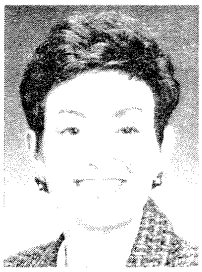
Administrative Law Section Newsletter

Volume XVI, No. 3 William L. Hyde, John D.C. Newton II, Co-editors March 1995

From the Chair . . .

by Vivian Garfein

Update on Local Government Law Section Certification Program



I'm pleased to report that the issue I discussed in our last newsletter, concerning the proposed certification program of the Local Government Law Section, was easily resolved. That section had proposed "Standards for Certification of a Board Certified Urban, State and Local Government Lawyer." Prior to the publication of our last newsletter, several meetings were held with members of our section together with members of the Government Lawyer and Environmental and Land Use Law Sections to oppose this proposed certification as being too broad and encroaching into other areas of practice.

Shortly after we last went to press, I received a letter from Glenn M. Woodworth, Chair of the Board of Legal Specialization and Education, together with a revised proposal from the Local Government Law Section—"Standards for Certification of a Board Certified City, County and Local Government Lawyer." These new "standards" appropriately narrowed the scope of the certification and addressed all the concerns raised by the opposing sections. No more meetings were necessary. We blessed the revisions and they should be on their way to finalization. I again want to thank the Local Government Law Section for their responsiveness in addressing our concerns. We wish them well with their program!

Never Was There Such a Crowd!

I speak of the turnout we had for the 1995 Pat Dore Administrative Law Conference. We hoped for 100, had room for 150, and started turning people away when the registration hit 200! It was a marvelous program which included points of view from all walks of administrative law life. I won't say more, except the word used most often during the day was provocative. I want to express my thanks to Bob for the outstanding program he put together. Pat would have been proud! Several of us said just that during the course of the day. I also want to thank all of the program participants. It was obvious that they put thought, time, and effort into their presentations.

We're Getting Closer

I am pleased to report that we now have cash and pledges totaling approximately $65,000 toward the $100,000 we need to complete our fundraising efforts for the Patricia A. Dore Endowed Professorship.

We recently compared our donor records with those of the FSU Foundation and found a few discrepancies which we think have been corrected. In an abundance of a caution, we are printing a list of the contributors in this newsletter (See page 2). If you have already contributed, please check to see if your name is there. If your name isn't on the list and should be, call me immediately at 904-921-9910.

For those of you who have not yet made a contribution, I urge you to do so. Don't miss this opportunity help us honor Pat's memory and work. When the chair is fully funded, a dedication ceremony will be held at the Florida State University College of Law. Dean Weidner is commissioning a portrait of Pat which will be placed in the Law School Rotunda together with a dedicatory plaque including the list of names of all those who contributed.

Please send your pledge or check to:

FSU College of Law
Dore Endowed Professorship
c/o Development and Alumni Affairs
425 West Jefferson
Tallahassee, Florida 32306-1034

Your contribution is tax deductible. Please join us in establishing this important professorship in honor and memory of one of Florida's most distinguished legal scholars, and a dear friend and mentor to many of us.

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Commission Studies Water Management Districts

by Sally Bond Mann
Executive Director, Water Management District Review Commission

The 21-member Water Management District Review Commission was created by 1994 legislation to "[p]erform a comprehensive review of Florida's system of regional water management."[1] Since creation of the five regional water management districts in 1972, their responsibilities and authority have expanded to include not only flood protection and the regulation of surface waters, but also environmental resource permitting, water quantity and quality protection, and the acquisition and management of ecologically sensitive lands. The Commission study will include examination of all aspects of the districts' budgeting and operational programs, as well as the constitutional and statutory authority of districts to manage regional water resources.

Directed by Chapter 94-270 to hold public hearings within the jurisdiction of each district for the purpose of receiving public comment on the operation of the water management districts and the laws they administer, the Commission has conducted several two-day meetings across the state,[2] and has scheduled additional hearings in Tallahassee (March 16-17), Live Oak (April 20-21), Clewiston (May 18-19), Pensacola (June 15-16), and Sarasota (July 27-28). Meeting agenda include overviews of regional programs and operations by district staff, Commission subcommittee meetings, an open-mike public hearing, and formal presentations by representatives of federal, state and local governments, regulated entities, environmental concerns, and agricultural and industrial interests.

The following subcommittees have been established within the Commission to conduct detailed reviews of the itemized topics, as described in the enabling legislation:

District Responsibilities & Operations: Legal responsibilities assigned to the water management districts, whether those responsibilities should be modified, and ways to improve the programmatic accountability of districts.

Financial Structure & Budgeting: Costs associated with operating the districts; funding mechanisms available to the water management districts to carry out their responsibilities; ways to improve the financial accountability of districts; the need to revise the budget development and adoption procedures of the districts; and the levy of ad valorem taxes and the public notice procedures of Chapters 200 and 373, *Florida Statutes*.

Land Acquisition, Planning & Management: Ways to improve planning and management activities for lands owned by the water management districts, including the potential for reorganizing and integrating the responsibilities of the districts, regional planning councils, Department of Environmental Protection and the Department of Community Affairs; alternatives to district management of acquired lands, including the feasibility of land management by the Department of Environmental Protection, other state or federal agencies, local governments, or non-governmental entities, singly or in combination.

As a whole, the Commission will review district governance issues, such as whether to appoint or elect governing board members, or perhaps select candidates in a manner similar to that of the judicial nominating commission or the Public Service Commission Nominating Council. In addition, Commission members will study the feasibility of creating new committees, subcommittees, or a joint committee of the Senate and House of Representatives with the expressed purpose of continuing legislative oversight of water resources management in Florida.

Chapter 94-270 directs the Commission to file a report of its recommendations with the Governor, President of the Senate and Speaker of the House of Representatives by September 1, 1995. Based on the depth of the mandated study and the quantity of documentation under consideration, however, Senator John McKay and Representative Vernon Peeples have filed companion bills for consideration in the 1995 regular session that would extend the reporting deadline to December 1, 1995. The Commission actively solicits comments and recommendations from Section attorneys, who are uniquely situated to readily observe current problems in water resource management in Florida. Please direct any inquiries or remarks to Sally Bond Mann, Executive Director and General Counsel, Water Management District Review Commission, 205 South Adams Street, Tallahassee, Florida 32301. Ms. Mann can be reached at (904)922-0981, or via facsimile at (904)921-8007.

Endnotes:

[1] See Chapter 94-270, Laws of Florida (1994). Former Senate President Philip D. Lewis is Chairman of the Commission, which is composed of the following individuals: William M. Bishop, Rosana D. Cordova, Thomas H. Dyer, John M. Finlayson, Joe Marlin Hilliard, Mary A. Kumpe, Senator Patsy Ann Kurth, Representative John Laurent, John R. Maloy, Mimi K. McAndrews, Senator John McKay, Mayor Carol Jaudon McQueen, R. E. Nedley, Thomas E. Oakley, Representative Vernon Peeples, Howard L. Searcy, Commissioner Samuel Taylor, Commissioner Patti B. Webster, and Sanford N. Young. Eric Draper resigned from the Commission on January 20, 1995; his replacement has not yet been announced by Senate President Jim Scott.

[2] Tampa (December 1-2, 1994); Orlando (December 15-16, 1994); Jacksonville (January 19-20, 1995); and Ft. Lauderdale/Hollywood (February 16-17, 1995).

Lose That Fiddle, Guys

by Suzanne Fannon Summerlin

The Florida Public Service Commission spends great effort trying to effectively regulate a constantly changing number of water and wastewater utilities. The Commission also consistently spends a great deal of time trying to interpret its statutory requirements, including among many other things, trying to determine if it has the jurisdiction to regulate a particular entity or the power to take a particular action. These are issues which face all regulatory agencies to some degree, but certainly no agency is any more bedeviled by them than the Commission, especially in the water and wastewater industry. Why is this? Why do we care?

To answer the second question first: we care because the cost and availability of clean, drinkable water and the effective treatment of wastewater are among the first tier of critical issues facing us as citizens of this state today. Without water, there is no life as we know it. Therefore, the economic regulation of water and wastewater utilities is of critical importance. Not simply because of the direct cost to a customer of these products, but more significantly, because of the overall cost to all of us of not acting in a manner consistent with the goal of conserving every precious drop of our most essential resource. We care, then, whether the agency charged with this economic regulation spends its very finite energies on trying to handle a constantly changing number of utilities and on trying to figure out what it can and can't do.

Now for the first question: Why is this? Why does the Commission have to handle a constantly changing number of water and wastewater utilities? Why does the Commission spend so much time figuring out what it can do? There are several reasons, but one fundamental reason is that, in the water and wastewater area, the Commission must operate within a statutory framework which permits counties to choose to regulate private investor-owned water and wastewater utilities within their boundaries or to opt to have the Commission regulate those utilities. While this scenario gives great deference to counties and the notion of home rule, which is probably desirable in some areas, this statutory scheme of regulation wreaks havoc for the Commission, as well as utilities and the customers of utilities, in numerous ways.

When a county decides to regulate its own utilities, it must regulate pursuant to the ratesetting provisions in Chapter 367, Florida Statutes. These provisions require that the counties must set rates that provide an opportunity for utilities to recover their expenses and earn a fair return on their investment used and useful in utility service. This is the same basis on which the Public Service Commission must set rates. A county may or may not have the regulatory expertise and sophistication to deal with the rather complicated issues involved in setting fair utility rates. The expense involved in a county creating its own regulatory framework, if that framework is to be professional and competent, is not going to be insignificant. This is not to mention the questionable reasonableness of this type of expense when a statewide professionally-staffed agency already exists. Another problem facing counties is that they are run by local politicians that must, legitimately, be responsive to their local citizens' concerns. Depending on the extent to which local politicians are able to balance the competing needs of utilities and customers, situations may occasionally arise where utilities are no longer financially viable entities. As a result, utilities may fail to provide adequate service or may even end up in abandonment. Customers get upset and want results. At some point, the frying pan gets very hot and a county may decide to send it and the fire to the Commission. Then the Commission is faced with an uncomfortable situation which will often require some serious decisionmaking that may not increase its popularity with the utilities involved or with the customers or both. Sometimes, to sweeten the pot, there is already litigation ongoing between the county and a utility with a particularly colorful history. The Commission then must determine what it is to do in the meantime.

Another common result of the county option process is that, when a county decides that the Public Service Commission should take over the regulation of its utilities, some utilities that may have operated pretty much unmolested by any regulation may be shocked to find that they are now required to get a certificate of authorization from the Public Service Commission, as well as to comply with a great number of statutes and rules. The Commission's statutes provide for a number of exemptions from Commission regulation, but an exempt entity must obtain an order from the Commission acknowledging its exempt status. Therefore, each time a county gives the Commission jurisdiction, the Commission must process applications for certificates or for exemption from whatever number of utilities may be operating in the county. All of this can cause a great deal of consternation when utility owners are faced with a completely new legal framework with which they are not familiar and for which they may not have the resources to become familiar or to obtain adequate counsel. In some cases, utilities may be operating that might never have been granted a certificate by the Commission in the first place, but once the Commission receives jurisdiction over a county, it cannot simply shut down systems serving customers. Beyond all of these considerations, the Commission simply has no control over when it will receive a substantial number of "new" utilities to regulate in varying financial and operational conditions.

Even determining if a particular utility is exempt from Commission regulation is not always the simple matter that it would appear it should be. Is the utility a governmental authority? Is it governmentally controlled? (Governmentally-owned, operated or controlled utilities are exempt from Commission regula-

tion.) Is it a non-profit corporation? Does the non-profit corporation provide service only to members who own and control the non-profit corporation? Will control of a homeowners' association transfer from a developer to the homeowners within five years and thus allow the association to qualify for exemption? Can an entity obtain both a landlord-tenant exemption and a small system exemption or any other combination of exemptions? Is a sub-metering company a utility? May a reseller collect deposits from its customers and still fall within the statutory exemption provided for resellers? Each of these issues and many others like them have spawned controversy in various dockets.

Another reason why the Commission's determination of its jurisdiction and power is complicated is that there are many other state agencies that have jurisdiction over environmental, water use, and growth management issues which are often inextricably related to the Commission's mission. It is not always so easy to figure out who has jurisdiction over an entity or a particular issue. For example, when a mobile home park applies for an exemption as a reseller (a system that merely collects from its customers the charges it pays to a primary provider), but includes a pass-through for another separate component of utility service as contemplated in the statutes regulating mobile home parks, does the Commission ignore this and declare the system exempt and thereby defer to another agency's statute or is the Commission bound to exercise the "exclusive" jurisdiction its statute confers?

Yet another very significant reason that the Commission sometimes finds it difficult to determine what it can and cannot do is that acting in the "public interest" can entail many things that are not expressly set forth in the statutes. Certainly no agency's statutes can spell out every nuance of the "public interest," but for the Commission, it seems, some very obvious gaps exist. For example, the Commission is statutorily required to set fair, just and reasonable rates for water and wastewater utilities. Does this include consideration of conservation issues? Certainly there is no explicit statement to this effect in the Commission's statute. Does the Commission ignore this obviously critical factor in determining rates under the guise of deferring to other agencies' environmental jurisdiction or does the Commission risk exceeding its explicit statutory authority?

Still another matter that causes the Commission concern at times is the lack of any clear direction as to which agency is preeminent in a particular arena and how the relationships between agencies are to work. The Commission's economic regulation of water and wastewater utilities directly impacts the environmental policies of the state's water management districts and the Department of Environmental Protection, as well as the environmental concerns of many citizen groups. Likewise, the activities of these agencies and groups, as well as the growth management policies of the Department of Community Affairs and the mandatory hook up requirements for septic tank owners in the Department of Health and Rehabilitative Services' statutes directly impact the economic situations of the utilities the Commission regulates. However, there is no formal statutory mechanism for the interworking of these agencies. There are obscure references in each agency's statutes that refer to the others, but not in a meaningful direct fashion. Delicate negotiations may sometimes occur, but much of the time each agency rolls along in its own orbit and when two or more agencies' courses collide, utilities and/or customers may be victims.

There are important and innovative ideas that need implementing if the State of Florida is going to have a fighting chance in the struggle to conserve its water and its environment while providing citizens with essential water and wastewater services. One of the most promising concepts that is now being addressed is that of "reuse" of reclaimed water. In a recent matter before the Commission, a utility came with a proposal to settle an ongoing proceeding regarding the appropriate rates to be charged to allow the utility to accumulate the funds needed to build a major reuse facility. The utility came to the table with a stipulation to resolve all of the pending issues and had all of the parties in agreement, including a water management district and citizen groups and the Public Counsel. The stipulation provided for the Commission to oversee the activities of a non-profit organization that would receive monies, via a surcharge collected by the utility from its customers, and utilize those monies to fund the reuse project. The goal of the creation of the nonprofit corporation is to avoid the income tax liability that would result if the utility retained the surcharge monies and utilized them to fund the reuse project. While approving of the problem-solving efforts that had resulted in the stipulation, the Commission expressed concern that, as the Commission does not have jurisdiction over non-profit entities, it could not approve of the terms of the stipulation regarding the Commission's supervisory role. The matter is yet to be resolved.

An example of a proceeding in which the Commission is struggling to determine whether it can or must regulate particular utility systems is currently ongoing at the Commission. Southern States Utilities, Inc., operates approximately 150 water and wastewater systems across the State of Florida, some in counties regulated by the Commission and some in counties that have chosen to regulate their own utilities. Because Chapter 367.171(7), Florida Statutes, provides that the Commission shall have jurisdiction over all utility systems whose service transverses county boundaries, the Commission is investigating whether it does, in fact, have jurisdiction over Southern States Utilities, Inc.'s systems located in non-Commission regulated counties. The Commission will take testimony and evidence on whether the service provided by Southern States Utilities, Inc.'s systems "transverses" county boundaries, whether all of their systems constitute, in effect, one "system." Presumably, the Commission will dutifully hear and ponder what activities Southern States performs that actually physically cross county boundaries. It will hear from the counties that are participating that a system's service does not transverse county boundaries unless its physical pipes do. The Commission already regulates the great majority

continued on page 6

LOSE THAT FIDDLE

from page 5

of this utility's systems. One must wonder whether a statute that requires this type of exercise by the Commission, or worse yet, that designed this scheme of fragmented regulation, is conducive to effective utility regulation.

Endless Commission proceedings have focused on trying to figure out what the Commission can or can't do in a particular matter because of unclear statutory intent, ambiguous or cryptic statutory language, and sometimes directly contradictory statutory language. There are many areas in which issues have arisen as to what power the Commission has to set rates in one fashion or another, what role do counties or cities play in the certification process, etc. The Commission has done the best it could in fashioning answers to all of these issues in one way or another, but the Commission can only act within the statutory parameters set for it.

It is not rose-colored glasses that makes the Public Service Commission the regulator of choice for water and wastewater—there are many things the Commission does not do as well as it should or could. It is merely common sense that suggests that a centralized professionally staffed agency that is highly regarded throughout the nation as a regulator in this field would be the appropriate situs for jurisdiction over all water and wastewater utilities in the state and over all the policy issues that affect this arena of regulation.

In sum, it is truly amazing how well the Commission has done considering the statutory tightrope it must walk on a daily basis. But it is time to slash the Lilliputian cords of home rule and fragmentation of regulatory jurisdiction and policy to allow the State of Florida to lumber forth into a new era. As a body of political appointees, the Commission has not and probably never will aggressively seek an expansion of its jurisdiction, regardless of its view of the desirabillty of such an expansion. How much better for every citizen of Florida if the Legislature would put down its fiddle, stop watching while Rome burns, and give the Commission much more comprehensive jurisdiction and clearer and more effective direction.

Suzanne Fannon Summerlin has recently begun a solo practice in administrative and utility regulatory law in Tallahassee, Florida. Ms. Summerlin was Chief of the Bureau of Water and Wastewater in the Division of Legal Services at the Public Service Commission until August 1994, where she previously had served as a senior attorney in both the Water and Wastewater and the Telecommunications Bureaus. A graduate of Florida State University College of Law, Ms. Summerlin has taught Administrative Law at FSU's School of Public Administration. Ms. Summerlin currently publishes The Waterline *which provides a summary of the water and wastewater decisions of the Florida Public Service Commission on a monthly basis. Ms. Summerlin may be reached at (904) 531-9990, 1300 Executive Center Drive, Box 414, Tallahassee, Florida 32301.*

Meet DOAH's Three New Hearing Officers

The Division of Administrative Hearings has added three Hearing Officers to its corps. They are Richard Hixson, Suzanne F. Hood, and Patricia Hart Malono. The following biographical sketches will introduce them to members of the Section who have not yet had an opportunity to meet them.

RICHARD HIXSON received his B.A. degree from the University of Florida in 1970 and his J.D. from the University of Virginia in 1973. He served as a Law Clerk for United States District Court Judge Ben Krentzman in Tampa from 1974 until 1976. He then worked in the Florida Attorney General's Office from 1976 until 1981 where he was the Chief of Civil Litigation. Mr. Hixson next worked with the Florida House of Representatives from 1981 through the end of 1994, where he served as Staff Director for the House Judiciary Committee and also as House Special Master for Claims.

SUZANNE F. HOOD received her B.A. degree from Stetson University in 1966 and her J.D., with honors, from Florida State University in 1987. After admission to The Florida Bar, Ms. Hood completed judicial clerkships at the Supreme Court of Florida and at the First District Court of Appeals of Florida. Her legal experience includes working as a Senior Attorney for the Department of Insurance, specializing in the prosecution of unauthorized insurers. Immediately prior to becoming a Hearing Officer in August of 1994, Ms. Hood engaged in a general practice of law in the private sector.

PATRICIA HART MALONO received her B.A. degree in 1969 and her J.D. (with high honors) in 1981 from Florida State University. She was admitted to the Order of the Coif and to The Florida Bar in 1981. After serving as a research aide with the Florida Supreme Court from 1981 to 1983, Ms. Malono taught at the Florida State University College of Law from 1984 to 1987 as a full-time Instructor of Legal Research and Writing. Before coming to the Division in January, 1995, she was a shareholder in McConnaughhay, Roland, Maida & Cherr, P.A., where she practiced in the areas of appellate, corporate, commercial, regulatory, and administrative law. She is admitted to practice before the United States District Court for the Northern and Middle Districts of Florida and the Eleventh Circuit Court of Appeals. She is a member of the Administrative Law Section of The Florida Bar and of the Regulatory and Administrative Law Section of the American Bar Association.

Big Changes Ahead for Agency Rulemaking

by Dan R. Stengle, General Counsel, Department of Community Affairs

Between the Governor and the Legislature, it promises to be a major year for interest in, and changes to, the rulemaking activities and processes of state government. Those who wish to have input into the changes to the Administrative Procedure Act being considered by the Legislature would be well-advised to act soon, as initiatives to amend the APA were being crafted by legislative committees well in advance of the March 7 start of the 1995 Legislative Session.

On the gubernatorial front, and commencing with his inaugural address on January 3, Governor Chiles has taken aim at the proliferation of agency rules. The Governor has stated that the current regulatory climate must change if small business is to view government as a friend, rather than a foe. His goal is to reduce agency rules by 50 percent, and he has been taking action to make the goal into reality. Agencies under the control of the Governor were directed to identify — prior to the commencement of the Legislative Session — rules that it recommends for repeal, even if repeal would require legislative action. The rules that agencies were directed to target initially include: (a) obsolete rules; (b) organizational and procedural rules; (c) rules that merely track statutory language; (d) rules adopted only to implement a statute when the agency believes a rule unnecessary to do so; (e) rules adopted because they were mandated by section 120.535, Florida Statutes; and (f) any other rules the agency believes are unnecessary.

Directives to agencies will be issued soon for more substantive governmental rules streamlining. The Governor plans to complete the 50 percent reduction within the next 2 years. Governor Chiles has put Lt. Governor Buddy MacKay in charge of the rules streamlining effort. Coordinating the agency work on the rules reduction project will be DOAH hearing officer David Maloney.

Meanwhile, the Legislature began work in January on major changes to the Administrative Procedure Act. The efforts thus far have been spearheaded in the House of Representatives by the Select Committee on Streamlining Government Regulations, and in the Senate by the standing Committee on Governmental Reform and Oversight. The House select committee began work on Proposed Committee Bill SGR 95-01, while the Senate committee began its work with Senate Bill 536 by Senator Williams. The Florida Chamber of Commerce and Associated Industries of Florida each submitted to the Legislature separate proposals for APA amendments. Additionally, the Senate bill includes components of the legislative work product of the now-defunct Senate Select Committee on Governmental Reform, which had initiated a major — but unsuccessful — APA amendment effort in 1994.

Senate Bill 536, as introduced, would bring about significant APA changes. Among its various amendments to chapter 120 are a variety of attorney fee and cost awards against agencies for invalid rule promulgation, failure to promulgate rules as required by section 120.535, Florida Statutes, and amending a proposed or existing rule in response to a filed challenge. The bill also provides that agency proposed or existing rules are presumed to be invalid, and the agency bears the burden of proving their validity. Additionally, the bill would give the Administrative Procedures Committee (JAPC) the power to suspend proposed or existing rules until the ensuing legislative session, and would increase the opportunity for legislative oversight of the rulemaking process in a variety of ways. The bill would require a notice of proposed rule development for each rule that an agency ultimately will propose, would formalize extensive requirements for a rulemaking record, and would require an agency to prepare a statement of estimated regulatory costs on each rule promulgated. The Senate bill passed the Committee on Governmental Reform and Oversight on January 23. Its only other reference was the Committee on Rules and Calendar.

The major House bill contains a number of provisions dealing with many of the issues dealt with in the Senate bill. The House select committee considering PCB SGR 95-01 had met more frequently than the Senate committee prior to the Session, however, and the House bill had been amended in a number of respects even prior to its introduction at the commencement of the Session.

Other prefiled bills included HB 133 by Representative Posey, which would classify the knowing promulgation of a rule which goes beyond delegated legislative authority as a misdemeanor of the second degree, chargeable against the agency head. Senate Bill 550 by Senator Williams would, among other things, give DOAH hearing officers final order authority in proceedings under section 120.57(1), Florida Statutes. Senate Bill 482 by Senator Grant would require agencies to obtain approval for each proposed rule both from the JAPC, as well as committees of substantive jurisdiction over the substantive areas of the proposed rules. As well, SB 482 would repeal the authorization of an agency to refuse to withdraw or modify a proposed rule for which an objection has been made. House Bill 399 by Representative Eggelletion would create the Risk-Based Priority Council to incorporate "risk-based priority setting into the human health and environmental protection rules" of a variety of health and environmental agencies.

Likely, other APA bills will have surfaced by the time this issue of the newsletter reaches your hands. With each house of the Legislature seemingly racing the other to vote out a bill making dramatic changes to state agency rulemaking processes, the next issue of the newsletter may be able to report the final outcome of the legislative efforts.

Case Notes, Cases Noted and Notable Cases -or- Coruscations on Cases Under the APA

by David Dagon

Supreme Court Cases

Our final and therefore infallible Supreme Court recently approved changes to the rules of appellate procedure. Generally, the amendments will tend to confine en banc review of cases lodged in a district's subject matter division to only those judges sitting in the division. *See* ***In re: Amendment to Florida Rules of Appellate Procedure 9.331(b)*, 19 Fla. L. Wkly. S659 (Fla. Dec. 15, 1994).** Astute readers will recall that the Supremes recently approved of the First DCA's request to permit its judges to sit in subject matter divisions. The First DCA recently formed an APA/Worker's Comp division composed of five judges. *See* Thomas D. Hall, "Big Changes at the First District," 16 *Admin. L. Section Nwsltr.* 11 (Jan. 1995) (discussing Adm. Order 94-2 (Oct. 3, 1994)).

The rule operates in this way: en banc determinations are limited to those regular active judges within the subject matter division. If the chief judge finds "matters of general application" within the case, or if a three-fifths majority of the active judges of the whole court so desire, an en banc review before the entire court may be had. Court commentary to the amendment suggests that en banc review beyond the subject matter division would occur only in "exception instances."

Comment: In the First DCA, where at present only five judges comprise the new administrative law/worker's compensation division, a unanimous opinion (3-0) could be reversed by the division en banc only if at least one judge changes his or her prior decision. Thus, review en banc before the entire court would be the only likely way of tipping a panel opinion.

* * *

Well, send out for cold compresses; the Supremes have ventured once again into the APA. And as before, the result is yet another headache for those hoping for clarity and simplicity in Chapter 120. This time, in ***Department of Health & Rehabilitative Services v. A.S.*, 20 Fla. L. Wkly. S23 (Fla. Jan. 12, 1995),** the Court touched on the standard of review, and to a greater extent separation of powers issues.

The case arose under the statute creating HRS' central abuse registry. A hearing officer had found that A.S.'s decision to leave his child home alone was not an "act[] or omission[] of a serious nature [so as to] requir[e] the intervention of the department or the court." § 415.503(9)(e), Fla. Stat. (Supp. 1990) (defining "harm" to child). The agency adopted the findings of the hearing officer, but nonetheless refused to expunge A.S. from the registry. The final order instead recited that the findings constituted a failure to provide supervision within the meaning of Section 415.503(9)(e). In other words, the glass was more half full than half empty. On appeal, the Second DCA proved that judicial review is indeed a blunt tool; a panel by held that the statute was unconstitutional for its failure to provide definite terms. 616 So. 2d 1202.

In upholding the constitutionality of the statute, the Supreme Court first noted that due process concerns of notice and warning were not implicated by Section 415.503(9)(e)—a non-penal statute. *Cf. W.M. v. HRS*, 553 So. 2d 274 (Fla. 1st DCA 1989) (holding that Section 415.504 is non-penal and not subject to ex post facto doctrine), *rev. denied*, 564 So. 2d 490 (Fla. 1990). This in turn largely excused the Legislature's failure to define with complete specificity all actions or omissions falling within the ambit of Section 415.503(9)(e). Accordingly, the Court found that the statute "provides sufficient standards to be followed by HRS in carrying out the statutory child protection program." 20 Fla. L. Wkly. at S24. Nothing in the statute suggested that 'the powers' (such as they are) remain anything but separated. Similarly, the Court found the statute related rationally to the purposes of the child-protection program. *Cf. Hodge v. Jones*, 31 F.3d 157, 166 (4th Cir. 1994) (holding that a statute creating a Maryland abuse registry did not implicate a liberty interest in family privacy, thereby applying rational relationship test in favor of more searching scrutiny).

The Court then turned to the facts at hand, and found that the conduct of A.S. simply did not meet the definition provided in Section 415.503(9)(e). "Notwithstanding this deference normally given administrative agencies, an agency's conclusions are not immune from judicial review. Utilizing the appropriate test, we agree with the hearing officer's conclusion . . . ." 20 Fla. L. Wkly. at S24. The Court therefore affirmed the district's result, but took a shorter route. Dissents by Justices Grimes and Harding would have deferred to the agency's finding that neglect was established at hearing.

Comment: The Court deftly saved the statute from a misplaced vagueness analysis. And the brief separation of powers discussion fits well within established precedents. Well enough. But the Court then turned to what it called the "application" of the statute to the facts at hand. (Echoing, perhaps, a non-existent as-applied challenge?) This required the Court to diagnose the correct standard of review:

> The scope of review for findings of fact is whether the facts are supported by competent, substantial evidence in the record. § 120.68(10), Fla. Stat. (Supp. 1990). However, the administrative construction of a statute by the agency charged with its administration should not be disregarded or overturned by a reviewing court except for most cogent reasons and unless clearly erroneous. *ABC Liquors, Inc. v. Department of Business Regulation*, 397 So. 2d 696, 697 (Fla. 1st DCA 1981).

20 Fla. L. Wkly. at S24. At first, the recitation of this standard appears to

follow Section 120.68(7)'s command that "[t]he reviewing court . . . deal separately with disputed issues of agency procedure, interpretations of law, determinations of fact, or policy within the agency's exercise of delegated discretion." But it is also the point where the opinion departs from past practice.

The Court characterized the finding of neglect as a "conclusion" that was "not immune from judicial review." 20 Fla. L. Wkly. at S24. This self-styled conclusion of law was then found to be clearly erroneous. But since when is a finding about a "specific act[] or omission[]", § 415.503(9)(e), Fla. Stat. (Supp. 1990), a conclusion of law? Clearly, such a finding is one of fact. *See B.B.A. v. Department of Health & Rehabilitative Services*, 581 So. 2d 955 (Fla. 1st DCA 1991) (CSE supported placement of name on registry). The statute creating the abuse registry almost says this directly. *See* § 415.103(3)(d)2.b., Fla. Stat. (Supp.1990) ("At a hearing conducted pursuant to the provisions of chapter 120, the department shall prove by *a preponderance of the evidence* that the alleged perpetrators committed the abuse, neglect, or exploitation.") (emphasis added). This much was also evident from the district's opinion as well: "While we might be inclined to dispose of this case . . . by simply holding that *the hearing officer's determination of a disputed issue of fact* concerning the presence of harm or threatened harm must prevail . . . " 616 So. 2d at 1206 (emphasis added).

Now, in fairness to the Court's opinion, the hearing officer's recommended order did not clearly label such a finding as a question of fact (nor did it clearly label it as a conclusion of law for that matter! *See* 616 So. 2d at 1205). But the Court's opinion unnecessarily indulges in the beliefs that the finding was (1) a conclusion of law, and (2) a conclusion that was clearly erroneous. The same result could have been reached (presumably without drawing two dissents) by simply holding that the hearing officer's finding of fact contained competent, substantial evidence, and could not be reversed by the agency's final order. *See* § 120.57(1)(b)10., Fla. Stat. (Supp. 1990).

District Court(s) of Appeal(s)

When engaged in a proceeding before DOAH, an agency is not permitted to take further action except as a party litigant. This much is clear. *See* § 120.57(1)(b)3., Fla. Stat. (1993). But what happens where the agency, while a party litigant, attempts to use other statutory mechanisms to augment discovery? The opinion in ***Conval Care, Inc. v. Agency for Health Care Administration*, 19 Fla. L. Wkly. D2608 (Fla. 1st DCA, Dec. 15, 1994),** now provides the answer.

In *Conval Care*, HRS' original attempts at terminating the participation of Conval Care, Inc., (CCI) in the state Medicaid program had progressed only as far as a formal hearing. HRS then sought Medicaid documents from CCI, and under the authority of Section 409.913, imposed sanctions on CCI's refusal. Since HRS could use its demand power under Chapter 409 only for legitimate investigatory purposes, the Court found the request outside of the formal proceeding improper.

Comment: Similar authority comes from *Nicolitz v. Board of Opticianry*, 609 So. 2d 92 (Fla. 1st DCA 1992), *Miller v. Department of Environmental Regulation*, 504 So. 2d 1325, 1327 (Fla. 1st DCA 1987) (The "prohibition is clearly confined to action while the hearing officer retains jurisdiction" and vanishes upon delivery of a recommended order.); *Upjohn Healthcare Services, Inc. v. HRS*, 496 So. 2d 147 (Fla. 1st DCA 1986) (complex CON facts; court essentially approved of a hearing officer's ruling that s. 120.57(1)(b)3. prevented the agency from modifying its challenged policy); *New v. Department of Banking & Finance*, 554 So. 2d 1203, 1207 (Fla. 1st DCA 1989) (where settlement agreement fails to dismiss proceeding, jurisdiction remains with hearing officer; if the parties neglect to request that DOAH relinquish jurisdiction, and a settlement fails to result in an informal proceeding, the proper procedure is to resume the formal hearing) (citing *United Telephone v. Mann*, 403 So. 2d 962 (Fla. 1981); *Fun & Frolic v. Division of Alcoholic Beverages & Tobacco*, 457 So. 2d 509, 510 (Fla. 4th DCA 1984)). The section effectively deprives an agency of the use of its status as a party litigant and the simultaneous use of free-form agency action. *See Department of Banking & Finance v. Centrust Bank*, DOAH Case No. 89-6827 (Order of Jan. 11, 1990).

The panel's decision to give Section 120.57(1)(b)3. such force is in line with the legislative desire to "put[] the parties on equal footing as party litigants" with the agency. House of Representatives, Com. on Gov. Ops., *Staff Analysis and Economic Impact Statement PCB #27* (Apr. 18, 1984) (analysis of 1984 legislation creating prohibition in Section 120.57(1)(b)3.).

* * *

An overgrown rule challenge has yielded a bumper crop of issues. In ***Ameraquatic, Inc. v. Department of Natural Resources*, 20 Fla. L. Wkly. D366 (Fla. 1st DCA Feb. 7, 1995),** the former Department of Natural Resources proposed revisions to Chapter 16C-20, where the Department sets forth plant management policies and regulates the use of herbicides in aquatic systems. Nearly every species and variety of argument was applied to the rule revisions: non-delegation, exceeding scope of delegated authority, arbitrary and capricious, unbridled discretion, and overbreadth.

Appellants first tried to "round up" (pun intended) the authority for the rules with a non-delegation argument. The *Microtel* standard allowed the panel to hold that while the Legislature is obliged to provide adequate standards and guidelines, the drafting of detailed or specific legislation may not always be practical or desirable. *Microtel, Inc. v. Florida Pub. Serv. Comm'n*, 464 So. 2d 1189, 1191 (Fla. 1985). Sections 369.20(7) and 369.22(12) therefore provided the necessary general legislative policy and merely transferred subordinate functions to an agency with expertise to respond to complexities: "more detailed or specific legislation . . . , would not be practical." 20 Fla. L. Wkly. at D367.

A second "root-and-branch" argument made by appellants concerned DNR's basic authority to regulate the use of pesticides. Under Section 487.051(2), exclusive jurisdiction to regulate pesticides resides in the Department of Agriculture and Con-

continued on page 10

CASE NOTES, CASES NOTED...

from page 9

sumer Affairs, "[e]xcept . . . as otherwise provided by law." The panel agreed with the hearing officer that Section 369.20(7) (authorizing the Department's development of standards respecting chemical, biological and mechanical control activities) was good authority "as otherwise provided by law." DNR's rules could therefore take root in Chapter 369.

This left the panel free to weed through the herbicide rules in greater detail. The harvest: A permit criteria rule that "generally track[ed]" its statute did not contravene or exceed its authority. Competent, substantial evidence likewise upheld the hearing officer's finding that the task of assigning weight to each permit criteria would prove impractical.

The wisdom of tracking the authorizing statute in rule also proved decisive to DNR's first point of cross-appeal. Since the agency largely reproduced in rule the statutory definition of "eradication program," it had not mangled its authority. The modification of the statutory term from "aquatic plants" to "target aquatic plants" in rule did not graft exotic new authority onto the legislation.

The panel also upheld the Department's decision to grant a garden-variety permit exemption for work in certain water bodies. Statutory authority for exemptions, along with testimony about the basis for creating a class worthy of the exemption, allowed the panel to reverse the hearing officer's finding.

But appellants were not merely on a fishing expedition and did score a few victories on a couple of points. One rule would have allowed the Department to require the return of removed plants as a permit condition "to maintain habitat or for other environmental benefits." Here, the Department had in rule assumed a correlation between aquatic vegetation and fish populations; but evidence supporting this correlation failed to sprout at hearing. Without support, the Department could not overcome the blistering testimony of a limnologist, agronomist, and district manager offered by Appellants.

The panel also pruned the rule of an arbitrarily limited exemption. The Department proposed to exempt only waters where the riparian owners physically or mechanically removed plants to create access corridors; chemical clearings would not be exempt. The basis for this narrow exemption was not nurtured with any fortifying testimony or evidence; it therefore withered and died on appeal.

The panel found arguments on remaining issues to be all wet. Appropriate relief followed.

* * *

The rule challenge drawn in ***Coastal Petroleum Company v. Department of Environmental Protection*, 20 Fla. L. Wkly. D374 (Fla. 1st DCA Feb. 9, 1995),** proved less complicated. There, petitioner continued its cat and mouse game with the state over its ability to exercise rights under an oil and gas lease. Coastal had submitted its application for a permit to drill an oil and gas exploration well under the lease. Citing rule, and without blinking, the Department asked for over a half-billion dollars in security — the estimated costs of a cleanup. Without this security, the permit was denied. And when the agency failed to change its mind at an informal hearing, an appeal followed.

The first DCA compared the rule and statute, and found no authority for additional security requirements beyond those provided by Coastal. "[T]he powers of administrative agencies are measured and limited by the statutes or act in which such powers are expressly granted or implicitly conferred." 20 Fla. L. Wkly. at D375 (citing *Department of Environmental Regulation v. Puckett Oil*, 577 So. 2d 988, 991 (Fla. 1st DCA 1991)). Since obtaining a permit was not merely a matter of kissing the right rings, but rather a function of Chapter 377, the Department's additional security requirement exceeded delegated authority.

* * *

When, exactly, has the fat lady sung? That is, when are final orders "over" and when can an agency reopen closed cases? The First DCA in ***Russell v. Department of Business and Professional Regulation*, 19 Fla. L. Wkly. D2410 (Fla. 1st DCA Nov. 14, 1994),** held that agencies can revisit final orders and reopen closed cases "when there is a change in circumstances or a demonstrated public need or interest." *Id.* at D2411. On the facts, the appellant failed to demonstrate the "extraordinary circumstances" required to revisit a closed case.

The court found roots for such a standard in the pre-1974 APA case of *Peoples Gas System, Inc. v. Mason*, 187 So. 2d 335 (Fla. 1966), where the Supremes regarded Florida as "among those jurisdictions holding that such agencies do have inherent [keyword] power to reconsider final orders which are still under their control." *Id.* at 338. The *Mason* standard received a smattering of approval after the 1974 APA.

Judge Smith dissented, noting that the licensing board erroneously thought it was without jurisdiction to hear the appellant's request. The dissent noted that at the very least, the appellant should have been given a chance to argue "extraordinary circumstances" before the board. But the majority opinion found no record support that would let the Board decide otherwise.

Comment: In general, good authority supports the opinion of the *Russell* panel. *E.g.*, *Mann v. Dep't Prof. Reg.*, 585 So. 2d 1059, 1061 (Fla. 1st DCA 1991) ("[W]e are also unwilling to say that the board is precluded in all cases from ever revisiting such an order."); *Richter v. Florida Power Corporation*, 366 So. 2d 798 (Fla. 2d DCA 1979); *see also* AGO 88-40 (Sept. 16, 1988). *Cf. Taylor v. Department of Professional Regulation*, 520 So. 2d 557, 560 (Fla. 1988) (declining to address "the authority of administrative agencies to rehear or reconsider their orders in the absence of a specific authorization by statute or rule").

But there remains a lingering issues in the *Russell* opinion. In short: What are "extraordinary circumstances" that would warrant a revisit to a final order? Moreover, how does such a standardless standard avoid the problems caused by a lack of finality of judgment? Observe:

> The omission [in the Model Rules] does not create a rule authorizing a petition for rehearing. . . . If we adopted [a contrary] view, every administrative order would remain open for an indetermi-

nate period for the filing of a petition for rehearing. There would be no finality to any administrative order . . . . The appellate court's jurisdiction should not hinge upon such uncertainty.

Systems Management Associates, Inc. v. HRS, 391 So. 2d 688, 690 (Fla. 1st DCA 1980). With *Systems Management*, the Court found a greater wisdom in stressing the finality of administrative orders; but with *Russell*, the Court seem to hold the opposite by noting that "changed circumstances" or "public need" could serve to reopen final orders in "extraordinary circumstances." The panel's opinion does not resolve the tension between these two principles.

* * *

The Second DCA also touched on the finality of administrative orders when it considered the jurisdiction of an agency to entertain hearings stemming from emergency orders. In ***West Coast Regional Water Supply Authority v. Southwest Florida Water Management District*, 19 Fla. L. Wkly. D2383 (Fla. 5th DCA Nov. 4, 1994),** the District issued emergency orders restricting the amount of ground water that may be withdrawn to serve the Tampa Bay area water supply system.

The usual suspects challenged the orders. The regional water supply authority, taking a break from its normal duties of suing under the public records laws, filed an appeal of the emergency order. Pinellas County decided the better approach would be to ask for a formal hearing. Not to be outdone, the City of St. Petersburg covered its bets by doing both—asking for a hearing and directly appealing the order. The District denied the requests for formal hearings, suggesting that the pendency of the direct appeal deprived it of jurisdiction. Timely appeals followed.

The panel frowned. The lack of a record on direct appeal and the multiplicity of the proceedings clearly troubled the Court. Sensing the District was about to both have and eat its cake, the court dismissed the direct appeal for lack of jurisdiction. "Judicial review of the decision reached after the requested hearing would provide an adequate remedy. The adequacy of that remedy prevents judicial review of a non-final emergency order until the requested hearing has occurred." *Id.* at D2384 (citing, among other good authority, § 120.68(1), Fla. Stat. (1993)). This finding required the Court to hold that the District improperly denied the requested hearings.

Comment: What a mess! It seems the trouble all came from administrative procedures described in Chapter 373 that parallel those seen in Chapter 120. When the Legislature revised the APA in 1974 with the intention of making it uniform, it later removed existing administrative remedies located in various organic statutes. *See* Ch. 95, 1978 Laws of Fla. 229 (striking numerous portions of Chapter 373 pertaining to procedure). These changes in the 1970s placed Florida's APA 10 years ahead of its time—where it has remained, firmly rooted, for the last 20!

Time now has caught up with the emergency order procedures in Section 373.119(3), which evidently survived Legislative overhaul of Chapter 120. But we do know that in designing many of these review procedures, Dean Maloney intended Florida's water code to "guarantee minimum due process to those who are regulated." Frank E. Maloney, et al., *A Model Water Code* § 1.09 at 111-13 (1972). So the panel's decision to apply APA remedies (which dissolve appellate jurisdiction prior to hearing) in place of those found in Chapter 373 may not be inconsistent with the drafter's intent.

Briefly Noted

Pendulum watchers will note the latest swing in the value of Section 120.535 found in ***Christo v. Department of Banking & Finance*, 20 Fla. L. Wkly. D262 (Fla. 1st DCA Jan. 26, 1995),** where a panel held that the 1991 mandatory rulemaking requirement had displaced the former cause of action under Section 120.56.

Appellants brought a two-pronged attack on numerous unpromulgated rules, alleging violations of both Section 120.56 and 120.535(1). A hearing officer dismissed the bulk of the petition, finding that only one unadopted rule was ready for rulemaking. The hearing officer reasoned that Section 120.535 had largely displaced Section 120.56, with the noted exception that Section 120.56 still allows one to test the validity of an unpublished rule that enlarges, modifies, or contravenes the specific provisions of law implemented. Since the agency was expeditiously and in good faith converting its nonrule manuals into rules, there was no Section 120.535 violation.

The Court approved of this reasoning: "We hold that the hearing officer correctly concluded that section 120.535 provides the exclusive mechanism for challenging an agency's failure to adopt agency policy as rule . . . ". This brought the court to further conclude that the defenses in Section 120.535(1)(a) speak of a Legislative approval of "true incipient policy." Else, the panel reasoned, why would section 120.535(8) clearly state that "All proceedings to determine a violation of subsection (1) shall be brought pursuant to this section"? A few maxims of statutory construction sealed the holding. With the opinion, the sword of Section 120.535 has been beaten into a shield.

* * *

The First DCA took only two 'graphs to reverse an order of HRS that relied on repealed rules and orders under appeal in collateral proceedings. In ***S.G. v. Department of Health & Rehabilitative Services*, 19 Fla. L. Wkly. D2410 (Nov. 16, 1994),** the agency reject a hearing officer's recommendation that S.G.'s name be expunged from the abuse registry. The agency rejected this conclusion, citing a circuit court order then under appeal, and relying on Rule 10M-29.018, F.A.C., to find proof of neglect. The First DCA noted that the circuit court order wasn't final (and in any event was later reversed by the 3d DCA), and that Rule 10M-29.018 had been repealed two weeks before the final order. Without a brief filed by HRS, the panel was persuaded only to reverse.

Brief Comment: The Court flirted with the issue of whether an agency may validly apply a repealed rule, but instead decided the matter based on the 3d DCA's reversal of the circuit court order. By far, the most interesting issue is the effect of an agency's decision to repeal a rule. Can the agency then rely on the rule

continued on page 12

CASE NOTES, CASES NOTED...

from page 11

as policy? If the agency's reward for creating a rule is a presumption at hearing, what is the agency's punishment for abandoning an existing rule? Certainly such horse-trading implicates more than general Section 120.535 principles. By resorting back to "[c]ustom, that unwritten law, /By which the people keep even kings in awe," Sir William Davenant, *Circe*, an agency implicates notions of fair play served by rulemaking.

The recent executive call for all agencies to cut their rules and procedures by 50%, *cf.* Lucy Morgan, "Politicians Compete to Cut Back on Rules," *St. Pete Times* (Feb. 25, 1995), might increase the frequency of repealed rules. This should provide parties with the opportunity to answer this question.

* * *

When an evidentiary error is made at hearing, the proper remedy is to remand for further hearings. So said the Court in ***Lillyman v. Department of Highway Safety & Motor Vehicles*, 19 Fla. L. Wkly. D 2376 (Fla. 5th DCA 1994),** where a limitation on cross-examination and a denial of a proffer tainted a license revocation proceeding. The Court noted the administrative remedy (repeated most recently in *Bass v. Florida Department of Law Enforcement*, 627 So. 2d 1321 (Fla. 3d DCA 1993)), resembled the practice of granting a new trial when errors foul the flow of evidence at trial.

* * *

Fee hunters take note: the failure to comply with the requirements of Section 284.30, Florida Statutes, precludes the award of attorneys fees against agencies. In ***Department of Health & Rehabilitative Services v. Cordes*, 19 Fla. L. Wkly. D 2369 (Fla. 1st DCA Nov. 7, 1994),** the appellee had sued for enforcement of a settlement agreement under Section 120.69, but neglected to provide the notice required in Section 284.30. Although the state may waive the requirement by failing to timely assert a lack of notice, *see Florida Medical Center v. Department of Heart & Rehabilitative Services* (Fla. 1st DCA 1987), no such waiver occurred here. Merely including a request for fees in a petition for Section 120.69 enforcement is not enough.

* * *

Like a broken record, the First DCA keeps reminding agencies of what Section 120.57(1)(b)10. states without ambiguity: the factual findings of a hearing officer, when based on competent substantial evidence, may not be disturbed in an agency's final order. The Court repeated this once again in ***Hubbard Construction Company v. Department of Transportation*, 19 Fla. L. Wkly. D2097 (Fla. 1st DCA Sept. 29, 1994),** where the agency rejected a hearing officer's finding that a discrepancy in a bid was a minor irregularity. This is not the first time the Court acted to preserve a hearing officer's findings. With respect to DOT, Section 120.57(1)(b)10. states a principle with a provenance dating at least to *DOT v. Groves-Watkins*, 530 So. 2d 912, 913 (Fla. 1988), and *Asphalt Pavers v. DOT*, 602 So. 2d 558 (Fla. 1st DCA 1992). *See also Overstreet Paving Co. v. DOT*, 608 So. 2d 851 (Fla. 2d DCA 1992).

David Dagon contributes a regular column on case notes. Response to the column has encouraged the author to suggest the use of the internet to provide unabridged case summaries and other essays on administrative law, perhaps by merely through ftp transfer, and perhaps ultimately as a list service. Those interested should send e-mail to Dagon@freenet.fsu.edu. Those not sure what this means, but wishing to find out more, should send snail mail to the author at the Tallahassee office of Earl, Blank, Kavanaugh & Stotts.

45th Annual Meeting of The Florida Bar

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Friday, June 23

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2:30 - 5:30 p.m.	Executive Council-Section Annual Meeting

For registration forms and more details about the Annual Meeting, see the April 15 issue of The Florida Bar News.

Defending the Applicant in Certificate of Need Litigation:

Avoiding the Prohibition on Entering New Data at Final Hearing

by Seann M. Frazier

Your client has applied for a Certificate of Need[1] to develop a new inpatient health care service and has asked you for assistance. After completing the application process, the Agency for Health Care Administration (AHCA) preliminarily awards your client its desired service. Cobatched applicants and existing providers instigate a Florida Statute section 120.57(1) formal hearing to challenge that awards. During discovery, new data concerning the utilization of your desired service is uncovered. Is it admissible? This article will examine limitations on the scope of admissible evidence in Certificate of Need litigation and ways by which experienced counsel may argue for either the inclusion or exclusion of such data.

Prior to 1985, the Department of Health and Rehabilitative Services (HRS) established a system of batching cycles in which pools of applicants could apply to fill any future health care need projected by HRS.[2] Under this system, HRS permitted denied applicants to challenge agency decisions, and, while waiting for an administrative hearing, amend their applications to address any new need projection published by HRS in the interim.[3] Denied applicants on appeal would sometimes receive the benefit of addressing a new need projection, even before new applicants could apply to address that same need. In 1985, the First District Court of Appeal first mandated that a change in the system was necessary. *Gulf Court Nursing Center v. Dept. of Health and Rehabilitative Services*, 483 So. 2d 700, 705 (Fla. 1st DCA 1985). In *Gulf Court*, the court found that HRS' system violated the comparative review principles espoused in *Bio-Medical Applications of Clearwater, Inc. v. Dept. of Health and Rehabilitative Services*, 370 So. 2d 19 (Fla. 2nd DCA 1979) and *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327, 626 S.Ct. 148, 90 L. Ed. 108 (1945). The court ruled that applicants may not be awarded CONs on a "first-come, first-served" basis. While the court did not specifically overrule the updating of applications, it mandated that any updated application be comparatively reviewed with newly filed applications which addressed the same "pool of need" for health care services.[4]

Prohibition of Amendments

In order to avoid the potential for endless changes to applications during the pendency of a Florida Statute section 120.57(1) formal hearing, the AHCA[5] has promulgated a rule concerning amendments to already completed CON application. The rule, in relevant part, reads:

(b) Subsequent to an application being deemed complete by the agency, no further application information or amendment will be accepted by the agency.

Fla. Admin. Code rule 59C-1.010 (2)(b) (1992). Twice yearly, the AHCA offers potential applicants the opportunity to formulate and submit the best application they can author based on available information.[6] Florida Administrative Code rule 59C-1.010(2)(b) allows for the effective administration of CON applications under the concept of comparative "batched review." Were it not for this rule's prohibition of amendments, CON applications would become moving targets, able to avert valid criticism by amending their applications to correct observed flaws.

Florida case law has upheld the rule and determined that amendments to CON applications are contrary to the sanctity of comparative review:

The opinion of *Gulf Court Nursing Center v. Department of Health and Rehabilitative Services*, 483 So. 2d 700 (Fla. 1st DCA 1986), indicates that strict adherence to the rules precluding the amendment of completed applications is essential to the integrity of the batching concept for comparative review. Rule 10-5.010(2)(b), F.A.C.[7] provides that after an application is 'deemed complete . . . no further application information or amendment will be accepted . . . .' HRS has interpreted its rules, in light of *Gulf Court* as precluding the amendment of a completed application after initial agency review, except upon a change of circumstances beyond the applicant's control. *See e.g. Good Samaritan Health Systems, Inc. v. Department of Health and Rehabilitative Services*, FALR 2343, at 2365 (May 5, 1987).

Manor Care, Inc. v. Department of Health and Rehabilitative Services, 558 So. 2d 26, 28-29 (Fla. 1st DCA 1989).

In *Manor Care*, an applicant for a community nursing home CON submitted "updates" to its CON application after the project had been reviewed and denied by the HRS.[8] The applicant's, Manor Care's, initial application was based on a design incorporating three beds per room.[9] Its updated application allocated two beds per room.[10] This change was accompanied by an increase in square footage and an altered Medicaid commitment.[11]

As described by the First District Court of Appeal:

Determining that Manor Care's revised application was more than a 'mere updating' and was intended to overcome criticism expressed in HRS' initial review, the hearing officer concluded that Manor Care was attempting a 'substantial change' in the application, constituting an 'impermissible and unauthorized amendment' which could not be considered. *Noting that evidence was not sub-*

continued on page 14

LOSE THAT FIDDLE

from page 5

mitted in support of Manor Cares original application, the hearing officer recommended that it be denied.
Id. (emphasis added).

The First District Court of Appeal adopted the hearing officer's position, rejecting Manor Care's amendments.[12]

Were evidence truly limited to that available at the time of application, there would be no questions as to the admissibility of new data submitted by applicants in certificate of need litigation. Would that it were so simple. An issue arises when like and existing facilities who have inserted themselves into a formal administrative hearing bring new evidence of lower-than-projected population, utilization, etc. This information is admitted for the purpose of rebutting the projections made in an initial application. Additionally, existing providers may bring in evidence of subsequently approved beds or services which offset the need which an application seeks to fill.[13] Under *Gulf Court* and its progeny, the applicant should not be permitted to also admit new evidence as to utilization, population or other trends which might offset the rebuttal testimony presented by existing providers. However, Florida law has developed two methods by which applicants may avoid the prohibition on amendments to applications and admit the evidence they believe helps their case.[14]

Exceptions to the Rule

First, an applicant has been permitted to distinguish an "amendment" to its application from new events occurring subsequent to an application's filing, when those events are not within the applicant's control.[15] In *Manor Care, Inc. v. Department of Health and Rehabilitative Services*, 558 So. 2d 26 (Fla. 1st DCA 1989), the First District Court of Appeal held that certain changes in a nursing home CON application's room designs were so extensive that they amounted to prohibited amendments to the initial CON application filed. *Id.* at 29. However, the court went on to recognize that new information not within the applicant's control at the time of application is admissible:

> While minor refinements to an application have been allowed in cases such as *Health Care*[16] and *Palms Residential Treatment Center, Inc. v. Department of Health and Rehabilitative Services*, 10 FALR 1425 (February 15, 1988), HRS has continued to maintain that **as to matters within an applicant's control**, significant changes to a completed application are not permitted. *See Charter Medical-Orange County, Inc. v. Department of Health and Rehabilitative Services*, 11 FALR 1087 (February 2, 1989).

Manor Care, 558 So. 2d at 29 (emphasis added).

The extent to which new information may be considered "beyond the applicant's control," yet not constitute an amendment to the application, was considered in a recent Recommended Order issued by the Honorable Hearing Officer Eleanor M. Hunter. In *St. Mary's Hospital, Inc. v. Agency for Health Care Administration*, Div. of Admin. Hearings Case No. 93-0957[17] the Hearing Officer found:

> The court in *Manor Care, Inc. v. Department of Health and Rehabilitative Services*, 558 So. 2d 26, 29 (Fla. 1st DCA 1989), stated that, 'as to matters within an applicant's control significant changes to an application are not permitted.' *In Charter Medical-Orange County, Inc. v. DHRS*, (DOAH Case No. 87-4748), Appendix 2, the Hearing Officer concludes that:
>
> The concept of 'control' of the applicant over the information that goes into the original application is the only phrase that gives applicants any guidance. The word 'control' probably is intended as a "knew or reasonably should have known" standard. If the applicant should reasonably have known about the information and should have provided the department with information as part of its original application, then the new information cannot be considered during the formal administrative hearing.
> *Id.* at paragraph 55.

The Hearing Officer then found that an applicant's staffing plan resulting from the opening of an outpatient catheterization lab and an agreement entered into between the applicant and Duke University were events subsequent to filing an application, not known to the applicant at the time the application was filed, and therefore admissible.

The second means by which applicants may avoid Florida Administrative Code rules and case law[18] which prohibit amendments is by "explanation of the underlying basis" for assertions made within their certificate of need applications. Such explanations do not constitute amendments to certificate of need applications. In *Marriott Retirement Communities, Inc. v. Department of Health and Rehabilitative Services*, 14 FALR 2673 at 2677 (HRS 1992), a Final Order adopted a conclusion of law which regarded the admissibility of the underlying bases for assertions made within a CON application:

> The current financial ability of the company to undertake this project was called into question. MRCI filed a complete audited financial statement in compliance with the statutes. MRCI proved at hearing the underlying basis for the financial data contained that financial statement. **Detail provided at the hearing does not constitute an amendment to the application. An applicant is not required to set forth in its application every piece of evidence or testimony upon which it may rely if it proceeds to hearing on this matter.** *Sarasota County Public Hospital d/b/a Memorial Hospital, Sarasota and Adventist Health Systems/Sunbelt, Inc. d/b/a Medical Center Hospital v. Department of Health and Rehabilitative Services and Venice Hospital, Inc.*, 11 FALR 6248 (DOAH Case Nos. 89-1412, 89-1413).
> *Marriott*, at 2708 (emphasis added.)

The Hearing Officer in *Marriott* went on to find that the data initially included in the application, when combined with the information presented at Final Hearing, demonstrated that MRCI had the financial ability to execute it proposed project.[19]

Conclusion

Though counsel charged with defending a CON applicant may wish to make use of recent favorable data, he or she should be aware of the admonition that comparative review and AHCA rules prohibit any amendments to a CON application. At the same time, counsel should avail himself or herself of the exceptions to that rule in order to admit evidence of changes in circumstances beyond an applicant's control or as an expla-

nation of the underlying basis of an application's statement.

Endnotes

[1] Florida Statute section 408.032(2) defines Certificate of Need as "a written statement issued by the Department evidencing community need for a new, converted, expanded, or otherwise significantly modified health care facility, health service or hospice." Fla. Stat. section 408.032(2) (1993).
Pursuant to Florida Statute section 408.041 a Certificate of Need ("CON") is required for any project which is subject to review under Florida Statute sections 408.031-408.045 (1994). Such projects include the new construction or establishment of additional health care facilities; the addition of hospital beds, and even the termination of health care service. Fla. Stat. section 408.036, et seq. (1994).

[2] *Gulf Court Nursing Center v. Dept. of Health and Rehabilitative Services*, 483 So. 2d 700, 702 (Fla. 1st DCA 1985); this system of batching cycles is now generally codified at Florida Administrative Code chapter 59C-1. A specific schedules of batching cycles is provided at Florida Administrative Code rule 59C-1.008(1)(l) (1992).

[3] *Id.* at 707, cling HRS rule 10-5.14 (1984 edition).

[4] *Id.* at 708.

[5] Formerly a division of Department of Health and Rehabilitative Services. Responsibilities for the administration of certificates of need was transferred to the AHCA in 1992. s. 15, ch.92-33.

[6] This system of "batched review" is described generally at Florida Administrative Code rule 59C-1.008.

[7] Renumbered Florida Administrative Code rule 59C-1.010(2)(b) (1992).

[8] *Manor Care*, 558 So. 2d at 28.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Manor Care*, 558 So. 2d at 29.

[13] While a fixed need pool is accepted as valid if unchallenged, Florida case law has held that the approval of a previous batching cycle's certificate of need is admissible evidence in a subsequent batching cycle's formal administrative hearing. In *Health Quest Realty v. Department of Health and Rehabilitative Services*, 477 So. 2d 576 (Fla. 1st DCA 1985), Health Care and Retirement Corporation of America ("HCRC") applied for nursing home beds to HRS. In a subsequent batching cycle, Health Quest Realty ("Health Quest") applied for nursing home beds. Health Quest was preliminarily denied by HRS and requested an administrative hearing. Subsequent to its hearing, but before the entry of a Recommended Order, HRS granted a CON for nursing home beds to HCRC. The hearing officer recommended that Health Quest's application be denied, in part, because the award to Health Care had satisfied any need for additional nursing home beds. HRS adopted the hearing officer's findings and Health Quest appealed.
In *Health Quest Realty*, the First District Court of Appeal found:
. . . we do not think HRS was required to ignore the impending grant of a CON to HCRC. Certainly HRS was entitled to recognize its own prior order granting a CON for the beds in Broward to another party, HCRC, when it considered the Hearing Officer's Recommended Order on Health Quest's application. *Health Ouest Realty* at 577. Clearly, evidence of a certificate of need award in a prior batching cycle is admissible evidence, even when that earlier approval has not yet achieved Final Order.

[14] *Manor Care, Inc. v. Department of Health and Rehabilitative Services*, 558 So. 2d 26 (Fla. 1st DCA 1989); *Marriott Retirement Communities, Inc. v. Department of Health and Rehabilitative Services*, 14 FALR 2673 at 2677 (HRS 1992).

[15] *Manor Care, Inc. v. Department of Health and Rehabilitative Services*, 558 So. 2d 26 (Fla. 1st DCA 1989).

[16] *Health Care and Retirement Corporation of America v. Department of Health and Rehabilitative Services*, 516 So. 2d 292 (Fla. 1st DCA 1987).

[17] DOAH Recommended Order issued November 2, 1994.

[18] *Meridian, Inc. v. Department of Health and Rehabilitative Services*, 548 So. 2d 1169 (Fla. 1st DCA 1989).

[19] *Id.*

"Rule" — The Latest Four-Letter Word

by Stephen T. Maher

On the opening day of the 1995 Legislative session, Governor Chiles strapped on a back brace, hoisted 3,500 rules to the podium, and declared that it was time to slay the dragon of overregulation. One key part of the Governor's plan is his call for the repeal of Section 120.535, Florida Statutes. 535 is an unlikely villain in this drama. It is one of the few sections added to the Florida Administrative Procedure Act in recent memory that was (and is) really necessary and that actually has proven to be quite effective in practice. 535 has been targeted for repeal because it requires state agencies to write down their policies in the form of rules. The fact that 535 has been quite effective in securing agency compliance with required rulemaking with a minimum of litigation only makes it more vulnerable to attack.

Why is 535 bad? Because rules are bad. If rules are bad, then statutes that make agencies make rules must be very bad indeed. Why are rules bad? People who do not like government think rules are bad because rules represent the power that the bureaucracy has to control their lives. Rules are the messengers of the bad news of agency policy. Although they are written in black and white, rules make some people see red: "red tape" to be precise.

The Governor agrees that rules are bad, but for a much different reason. He understands that rules constrain the discretion of bureaucrats and that bureaucrats have even more power, and are less accountable for their use of power, in the absence of written rules. By focusing popular anger with bureaucrats on the written rules that serve to keep bureaucrats under control, the Governor can, in one master stroke, release constituent anger and release his bureaucrats from their regulatory constraints.

There was a time, just a few years ago, when it seemed that most people thought that 535 was good. The Legislature thought it was good. The Legislature passed 535 in 1991 and sent it to the Governor. The Governor was skeptical at first, but he eventually accepted 535, as well. In those days, rules were good. It was the agencies who would not write down their policies as rules who were bad. 535 was good because it made agencies — which were resistant to adopting written rules — set out their policy in the Florida Administrative Code. Once in the Code in the form of rules, agency policy is more accessible to the Floridians whose substantial interests it affects. Many questions about agency policy can be answered by reading the Code.

People who are regulated by agencies need to know what agency policy is. In the days before 535, when agencies were not required to write their policies down as rules, agency policy was sometimes hard to determine. People could not always find out what they needed to know. It is hard to tell how to act to avoid violating agency policy when that policy is not written down. It is hard to know whether you are being treated the

continued on page 16

"RULE"

from page 15

same way as other people in the same situation when the rules are unwritten. It is hard to know whether agency policy is contrary to statute when the policy itself is hard to find. Before 535, even the Legislature could not look in a book and tell whether the agency was properly interpreting and following governing statutes. How soon we have forgotten all of these good reasons for requiring agencies to adopt their policies as written rules.

The Governor's call for the repeal of 535 is politically brilliant, not only because he is likely to get a medal for turning his bureaucrats loose on the people of Florida, but because repeal of 535 will effectively undermine all of the Legislature's recent efforts to revise the rulemaking process. Legislators have advanced many proposals in the last few years that would make rulemaking more complex and cumbersome. The Governor can afford to allow all sorts of further burdens on executive agencies that participate in the rulemaking process if 535 is repealed because, in the absence of 535, his agencies will not be doing much rulemaking.

Not only has the Governor called for the repeal of 535, the mother of new rules, he has called for the mass repeal of many pounds of existing rules. This purge of the Florida Administrative Code may be completed in record time. The Governor promises to identify the rules that his agencies are willing to repeal in about a month. Thus, it appears that many rules, those black and white messengers of the bad news of agency policy, may be slain this spring.

Those who are hostile to government will cheer. Those inside the executive branch will cheer, as well, because they will have greater freedom to exercise the power of discretion and to implement their personal understanding of the law. Victory over the tyranny of rules will certainly be declared. But agency policy, the message that animated the slain messengers, will still walk the earth, this time more silently and unseen. "Phantom government," the target of so much legislative anger over the years, will experience a rebirth. The tyranny of nonrule policy, overthrown in 1991, will be restored. The devil we know, or can at least read about, will be replaced by the devil we don't.

There is no doubt that the Governor's proposed actions are a bold symbolic stroke. But symbolism is not enough. If the Governor really means to slay the dragon of overregulation, he must do more than drive regulation underground. Making government less visible only hides the problem. The only way to cut agency policy in half is to cut in half the statutes that fail to include the details of what they require, and instead delegate to agencies broad powers of interpretation. The only way to prevent the creation of masses of new agency policy in the future is to draft such clear and detailed statutes that agencies will need to flesh out very little in agency-created policy to do their jobs.

The repeal of existing written rules does not relieve people from the burden of government; it just hides government policy that once was clear. It creates policy icebergs, with a little visible written policy on top, and much unwritten policy just below the surface, ready to sink passing constituents. This not only hurts constituents whose interests are sunk by unwritten rules, it hampers legislative oversight, as even legislators have a hard time knowing exactly what agency policy is. This is not conjecture. We know this from experience. That is why 535 was enacted as law.

It is now "trendy" to tell horror stories about rules and to blame rules for a variety of indefensible government actions. But an equal number of horror stories could be told about the abuses of government unconstrained by rules. Horror stories about rules prove that the drafters of rules did their job poorly, not that there is something inherently wrong with rules. The fact that there are bad rules does not prove that rules are bad any more than the fact that there are bad people proves that people are bad. Rules, by nature, are somewhat inflexible, but the inflexibility of rules is neither always a vice, or always a virtue. When rules keep government from treating people in similar situations differently, their inflexibility is a virtue. When they prevent the treatment of people in different situations differently, their inflexibility is a vice and a challenge to the drafters to shape the rules to avoid unwanted inflexibility. Rules can include exceptions and can be drafted to allow agencies more flexibility where that is desirable.

Our Florida Administrative Procedure Act has always reflected a distrust of government. That distrust was born of the administrative process that existed in Florida before the present APA, and is reinforced by day-to-day experience with government. Neither history nor experience counsels a return to yesteryear.

Stephen T. Maher is a lawyer and legal educator. He has written extensively on the Florida Administrative Procedure Act. His latest law review article on the subject, Getting Into the Act, 22 Fla. St. U. Law Rev. 277 (1994), is part of a five-article Symposium he organized in the Florida State University Law Review to discuss efforts to amend the Florida APA during the 1994 Legislative Session.

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

Public Utilities Law Committee Report

by Suzanne Brownless, Chair

On January 20, 1995 the Public Utilities Law Committee held a joint seminar with the Competitive Energy Producers Association entitled *The Electric Utility Industry in Transition*. The speakers were: Linda Loomis Shelley, Secretary, Department of Community Affiars, "The Role of Integrated Resource Planning in Florida;" John J. Stauffacher, "Retention of QF Protections in New Competitive Environment;" Kenneth K. Henderson, Director of Commission Advisory and Compliance Division, California Public Utilities Commission, "The California Experiment;" Michael S. Bradley, Hicks, Maloof & Campbell, "Bidding in Georgia" and the Honorable Jim Davis, "Issues Shaping Florid'a Energy Future." Seventy-five attended the seminar which raised a total of $4,280.00 with one-half, $2,140.00, given to theAdministrative Law Section.

Immediately after the seminar the Public Utilities Law Committee held a meeting attended by eleven members. At this meeting the membership voted unanimously to:

1. Postpone the committee's scheduled May 10, 1995 CLE seminar until after the legislative session.

2. Nominate and elect Floyd R. Self as the next chair of the committee.

3. Nominate and elect Karla Teasley as the chair-elect for the committee.

Any member of the Administrative Law Section can join the Public Utilities Law Committee simply by registering with the chair. Our next CLE will be in Tallahassee and cover 1995 session telephone, gas, electric and water and wastewater legislation/proposals as well as applicable administrative law legislation/proposals.

Minutes

Administrative Law Section Executive Council Meeting
Friday, January 13, 1995
Miami, Florida

I. CALL TO ORDER

The meeting was called to order by Section Chair Vivian F. Garfein.

Members present: Stephen T. Maher, Vivian F. Garfein, Linda M. Rigot, M. Catherine Lannon, Ralf G. Brookes, Katherine A. Castor, Carol A. Forthman, John D.C. Newton, and Mary F. Smallwood.

Members excused William E. Williams, Suzanne S. Brownless, Veronica E. Donnelly, William L. Hyde, Robert M. Rhodes, P. Michael Ruff, Betty J. Steffens, Diane D. Tremor, and W. David Watkins.

Others in attendance: Jackie Werndli.

II. PRELIMINARY MATTERS

A. Consideration of the Minutes from the October 21, 1994, meeting:

The minutes were approved with corrections to Item III.D. to reflect that the Local Government Law Section's area of certification entitled Urban, State and Local Government Lawyer had been approved by both the Board of Legal Specialization and Education and the Board of Governors and that the certification area included state agency administrative practice and did not apply only to local government administrative practice.

B. Treasurer's Report: Cathy Lannon reported that the Section has a healthy balance of approximately $24,000.

C. Report from the Chair: Vivian Garfein advised that the essence of her report appears in the Chair's Column in the Section Newsletter dated January, 1995, regarding the area of certification for the Local Government Law Section. She updated the status of that certification by reporting that the Board of Governors has rescinded its approval of the proposed certification entitled Urban, State and Local Government Lawyer at its November meeting and that this Section, the Government Lawyer Section, the Environmental and Land Use Law Section, and the Local Government Law Section had agreed on a compromise: narrowing the proposed area of certification and changing its name to City, County, and Local Government Lawyer. It is expected that the revised area and title will be approved by the Board of Legal Specialization today and by the Board of Governors at its February meeting and then be submitted to the Supreme Court in late February for final approval. There followed a general discussion regarding the need for more section involvement in the appointment of members of area certification committees, which committees are appointed by the President of The Florida Bar with the committee members being automatically certified in the area without paying the certification fee or taking the certification examination.

III. COMMITTEE REPORTS

A. Long Range Planning Committee: No report

B. Continuing Legal Education Committee

Carol Forthman reported that the videotaping session of Practicing before the Division of Administrative Hearings held yesterday at the Bar's Midyear Meeting was well attended and well received exccpt that the room at the Hyatt Regency where the program was presented was so cold that some attendees had to leave early. Carol recommended that the section conduct a CLE program at the Bar's mid-year meetings in the future since we were able to reach

continued on page 18

MINUTES

from page 17

lawyers who do not regularly attend this section's CLE programs. Vivian suggested that Kathy Castor, our membership committee chair, contact those who attended yesterday's CLE regarding their interest in joining the section.

C. Publications Committee

Linda Rigot reported that the second Newsletter for this Bar year is in the mail, and the January 1995 issue of the Bar *Journal* contains an article by Charlie Murphy on practicing before the Public Service Commission. Linda also reported that work is nearing completion on the Supplement to the 4th Edition of the Florida Administrative Practice Manual to be published by the Bar.

D. Legislative Committee

Steve Maher reported the rumor that some of last year's proposed revisions to Chapter 120 will be seen again in the legislative session which begins in March. In an effort to educate legislators regarding those issues, the F.S.U. Law Review has produced a symposium issue which presents the arguments in favor of and in opposition to last year's proposals, which issue will be used as conference materials at the section's Conference on the Constitution. Reprints will also be circulated through the legislature as soon as possible.

At this point in the Council meeting, Ed Blumberg, Chair of the Bar's Legislation Committee, stopped by to say hello and to remind the Council that any section proposed legislation should be submitted for approval to the Legislation Committee before its meeting on February 15 in Tallahassee.

E. Pat Dore Endowed Professorship Committee

Vivian Garfein requested that the Council approve contributing an additional $5,000 to the Fund to bring us closer to our goal. A motion to do so passed. Vivian will also be requesting a contribution from the Environmental and Land Use Law Section. She has spoken with the personal representative of Pat's estate and is hopeful that Pat's estate will be contributing $10,000 of Pat's own funds. If these contributions are made, we will only need another $25,000 to $30,000 to reach our goal, and an intensive campaign will be undertaken to achieve our commitment. Vivian will also be writing an article for the Government Lawyers Section, seeking additional contributions.

F. Model Rules Revision Committee

Linda Rigot reported that the Administration Commission has conducted a workshop on the proposed revisions to the Model Rules. A final draft has not yet been distributed.

G. Pat Dore Administrative Law Conference

Registrations for the Conference to be held on February 3,1995, continue to be received. Reservations had been limited to 100 attendees due to space limitations for the lunch, but the possibility of increasing the number of attendees to 150 will be pursued.

H. Public Utilities Law Committee: No report

I. Conference on the Florida Constitution

Preparations and arrangements for the Conference, which has now been moved to March 6, the day before the 1995 legislative session begins, have been taken over by the Collins Center. Direct mailings are being used to obtain registration in advance, where possible. Attendance is limited to 200, the number of seats in the Cabinet Room. The cost of the Conference includes lunch and a two-volume issue of the Nova Law Review on the Florida Constitution.

J. Membership

Kathy Castor reported that the section now has 881 members. Kathy presented the Council with a proposed amendment to the section's By-laws which would allow persons who are not members of The Florida Bar to become affiliate members of the section. The amendment would allow persons such as members of the legislature, legislative staff, agency staff, members of administrative boards, legal assistants, and law students to become members of the section but they would not be permitted to hold a section office or to vote on section matters. The motion to so amend the By-laws was approved, and the proposed amendment will now be submitted to the Bar's By-laws Committee.

K. Council of Sections

Since the Council of Sections has not met since the section's last Executive Council meeting, there is no report.

IV. OLD BUSINESS: None

V. NEW BUSINESS

A. Judge Charles J. Kahn, Jr., of the First District Court of Appeal stopped by the meeting to discuss the Court's new division into panels, one of which will handle only administrative law cases, but including worker's compensation. The first panel of judges has been assigned to the Administrative Division, and they are Chief Judge E. Earle Zehmer, Judge Edward T. Barfield, Judge Michael E. Allen, Judge Marguerite H. Davis, and Judge Kahn. Although the Supreme Court has recently approved a new en banc rule, it is still uncertain how that rule will affect the administrative law panel.

B. The Council voted to give a plaque to Representative Randy Mackey to express the section's appreciation for his support in obtaining funding for the DOAH ACCESS system and a plaque to Sharyn Smith for creating the ACCESS database which provides indexes and full retrieval of all recommended and final orders from all cases heard by the Division of Administrative Hearings.

C. The 1995-96 proposed budget for the section was approved.

D. Vivian advised that she had received a letter from the Florida Bar Foundation requesting nominations for the Foundation's Medal of Honor award. Vivian suggested that the section nominate the late Professor Steve Goldstein. The motion was approved.

VI. GENERAL DISCUSSION

A. Cathy Lannon announced that the Government Lawyers Section will be co-sponsoring a CLE program in cooperation with the American Bar Association's Government and Public Sector Lawyers Division to be held in conjunction with the ABA's Midyear Meeting, on February 10,1995, at the Hyatt Regency in Miami. There will be a reception for government lawyers following the CLE.

B. Cathy also announced that Peg Griffin, our former section adminis-

trator, is leaving her employment with The Florida Bar.

C. It is time to advise the Bar when the section's annual meeting will be held as part of the Bar's Annual Meeting in June. There was discussion as to whether to host a reception for section members as has been done traditionally or whether to discontinue the reception in view of the poor attendance last year caused by the number of receptions taking place at the same time. Council members favored hosting a luncheon with a guest speaker (and possible CLE credit) to be followed by the section's executive council and annual meetings on June 23rd. Jackie Werndli will check on whether such a schedule can be coordinated.

VII. TIME AND PLACE OF NEXT MEETING

Friday, May 12, 1995 (tentative)
Tallahassee

VIII. ADJOURNMENT:

The meeting was adjourned at 10:55 am.

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

Administrative Law Overview

Course Classification: Intermediate

May 12, 1995
Florida State Conference Center
555 W. Pensacola Street
Tallahassee, FL

Course No. 7402R

LECTURE PROGRAM

12:00 noon - 12:30 p.m.
Late Registration

12:30 p.m. - 1:00 p.m.
Professional and Occupational Licensing
M. Catherine Lannon, Tallahassee

1:00 p.m. - 1:30 p.m.
Alcoholic Beverage Licensing: State and Local Approvals
Harold F. Purnell, Tallahassee

1:30 p.m. - 2:00 p.m.
Health Law and Certificates of Need
James C. Hauser, Tallahassee

2:00 p.m. - 2:30 p.m.
Bid Disputes after *Grove-Watkins*
Martha H. Chumbler, Tallahassee

2:30 p.m. - 3:30 p.m.
Environmental, Land and Water Use Permitting and Ethics (DEP, DCA & WMD)

Effectively Representing the Applicant
Roger W. Sims, Orlando
Effectively Representing the Challenger
Richard J. Grosso, Ft. Lauderdale
Effectively Representing the Agency
Terrell K. Arline, Tallahassee

3:30 p.m. - 4:30 p.m.
Administrative Practice before Local Governments
Ralf G. Brookes, Key West

4:30 p.m. - 5:00 p.m.
1995 Legislative Session Update
G. Steven Pfeiffer, Tallahassee

5:00 p.m. - 6:00 p.m.
Reception (Cash Bar)

Credit may be applied to more than one of the programs below but cannot exceed the maximum for any given program. Please keep a record of credit hours earned. RETURN YOUR COMPLETED CLER AFFIDAVIT PRIOR TO CLER REPORTING DATE (see Bar *News* label). (Rule Regulating The Florida Bar 6-10.5).

DESIGNATION PROGRAM
(Maximum Credit: 5.5 hours)
Administrative and Governmental Law: 5.5 hours
Environmental Law: 1.0 hour
General Practice: 5.5 hours
Corporation & Business Law: .5 hour

CLER PROGRAM
(Maximum Credit: 5.5 hours)
General: 5.5 hours
Ethics: 1.0 hour

CERTIFICATION PROGRAM
(Maximum Credit: 2.5 hours)
Appellate Practice: 2.5 hours
Civil Trial: 2.5 hours
Health Law: .5 hour

The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

REFUND POLICY

Requests for refund or credit towards the purchase of audiotapes of the program **must be in writing and postmarked** no later than two business days following the course presentation. Registration fees are non-transferrable. A $15 service fee applies to refund requests. Registrants who do not notify The Florida Bar by 5:00 p.m. on May 5, 1995, that they will be unable to attend the seminar, will have an additional $10 retained. Persons attending under the policy of fee waivers will be required to pay $10.

Register me for "Administrative Law Overview" Seminar

May 12, 1995, Florida State Conference Center (053)

TO REGISTER OR ORDER TAPES/MATERIALS, MAIL THIS FORM TO: The Florida Bar, CLE Programs, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar. If you have questions, call 904/561-5831. ON SITE REGISTRATION, ADD $10.00. **Registration is by check only.**

Name _____ Florida Bar # _____
Cannot be processed without this number.
Above your name on the *News* label

Address _____

City/State/Zip _____

(JW) Course No: 7402R

( ) Member of the Administrative Law Section: $85
( ) Non-section member: $100
( ) Full-time law college faculty or full-time law student: $55
( ) Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

COURSE MATERIALS—AUDIOTAPES

Private taping of this program is not permitted.

Delivery time is 4 to 6 weeks after the date of taping. PRICES BELOW DO NOT INCLUDE TAX.

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