federal and Florida constitutions prevent a dentist from being disciplined because of violation of a statute where he never was charged with a violation of that statute and where the alleged violations occurred before the passage of the statute which the dentist was alleged to have violated. *Delk v. DPR*, 17 FLW D307 (Fla. 5th DCA, Case No. 91-518, January 24, 1992). Due process also required the Board of Medicine to provide a new hearing where the notice provided to licensee did not apprise him of the issues to be addressed by the Board. *Wagman v. Board of Medicine*, 16 FLW D2983 (Fla. 1st DCA, Case No. 91-808, November 26, 1991). Moreover, the Board cannot permanently revoke a license to practice medicine even though faced with a seemingly endless stream of petitions for reinstatement, at least until there has been an opportunity for a full hearing on the question of permanent revocation. *Cohen v. DPR*, 16 FLW D2982 (Fla. 1st DCA, Case No. 90-3516, November 26, 1991).

Orders of the Florida Real Estate Commission were reversed by at least two courts in January. In *Munch v. DPR*, 17 FLW D200 (Fla. 1st DCA, Case No. 90-3238, January 2, 1992), the court instructed the Commission as to the principal purpose of the APA and DOAH after the Commission adopted findings of fact and conclusions of law different than those found in the DOAH recommended order. While the Commission reversal of some of the conclusions was approved, the court went out of its way to tell the Commission that the court agreed with the hearing officer that only minimal and technical violations were involved and that the Commission should focus its disciplinary powers upon dishonest and unscrupulous types. Disciplining of real estate licensees by the Commission was reversed in *Anglickis et al. v. DPR*, 17 FLW D324 (Fla. 2d DCA, Case No. 90-02791, January 24, 1992), where the court found that the Commission's later adopted rule could not be applied to the licensees when there was no competent substantial evidence to support the rule as an incipient policy.

In *Health Quest Corporation IV et al. v. HRS*, 17 FLW D279 (Fla. 1st DCA, Case No. 89-302, January 14, 1992), however, the court quoted subsequently adopted HRS rules and gives them weight as incipient policy in the context of an HRS final order and DOAH recommended order which found that appellant's CON had expired. The later adopted rules were considered even though the hearing officer "did not have the benefit" of these rules at hearing. The divided court reversed HRS reaching a result favorable to the non-governmental litigant just as in *Short, Wagman, Cohen, Delk, Munch* and *Anglickis*.

This same pattern held in *DHRS v. Health Care and Retirement Corporation*, 17 FLW D272 (Fla. 1st DCA, Case No. 90-2506, January 17, 1992, where the court upheld DOAH's final order declaring portions of HRS' Medicaid rules invalid with reference to a test for vagueness based whether "men" of ordinary intelligence would understand what the rule meant. However, it is clear that HRS' interpretation of its Medicaid rules is entitled to "great deference." *Maclen Rehabilitation Center v. DHRS*, Fla. 1st DCA, Case No. 90-1847, October 14, 1991).

HRS, however, prevailed in *Brookwood-Jackson County Convalescent Center v. HRS*, 17 FLW D1 88 (Fla. 1st DCA, Case Nos. 90-1061 etc., January 2, 1992), a CON case that underscored the mandatory nature of the CON filing requirements found in Chapter 381. Final denial of a CON application was appropriate because of deficiencies in statutorily mandated certifications and because the applicant was not the licensee.

A GFWFC final order provided insufficient protection for Key Largo rats and mice from domestic cats according to the court in *Mangrove Chapter of Izaak Walton League of America, Inc. et al. v. GFWFC*, 17 FLW D228 (Fla. 1st DCA, Case 91-389, January 14, 1992). However GFWFC's decision on a "subdivision-wide basis" was approved as a "permissible act of incipient agency action" and on remand GFWFC was instructed to address protection for the rats and mice from domestic cats as was suggested by the DOAH recommended order.

The applicant also was found entitled to a permit in *Hamilton County v. DER et al.*, 16 FLW D2657 (Fla. 1st DCA, Case No. 90-1718, October 10, 1991), a case involving a county challenge to DER's issuance of a permit for a medical waste incinerator in Jas-

continued . . .

per. Initially noting that Chapter 403 could not be used to prevent "construction and operation of legitimate business facilities and functions" and that Hamilton County had standing, the court held that the applicant could provide additional evidence (not contained in its application) as to reasonable assurances during the hearing because "the hearing officer may consider changes or other circumstances external to the application" ala *McDonald.* Ultimately the court held that competent substantial evidence supported DER's final order and found that DER's summary striking of exceptions because they were one day late was harmless error.

A growth management case, *DCA v. DOAH, Lee County, et al.*, 16 FLW D2709 (Fla. 1st DCA, Case No. 91-679, October 21, 1991), was an interlocutory appeal that the court refused to consider because review of the final agency action would provide an adequate remedy. However, the court noted that the hearing officer's refusal to consider a settlement stipulation was ambiguous and the concurring opinion underscored the probable relevance of the settlement agreement.

While the court stated that it took "no pleasure in dismissing this appeal," it did firmly state that the time of mailing of a notice of appeal is irrelevant where the notice must be *filed* in a particular time frame. "Reliance upon the mail is not well founded." *Coca Cola Foods and GAB v. Cordero*, 16 FLW D2788 (Fla. 1st DCA, Case 91-2594, November 4, 1991).

Minutes

Administrative Law Section Executive Council Meeting

January 10,1992
Orlando, Florida

Call to Order

The meeting was called to order by Chair Gary Stephens at 8:30 a.m.

Members present: Thomas M. Beason, Ralf G. Brookes, M. Catherine Lannon, Stephen Maher, Steven Pfeifler, Mary F. Smallwood, Betty J. Steffens, Gary Stephens.

Others present: Peg Griffin, Tom Hall, Judge James R. Wolf.

Members absent with excuse: William R. Dorsey, Vivian F. Garfein, Linda M. Rigot, Diane D. Tremor, William E, Williams.

Consideration of the Minutes, November 7,1991

The minutes of the November 7,1991 meeting of the Executive Council were approved with the following correction: the absences of Stephen T. Maher and Betty J. Steffens were excused.

Officers' Reports

A. Report of the Chair—Gary Stephens shared his thoughts on the role of the Sections within The Florida Bar.

B. Report of the Chair-Elect—Steve Pfeiffer outlined his preliminary plans for the Ninth Administrative Law Conference. After discussion, it was the sense of the group that the conference should be held just prior to the next legislative session.

C. Treasurer—No report. Information relating to the budget was included in the meeting materials.

D. Report of the Secretary—All members were reminded to send copies of correspondence sent on behalf of the Section to the Chair and Peg Griffin or her successor.

Visit by Judge James R. Wolf of the First District Court of Appeal

Judge Wolf and Tom Hall, senior staff attorney at the Court, visited the executive council meeting to inform the group of some possible changes at the First District Court of Appeal. Judge Wolf told us that the Court's workload has increased beyond its planned capacity and that the Court is exploring the possibility of establishing a mediation program to help it cope with this situation. The Court may be able to obtain a grant to set up an experimental mediation program. The Court is seeking input from practitioners and some bar groups before preparing a grant request. The Workman's Com-

pensation Section has agreed to participate and the Council agreed that the Administrative Law Section would participate as well. Gary Stephens, Mary Smallwood, Steve Maher and Cathy Lannon (with Lee Nelson as an alternate) agreed to work with the Court on this project.

Committee Reports

A. Long Range Planning Committee—Steve Pfeiffer announced that a meeting of the Long Range Planning Committee will be held on March 19,1992 in connection with the next Executive Council meeting, which will be held on March 20, 1992.

B. Legislative Report—Betty Steffens discussed many pieces of proposed legislation of interest to the Section. Alter much debate, it became clear that the Council could not reach a consensus position on any of the proposed legislation.

C. CLE Committee—Cathy Lannon attended the last CLE meeting for Bill Dorsey and gave a report. It was announced that the Section's regular Spring CLE event will be rescheduled to a date later in the year.

D. Publications Committee—Steve Maher expressed concern that Dick Belz was not invited to write a reply to a recent newsletter article that was obviously of direct interest to Florida Institutional Legal Services, Inc. It was also reported that an article submitted for the Florida Bar Journal had been declined because it related to pending litigation.

E. Florida Bar/Council of Sections Meeting—Steve Maher reported at the Council of Sections meeting held the day before, The focus of the meeting was on a proposed compromise on the difficult issue of Section lobbying. The proposal would have required Sections to notify the Board of Governors of their legislative positions, and unless those positions were rejected by the Board, the Section would be permitted to lobby. The Public Interest Section was leaning toward opposing the compromise and at a time after the meeting of the Administrative Law Section Executive Council which these minutes detail, the Public Interest Section voted to oppose this compromise a file a court action. A more detailed discussion of the Council of Sections meeting and the issues involved is included in the February 1, 1992 Bar News.

Old Business

A. Recommendations of the Gender Bias Task Force—The recommendations of the Gender Bias Task Force designed to increase participation of women in CLE programs were unanimously adopted.

B. Review of Task Force Appointments—Task Force appointments were briefly reviewed.

New Business

A. Report on the 1991 All Bar Conference—Steve Maher gave a report on the All Bar Conference. Three Issues were addressed by the Conference, the client's security fund, reports professional malpractice and legal technicians. A more detailed discussion of the All Bar Conference proceedings is Included in the February 1, 1992 Bar News.

B. Consideration of Proposed Budget, 1992-93.—The proposed budget was approved.

Informational

A. The Office of Government Ethics—The Section opposed a proposed federal government policy that would have hampered the participation of federal government employees in bar activities. The proposed policy was modified in response to the large number of unfavorable comments received.

B. Peg Griffin, who has served the Section well as Bar staff for several years is leaving to work with the Young Lawyers Division. The Council thanked her for her years of faithful service.

C. Tom Ervin, who has served as the Section's Board Liaison for many years is leaving the Board of Governors. A new Board Liaison has yet to be selected.

Time and Place of Next Meeting

The next meeting of the Executive Council will be on March 20,1992 in Tallahassee, Florida. The Long Range Planning Committee will meet on March 19, 1992.

Respectfully submitted,

Stephen T. Maher, Secretary

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

1992-93

Projected Section Budget

Revenue		
Dues	15,200	
Dues Retained by Bar	7,600	
Net Dues	7,600	7,600
CLE Seminars	1,925	
Administrative Law Conference	12,000	
Videotape Sales	100	
Audiotape Sales	200	
Interest	2,240	
Total Other Revenues	17,065.00	16,465
Total Revenue		**24,065.00**
Expenses		
Faxs	150	
Postage	850	
Printing	320	
Officer/Council Office Exp.	500	
Newsletter	2,500	
Membership Drive	500	
Photocopying	160	
Staff Travel	836	
Officer Travel Expense	2,300	
Meeting Travel Expense	500	
CLE Speaker Expense	100	
Committee Expense	500	
Board or Council Meetings	400	
Bar Annual Convention	1,200	
Awards	350	
Other	100	
Total Expenses	**28,766**	

Beginning Fund Balance	**34,455**
Plus Revenue	**24,065**
Less Expenses	**28,766**
Operating Reserve	**2,877**
Ending Balance	**26,877**