Administrative Law Section Newsletter

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The Continuing Task of Administrative Law

by Stephen T. Maher

I. Introduction

Columbus discovered America, but it was sitting here a long time before he found it. The same is true of the recent discovery of administrative law. Even though many politicians have only discovered it in the last few years, administrative law has been around a long time.

The landscape of America has changed quite substantially since Columbus' time. But the central problems in administrative law have not changed that much over the years. That is clear from the following description of the task of administrative law, written by Justice Felix Frankfurter in 1927. It is as valid today as when it was written almost seventy years ago. That longevity is remarkable given the dramatic increase in both scope and complexity of government regulation of American life since that time.

The continued viability of Frankfurter's analysis is a testament to his grasp of the essence of administrative law. He was an accomplished administrative law professor and scholar before he ascended to the Court. But it also tells us something about administrative law. Since Frankfurter wrote this piece, we have seen earth-shaking changes in American administrative law, including the New Deal in the 1930s, the adoption of the federal Administrative Procedure Act in the 1940s and the Great Society in the 1960s. We have also seen a revolution in the way we regulate the environment, manage growth and regulate many other aspects of our lives in the last thirty years. Nevertheless, the central issues in administrative process have remained remarkably constant during that time. The following section was written by Felix Frankfurter almost seventy years ago.

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From the Chair ...

by Linda M. Rigot

Members of the Executive Council are convinced that if there were an award for the most meetings, this year's winner would be the Administrative Law Section. As a follow-up to the September and October meetings, the Executive Council met in November, in December, and in January to continue and complete the debate on specific amendments to Chapter 120 and on the reorganized or simplified version of the current Administrative Procedure Act (APA).

Chair-elect Bill Williams has ably appeared twice before the Governor's APA Review Commission in response to the Commission's request that the Section provide comments and recommendations. The Commission has considered many far-reaching concepts, ranging from agencies granting variances from their rules to the

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II. The Task of Administrative Law[1]

". . . [T]he range of control conferred by Congress and the State legislatures upon subsidiary law-making bodies, variously denominated as heads of departments, commissions and boards, penetrates the whole gamut of human affairs. Hardly a measure passes Congress the effective execution of which is not conditioned upon rules and regulations emanating from the enforcing authorities. These administrative complements are euphemistically called 'filling in the details' of a policy set forth in statutes. But the 'details' are of the essence; they give meaning and content to vague contours. The control of banking, insurance, public utilities, finance, industry, the professions, health and morals, in sum, the manifold response of government to the forces and needs of modern society, is building up a body of laws not written by legislatures, and of adjudications not made by courts and not subject to their revision. These powers are lodged in a vast congeries of agencies. We are in the midst of a process, largely unconscious and certainly unscientific of adjusting the exercise of these powers to the traditional system of Anglo-American law and courts. A systematic scrutiny of these issues and a conscious effort towards their wise solution are the concerns of administrative law. The broad boundaries and far-reaching implications of these problems may be indicated by saying that administrative law deals with the field of legal control exercised by law-administering agencies other than courts, and the field of control exercised by courts over such agencies.

* * *

"It is idle to feel either blind resentment against 'government by commission' or sterile longing for a golden past that never was. Profound new forces call for new social inventions, or fresh adaptations of old experience. The 'great society,' with its permeating influence of technology, large-scale industry, and progressive urbanization, presses its problems; the history of political and social liberty admonishes us of its lessons. Nothing less is our task than fashioning instruments and processes at once adequate for social needs and the protection of individual freedom. The vast changes wrought by industry during the nineteenth century inevitably gave rise to a steady extension of legal control over economic and social interests. At first, state intervention manifested itself largely through specific legislative directions, depending for enforcement generally upon the rigid, cumbersome and ineffective machinery of the criminal law. By the pressure of experience, legislative regulation of economic and social activities has turned to administrative instruments. Inevitably this has greatly widened the field of discretion and thus opened the door to its potential abuse, arbitrariness. In an acute form and along a wide range of action, we are confronted with new aspects of familiar conflicts in the law between rule and discretion.

* * *

"Because of the danger of arbitrary conduct in the administrative application of legal standards (such as 'unreasonable rates' 'unfair methods of competition,' 'undesirable residents of the United States'), our administrative law is inextricably bound up with constitutional law. But after all, the Constitution is a Constitution, and not merely a detailed code of prophetic restrictions against the ineptitude and inadequacies of legislatures and administrators. Ultimate protection is to be found in the people themselves, their zeal for liberty, their respect for one another and for the common good—a truth so obviously accepted that its demands in practice are usually overlooked. But safeguards must also be institutionalized through machinery and processes. These safeguards largely depend on a highly professionalized civil service, and adequate technique of administrative application of legal standards, a flexible, appropriate and economical procedure (always remembering that 'in the development of our liberty insistence upon procedural regularity has been a large factor'[2]), easy access to public scrutiny, and a constant play of criticism by an informed and spirited bar. They are still to be achieved, for we have hardly begun to realize deeply their need.

* * *

"But we must be on our guard against an undue quest for certainty, born of an eager desire to curb the dangers of discretionary power. For the problem of rule versus discretion is far broader than its manifestations in administrative law. There are fields of legal control where certainty—mechanical application of fixed rules—is attainable; there are other fields where law necessarily means the application of standards—a formulated measure of conduct to be applied by a tribunal to the unlimited versatility of circumstance.[3] To be sure, the application of a standard to individual cases opens the door to those abuses of carelessness and caprice and oppression against which we cannot be too alert. But resort to standards avoids the oppression and injustice due to abstractions whereby individual instances are tortured

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into universal molds which do not fit the infinite variety of life.

* * *

"In administrative law we are dealing pre-eminently with law in the making; with fluid tendencies and tentative traditions. Here we must be especially wary against the danger of premature synthesis, of sterile generalization unnourished by the realities of 'law in action.' Administrative law is also markedly influenced by the specific interests entrusted to a particular administrative organ, and by the characteristics—the history, the structure, the enveloping environment—of the administrative to which these interests are entrusted. Thus, 'judicial review' and 'administrative discretion' cannot be studied in isolation.

* * *

"What we need, above all else, is to know what is happening by objective demonstration of intensive scientific studies, instead of merely speculating, even wisely speculating, or depending on partisan claims of one sort or another. Research to no small measure is a painful means of proving what the insight of a few suspects or feels. There is need also for a technique of appraising the work of administrative agencies and of establishing the utility of such scientific appraisals. The generalizations, the philosophizing will gradually emerge from specific studies. Intensive studies of the administrative law of the States and the Nation in practice will furnish the necessary prerequisite to an understanding of what administrative law is really doing, so that we may have an adequate guide for what ought to be done. Here, as in other branches of public law, only here probably more so, we must travel outside the covers of lawbooks to understand law.

"Only a physiological study of administrative law in action will disclose the processes, the practices, the determining factors of administrative decisions, and illumine the relation between commissions and courts, now left obscure by the printed pages of court opinions. The shaping of our administrative law thus calls for students trained in the common law and familiar with its history. But in addition the inquirer must have a sympathetic understanding of the major causes which have led to the emergence of modern administrative law, and must be able to move freely in the world of social and economic facts with which administrative law is largely concerned. Above all, he must have a rigorously scientific temper of mind."

III. The Focus Today

As a state, we have not studied law in action as Frankfurter suggested. Instead, over the last few years we have been busy inventing "solutions" to problems with the Florida APA that have never been demonstrated to exist, while exhibiting a rigorously political, rather than scientific, state of mind. The goal of recent administrative procedure "reform" efforts that I have witnessed has had nothing to do with improving administrative procedure. The most common theme has been to use administrative law "reform" for political purposes, sometimes as a way to run against government while running it, sometimes to advance unpopular political agendas indirectly, through changes in procedure, rather than face opposition to those agendas head on, and sometimes because being against "big government" is trendy today.

Perhaps reading what Frankfurter had to say about administrative law so many years ago can give us some perspective, and help us understand two important points more clearly. First, that there are no magic bullet solutions to problems of administrative law, and second, that only by studying the process itself can we truly understand administrative law problems and propose effective administrative law solutions.

Endnotes:

[1] The entire text in this section of the article is an edited version of Felix Frankfurter, *The Task of Administrative Law*, 75 U. Pa. L. Rev. 614 (1927), and is reprinted with permission. Original footnotes have been deleted or renumbered.

[3] Brandeis, J., dissenting in Burdeau v. McDowell, 256 U.S. 465, 477 (1921).

[4] See Roscoe Pound, Administrative Application of Legal Standards, 44 A.B.A. Rep. (1919) 445.

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Deregulation Redux: Electric Industry Restructuring

by Suzanne Brownless

Last legislative session the Florida telecommunications industry was completely changed by the passage of Chapter 95-403, Laws of Florida. This was dutifully reported to you, faithful readers, in last September's issue of this fine publication (*Administrative Law Section Newsletter*, Volume XVII, No. 1, September, 1995). And although the consensus of informed opinion is that the interexchange carriers, of which AT&T is the most prominent and most vocally displeased, generally got the short end of the stick in last session's restructuring of the telecommunications industry, it seems that legislators are content to leave the "new" statute alone for now. That being the case, you might think that the world of public utility regulation would settle down and drift back into esoteric obscurity.

Not so gentle reader. It seems that the notion that competition is good for telecommunications, trucking, air

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lines and the natural gas pipeline industries, all of whom have been completely or significantly deregulated over the last ten years, has lead some policy makers at both the federal and state levels to think that competition might also be good for the electric industry. Uh-oh, here we go again.

Status Quo

Unlike the telecommunications industry which was regulated in Florida as early as 1911,[1] the electric industry is a latecomer to regulation with the first statewide regulatory statute enacted in 1951.[2] Statewide regulation by the precursor to the Florida Public Service Commission (FPSC) was seen by the state's investor-owned utilities (IOUs) as a means of escaping local regulation by counties and municipalities where rate increases were hard to come by in the best of times and virtually impossible to get in election years.

On the financial front, Wall Street has traditionally viewed electric utility stock as "widows and orphans" stock: the quintessential safe investment consistently paying high dividends. The enactment of the Federal Power Act and the Public Utility Holding Company Act in the 1930's as part of FDR's New Deal created an electric industry that was monolithic and vertically integrated from electric generation to delivery to the ultimate end user. From the 1930's until 1974 little changed in the electric industry on either the services or the technical side except Ready Kilowatt's hairdo (hat or jaunty Big Boy locks).

PURPA

Then the energy crisis of 1974 hit and the Arab oil embargo sent electric rates up through the roof as utilities scrambled to find enough oil to keep their generating units running. Conservation and alternative fuels: solar, wind, voltaic cells, renewables (aka garbage) suddenly were viewed as ways to make America less reliant on fossil fuels and the Arab Emirates. And another idea was hatched: cogeneration. Why not use the steam produced by industrial and manufacturing processes which was being vented into the atmosphere to turn turbines and generate electricity? That way the fossil fuel being burned to produce the steam did double duty. The net result was less fossil fuel burned overall and more electricity produced.

Great idea. Congress thought so too and enacted the Public Utility Regulatory Policies Act of 1978,[3] commonly referred to as PURPA. PURPA required IOUs to buy cogenerated power at their own incremental price of generation ("avoided cost") and required that cogeneration facilities be interconnected with the nation's electric grid and sold backup, supplemental and maintenance power by their local electric utility.

For the first time in 40 years there were independent power generators operating in virtually every IOU's backyard. Stated another way, large industrial customers had an alternative to purchasing electricity from their local utility. And since many industrial customers had been subsidizing the rates of residential customers for years, these customers left the IOUs and began generating all or a substantial part of their own power for the simple reason that cogenerated power was cheaper, and in many cases more reliable, than buying it from the IOU.

Industries were interested in producing power as cheaply and efficiently as possible, so their entrance into the power market spurred the development by vendors of advanced combined cycle gas technology, fluidized bed coal technology, steam heat recovery technology and coal gasification technology. Not only was new generating technology developed and refined but the capital costs for that technology fell as the market for that technology expanded. From 1978 to 1990 independent power was proven around the nation and in Florida to cost less than, and be as reliable if not more reliable than, IOU and municipal power.

In short, PURPA inadvertently spawned a set of competitors to the IOUs in the electric generation area, produced a "track record" for the new technology developed and set in motion the idea that maybe competition in other areas of the industry, e.g., transmission, might be equally as beneficial. Most importantly, it made large consumers of electricity comfortable with the idea that electricity was a commodity just like any other. And like any other commodity, large consumers became convinced that a free market, not a regulated one, would produce the best and lowest priced product. What was good for the widget was good for the watt.

EPACT and FERC NOPRS

Large consumers brought these ideas to Congress and Congress passed the Energy Policy Act of 1992 (EPACT).[4] EPACT revamped federal regulation of electric utilities with the goal of stimulating competition at the *wholesale* level. The bill created a new category of power generators who could own, build and operate power plants, and sell their

electricity anywhere in the United States. But, these generators could only sell to IOUs or municipalities. Sales at retail, that is, directly to the general public, were prohibited. The Congressional rationale supporting the wholesale/retail distinction was that savings generated at the wholesale level would "trickle down" to the retail customer. And besides, retail sales have always been the exclusive domain of the states, not the federal government.

Obviously, these new entities couldn't sell nationwide without access to the country's transmission grids. What's the use of generating power and having the ability to sell it at wholesale if you can't wheel it where it needs to go? The Federal Energy Regulatory Commission (FERC) was given the authority to order an electric utility to wheel this type of power if certain "public interest" criteria were met. The price for this wheeling is also to be set by FERC and must allocate the cost of this service to the entity requesting it, not the "native load" customer of the utility providing the service.

FERC took the Congress at its word and began requiring that electric utilities provide "open access" to their transmission grids as a condition for the approval of acquisitions and mergers with other utilities. Then things really got out of hand when FERC proposed rules to implement the "open access" portion of EPACT. The notorious "GIGA NOPRS" were published in March of 1995[5] and attached to these proposed rules are model "open access" tariffs. Everyone who is anyone in the electric industry has filed comments on these NOPRS and FERC has yet to issue a final version of the rules although this could happen as early as this spring. In the meantime all of the Florida IOUs (FPL, FPC, TECO and Gulf) have filed their version of "open access" transmission tariffs with FERC and are in the process of getting those approved/modified/denied.

Retail Sales

In the midst of all of this excitement at the federal level, the California Public Utilities Commission (CPUC) issued an *Order Instituting Rulemaking on the Commission's Proposed Policies Governing Restructuring of California's Electric Services Industry and Reforming Regulation*[6] in April of 1994 and things got radical. CPUC actually proposed that *all customers* be given access to the transmission grid so that they could purchase their electricity from whomever they pleased at whatever price they could wangle. The fact that CPUC proposed to phase in this access starting with large demand customers and moving to residential customers at the end of seven years did little to quiet the roar of indignation sent up by California's utility community. Clearly, CPUC was proposing the end of regulation the entire electric community had always known and grown to love. CPUC was actually proposing the deregulation of the last sacred utility cow: retail sales.

Although CPUC has since been made to see the error of its ways and has significantly modified its original restructuring proposal, the CPUC proposal triggered investigations into electric industry restructuring by other states. To date, approximately 35 of the 50 states are currently investigating restructuring either before their own regulatory agencies or in their legislatures or both.

Florida

Never being an organization to act without circumspection in regulatory matters of this complexity, the FPSC has not initiated its own investigation into electric industry restructuring at the statewide/retail level. The FPSC has, however, filed comments with FERC in response to its GIGA NOPRS stating that it has serious concerns with FERC's proposed rules and open access tariffs and warning FERC to keep its paws off areas which have traditionally been state jurisdiction. Due to "municipalization" provisions of EPACT, one particularly disturbing area is the blurry distinction between interstate transmission systems, clearly under the exclusive jurisdiction of FERC, and distribution systems, clearly under the exclusive jurisdiction of the states. One wouldn't want FERC to be able to espouse allegiance to state jurisdiction over retail sales while creating a loophole for a significant number of retail customers to bypass the local IOU or municipal utility and thereby bypass state regulatory control.

Leaping into the breach, the Florida Legislature has undertaken the task of examining Florida's electric industry. Several workshops have been held by the Public and Investor-Owned Utilities subcommittee of the House Utilities and Telecommunications Committee and a report is expected before the 1996 session starts on March 5.

Restructuring Issues

Having now worked ourselves into regulatory deja vu, what are the issues which the Legislature and the FPSC, if it ever comes to that, should consider? It will come as no surprise that the list looks very similar to the one developed for the telecommunications industry restructuring with a few wrinkles for industry specific issues.

Heading up the list is the fundamental issue of whether retail competition should be allowed at all. Will retail competition be beneficial to the residential ratepayer or only benefit the large electric consumer? Stated another way, will retail competition bring lower costs and a higher level of electric service or will it simply allow industrial and commercial customers to bail out leaving residential customers holding the bill for a bag full of "stranded investments"?

If you answer this issue no, you can concentrate on determining whether the state has a role in developing or encouraging the wholesale power market. If that strikes you as being a good thing, you can identify barriers to the development of that wholesale market and propose ways to remove or mitigate those barriers at the state level. Or, if you are not convinced that wholesale competition is a good thing, you can figure out clever ways to circumvent EPACT and FERC decisions by making it uneconomic and physically impossible for a high volume of such sales to occur and a viable wholesale market to develop in the state.

If, on the other hand, you decide that retail competition in some form might be a good thing and might bring some of the same benefits to electric consumers that lawmakers

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believe will be brought to telecommunications customers, you have to identify and evaluate restructuring proposals *based upon what you expect the electric industry to provide.* I emphasize this decision because it strikes me that this part of restructuring is often overlooked by both the proponents and opponents of retail competition.

The opponents of retail competition, usually IOUs and municipals, argue that a competitive market must provide exactly the same thing that a monopoly market provided or service has been degraded. The captive, residential customer must be sacrosanct and the industrial/commercial customer be damned. Proponents, lead by large electric consumers, argue that they want to be able to develop and shop for their own individual electric needs and that they have too long been hamstrung by restrictive tariffs and regulations. Everyone will be able to cut their best deal. The market will take care of and protect all of us.

It strikes me that neither argument is totally correct. After all, the current form of rate base regulation was a response to a totally free market which actually did not protect everyone. Some recognition of that fact must be part of any workable, equitable restructuring framework.

What the electric industry should provide to all Florida citizens is neither a trivial nor a simple question. It could include access to the broadest possible number of alternative service providers; more diversified services (something other than firm and interruptible); an adequate and reliable statewide electric grid; the ability to buy some or all of the ancillary services that are required to maintain that grid, e.g., voltage control; conservation programs; demand-side management programs; "universal service" to every citizen at some level; subsidized "lifeline" rates for low income or disabled citizens; or "green pricing." Or, it could include the ability for a citizen to demand interruptible residential service rather than firm service at the reduced rate how only available to larger users. Or it could mean that conservation programs like the popular "residential energy audit" will be supplied by private vendors rather than the local electric company and will not be subsidized by electric ratepayers as is now the case.

Having evaluated the pros and cons of the different retail competition models, federal and state jurisdictional issues have to be looked at. You might know what you want to do, but be unable to do it. What about planning for statewide capacity needs? Are you going to let the market make those decisions, the FPSC, or some other state agency? And, what is the role of the FPSC in this new world? Should they monitor the state of competition in generation, transmission and distribution services and report back to the Legislature; regulate those areas where meaningful competition does not develop; develop strategies to encourage competitive markets; or simply downsize to reflect reduced regulatory responsibilities?

Finally, having determined which competitive model is best, how are you going to transition from a totally regulated market to one significantly less regulated? Even California thought that the transition from the status quo to full competition in retail sales should be done over a period of seven years. What about notice restrictions, transmission and distribution access fees, exit fees, stranded investment, and providers of last resort?

Needless to say there are thousands of ways to address these issues and utility "experts" all over the land are putting on seminars and workshops exploring the whole area. Every McGraw Hill trade publication is full of them. Florida utilities are also busy developing strategies to minimize risk and maximize market share and profit in what everyone sees as the coming inevitable industry restructuring. One does not have to be a genius to understand that the massive corporate downsizings at TECO, FPC and FPL which have taken place in the last five years are part of a strategy to become "lean and mean" in this new electric market. And, FPL for the first time in its history reduced its dividends last year in order to have cash on hand to respond to an increasingly competitive electric energy market.

What's Happening

So far nothing. Last year Representative Dean Saunders (D. Lakeland) filed a bill which would have allowed a limited amount of retail wheeling as a pilot project. HB 2071. United and strong electric utility industry opposition quickly turned this bill into a "study bill" on the restructuring issue which quietly died as the session closed without being brought up in substantive committee.

There is speculation that Representative Saunders will try again and the electric utility community has responded to this speculation by signing up "hired gun" lobbyists in unprecedented numbers just in case something happens. As an example, according to the records kept by the Joint Legislative Management Committee, TECO, the smallest of the state's IOUs, increased its registered lobbyist team from 4 in 1994 to 19 in 1995 and has already signed up 10 in 1996 with the 1996 session still a month away.

No matter how united or how strongly opposed the Florida electric utility community is to addressing the issue of restructuring the electric industry, the increasing economic pressures of a global economy, federal actions and the responses of other states will force Florida to take these issues up legislatively sometime in the next two years. In short, the lyrics of an old song are apropos here: "I want you, I need you, It's just a matter of time."

Endnotes

[1] Chapter 6186, Laws of Florida (1911).
[2] Chapter 26545, Laws of Florida (1951).
[3] Public Law 95-617 (November 9, 1978).
[4] Public Law 102-486, 106 Stat. 2776 (1992).
[5] 70 FERC ¶ 61,357.
[6] Docket Nos. I.94-04-031 and I.94-04-032.

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Update on the Governor's APA Committee

by Mary Smallwood
Ruden, McClosky, Smith, Schuster and Russell, P.A.

One of the more significant amendments to the Florida Administrative Procedure Act being considered by the Governor's Administrative Procedure Act Review Commission is one that would add a generic variance and waiver provision to Chapter 120, Florida Statutes. While there was not a draft of a comprehensive bill at the time this article went to publication, comments of many members of the Commission suggest that the Commission's approach will be to include language in its final draft of the proposed legislation that allows any individual affected by an agency rule to request that the agency involved grant a variance or waiver from a provision of the rule that adversely affects that person.

It appears that there are several concerns that are leading members of the Commission toward this approach. First, a number of the Commissioners, particularly those who are also members of the Florida Legislature, have expressed concerns about the inflexibility of the present process. The common theme of the anecdotes discussed seems to be that the average citizen cannot afford to challenge an agency's action when it applies one of its rules in a fashion that leads to an absurd or, as one of the Commissioners expressed it, "a stupid," result. There was also a great deal of concern about the cost of formal proceedings.

A related concern providing impetus for this amendment appears to be Governor Chile's intention to bring common sense back to government. Again, the issue appears to be the inflexible approach of agencies in applying their rules.

In considering the implications of this proposed amendment it is probably best to start with a discussion of how we arrived at this point. The law in Florida is clear that an agency that has adopted a rule pursuant to the procedures of Section 120.54, Florida Statutes, may not vary from those requirements. *See Flamingo Lake RV Resort, Inc. v. Department of Transportation*, 599 So.2d 732 (Fla. 1st DCA 1992). The reason for this requirement is obvious. One of the primary purposes of the 1974 Administrative Procedure Act was to provide certainty to citizens by requiring agencies to adopt their policies as written rules in an open forum so citizens would be aware of those policies. Allowing an agency to then vary its policy on a case by case basis would defeat the purpose of requiring rulemaking.

It soon became apparent, however, that this concept was flawed to a certain extent. The courts quickly addressed the problems that were presented by ruling that an agency need not adopt each and every policy as a rule. *See McDonald v. Department of Banking and Fi-*

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Update on the APA

by Donna E. Blanton

The Governor's Administrative Procedure Act Review Commission, in an effort to introduce flexibility into the administrative process, has endorsed the concept of a new section in chapter 120 that would authorize agencies to grant variances and waivers to their own rules.

As this issue goes to press, the Commission is scheduled to consider a third draft of the variance and waiver provision at its February 8 meeting. While details of the proposed statute may be modified at that meeting, it appears likely that the Commission will forward a recommendation to the Governor and Legislature that a variance and waiver statute be enacted.

The Commission began its discussion of the need for variances and waivers by considering a general premise that was drafted after several Commissioners shared their own and citizens' experiences with agencies who insisted upon strict adherence to rules, even when the results were nonsensical. The premise stated:

> More flexibility is needed in the administrative process, particularly in the ways agencies apply their rules to the public. Agencies must write rules specific enough to be meaningful, yet general enough to fit a variety of situations. The broader the regulatory task, the greater the likelihood that unforeseen situations will arise, thus creating the need for "adjustments" to rules of general applicability. Consequently, to achieve an appropriate result for the public and private citizens, agencies often need flexibility to vary from literal requirements of rules. Procedural mechanisms are needed to consider individual requests for variances and exceptions to administrative rules of general applicability.[1]

In accepting this premise, Commissioners recognized that flexibility is only one part of a comprehensive administrative process that is based on a known set of regulations and procedures. Commissioners understand that the Florida Administrative Procedure Act was adopted in 1974 in large measure because of concerns about "phantom government" and to rein in unbridled agency flexibility. Thus, Commissioners expressed a desire to strike a balance between rigid adherence to rules and unpredictable application of them to the public.

Before any proposal on variances and waivers was drafted, Commissioners also reviewed constitutional issues unique to Florida that could have an impact on the Legislature's ability to include a general variance and waiver provision in chapter 120. Specifically, Commissioners evaluated and discussed the separation of powers provision in article II, section 3 of the Florida Constitution and the "nondelegation doctrine" that state courts have developed when construing that provision.[2] The Commission concluded that a general waiver and variance provision could be drafted that satisfies constitutional requirements so long as the Legislature does not give administrative agencies the authority to establish fundamental policy and provides

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nance, 346 So.2d 569 (Fla. 1st DCA 1977). In that case, the First District Court of Appeals recognized the obvious. If every policy of an agency was adopted as a rule and the agency could not waiver from that rule to address unexpected circumstances, government would be seriously hampered. The court took a practical approach to the requirement of rulemaking in Section 120.54, Florida Statutes, by requiring the agencies to adopt policies as rules only where the policy was sufficiently defined for rulemaking. This allowed agencies to defend general policies on a case by case basis in a Section 120.57 proceeding as it developed "incipient agency policy" to the point where rulemaking was appropriate.

Clearly, *McDonald* anticipated that the agencies would eventually adopt each policy as a rule when it became practicable to do so. Defining the policy through case by case adjudication would assist the agency in determining the final parameters of the rule that it would adopt. However, subsequent cases seemed to expand the *McDonald* doctrine by suggesting that an agency could continue to apply a "statement of general applicability," which the Act defines as a rule, indefinitely so long as it was willing to defend that policy over and over in Section 120.57 proceedings.

In 1991, the Florida Legislature adopted Section 120.535, Florida Statutes, to address its concern that the courts had strayed too far from the original legislative intent of Chapter 120 in allowing the agencies, essentially, unlimited discretion in when, or even whether, to adopt a policy as a rule. Section 120.535, as it presently exists, states the legislative intent that agency rulemaking is not discretionary. Instead, a statement of general applicability must be adopted as a rule as soon as "feasible and practicable."

The reaction of observers to the adoption of Section 120.535 has been widely divergent. On the one hand, some parties have felt that excessive agency rulemaking has stifled agency discretion to the point that the ability of agency personnel to use common sense has been compromised. These individuals point to the tremendous growth in the number of adopted rules as evidence of their point. On the other hand, many Legislators appear to believe that Section 120.535 has been ineffective because the sanctions imposed on an agency for failure to adopt a policy as a rule have no real impact.

A previous article in this newsletter has discussed the Commission's deliberations regarding Section 120.535 in some detail. At this time, it appears that the Commission's consensus opinion is that Section 120.535 should be retained and strengthened. This concept, however, has been tied to adoption of a variance and waiver provision in recognition of the fact that strengthening Section 120.535 would further reduce agency flexibility to address individual circumstances which don't fit within the bounds of a particular rule.

As this article goes to press, the language of such a provision has not been finalized; however, it appears that it would include the following concepts.

The drafts, to date, distinguish between a variance, a modification of a rule requirement, and a waiver, a decision not to apply all or some portion of a rule to an individual. The process for requesting or obtaining a variance or waiver would be the same, however.

The draft to be considered by the Commission at its last meeting on February 8,1996, provided that variances or waivers would be appropriate where the application of a rule would either create a "substantial hardship" or "violate principles of fairness." A hardship could essentially be of any type, including economic. Principles of fairness would be deemed to be violated where a rule affected an individual in a significantly different way it affected similarly situated persons.

The Commission rejected the position statement of the Administrative Law Section's Executive Council that any variance provisions should be incorporated into the individual substantive statutes rather than a procedural statute such as the Administrative Procedure Act. Again, the consensus of the Commission appears to be that variances should be available for virtually all agency rules. Moreover, the Commission saw no reason why a single set of criteria should not apply no matter what the substance of the particular rule.

At present, there are a number of substantive statutes that already contain variance provisions. For example, in the environmental area, Section 403.201, Florida Statutes, allows the Department of Environmental Protection (DEP)to grant a variance from either a statutory or rule provision if the applicant demonstrates that he falls within the statutory criteria. DEP has adopted rules that set forth the procedural and information criteria for requesting a variance. Conversely, many substantive statutes do not contain any provision for a variance.

The Commission also suggested that the agency should be required to notify an affected person of the availability of a waiver or variance. It is not clear, however, when this notification must be given. Presumably, if the citizen also needed a license pursuant to Section 120.60, the two actions would occur sequentially. In other words, the individual would apply for a license, and the agency would issue an intent to deny the license that would include a notification of the individual's right to request a variance from any rule that provided the basis of such denial.

The commission's discussions indicated that the variance review process would be similar to that for license applications, including containing a "default" provision for variance and waiver requests not acted on by the agency within 90 days.

The process for obtaining a variance or waiver would be set forth in the Model Rules of Procedure and be uniform from agency to agency. It appears that the process of obtaining a variance or waiver would be similar to that for obtaining a license. The agency decision to grant or deny a variance would be final agency action subject to the applicant's right to request a formal administrative hearing pursuant to Section 120.57.

The Commission members seemed to feel that the granting of a variance

or waiver should not be discretionary with the agency if all of the criteria are met.

Information regarding each agency's action on requests for variances and waivers would be submitted to the Governor's office and Legislature annually. Presumably, these orders would also have to be indexed pursuant to Section 120.53(2) as they would result from a proceeding under Section 120.57(1) or (2) or be rendered pursuant to (3) and have precedential value.

A number of very important questions are raised by the approach being considered by the Commission. Perhaps the most important issue is whether the approach will actually achieve the goals of the Commission to make it easier for the average citizen to influence an agency's decision, particularly where that citizen is adversely affected by an existing rule of the agency. Moreover, is it consistent with the original goals of the Administrative Procedure Act?

It is always dangerous to speculate about the long term impacts of a new or revised statute. However, our crystal ball may be a little clearer here since we have the history of the adoption of the original Act to guide us. While there was a great deal of resistance from most agencies during the early years following the Act's adoption, by the late 1970's most agencies were in general compliance. The result was a huge increase in the number of rules being adopted and a formalization of the administrative adjudicatory process. Because the agencies are now used to acting within the constraints of the Act, it is likely that the impacts of any major revisions to the Act would be felt very quickly.

If the Commission's approach prevails, presumably there would be a fairly significant increase in the number of rules adopted by agencies and a corresponding reduction in the agencies' exercise of discretion through implementation of unadopted policies. Instead, such agency discretion would be exercised through the granting or denial of variances or waivers.

More rules and less agency discretion can only mean that citizens will often find it necessary to apply for a variance or waiver. This further means that there are likely to be many more formal proceedings on the agency's determination to issue or deny as both the applicant and any substantially affected third parties would be entitled to request a hearing.

It is difficult to see how such a process would further the Commission's goals to make the administrative process more efficient and cost effective. Clearly the variance process could be as time consuming and costly as the permitting process has become. In addition, if a license is also required, the entire process could be twice as timely if the permit and variance requests are processed sequentially. It seems unlikely that citizens who have expressed dissatisfaction with the process as it presently exists will be helped by the proposed changes.

It is also questionable that separate proceedings on a permit request and a variance request, even where the petitioner is the same and the subject matter is the same, could be consolidated. It would be difficult to require the applicant in a single proceeding to take the contradictory positions that it could meet the applicable rules, thus being entitled to a license without a variance, and that it could not meet the rules, thus requiring issuance of a variance.

Another concern raised by this process is that it may make it more difficult to determine the agency's actual policy on a particular issue. If an agency is not required to index its final action on each variance, it would make it extremely difficult for an individual to determine the full scope of the agency's position on a particular matter. To be fully informed, a citizen would have to have a copy of the agency's rule and each of its final orders in any licensing or variance proceedings which construed that rule. Moreover, since variance requests would be processed case by case, the probability exists that conflicting or inconsistent results may be reached in different cases making it even more difficult to determine the agency's overall policy. If numerous variances are granted from a rule, those orders may ultimately be more important in determining an agency's policy than the actual rule language.

Another interesting issue that could arise is the standing of variance parties to participate in final administrative hearings on variance requests. For example, would the Board of Medicine have a recognizable interest in the decision of the Board of Nursing's decision to grant a variance from a licensing requirement?

When you consider that granting of variances may be mandatory, that citizens must be notified that a variance process is available, and that there will be more rules from which variances may be needed, the potential exists that a very large number of variances will be requested, significantly increasing the number of formal administrative hearings held before the Division ofAdministrative Hearings. No discussion has occurred as yet on the need to hire additional hearing officers to handle the work load. If additional staffing is not part of the final legislative proposal, it seems likely that there will be an adverse impact on the scheduling of administrative hearings in a timely manner.

Finally, there is no reason to believe that a one-size-fits-all variance process will work. Is it really appropriate to use the same criteria in evaluating a request for a variance from a chemical manufacturing facility from hazardous waste financial responsibility requirements as it is to determine whether a cosmetologist should be granted a variance from a licensing requirement?

The benefit to amending the Administrative Procedure Act to strengthen the provisions of Section 120.535 and to create a variance and waiver provision is clear. It would hopefully result in more agency statements of general applicability being adopted through rulemaking so affected citizens could more easily determine the rules of the game. Moreover, there is little question that there are often instances in which strict application of an adopted rule to a particular individual may result in an absurd or unintended result. A variance or waiver provision may be effective to ameliorate such situations. Substituting this type of process for the one envisioned by the *McDonald* court, which allowed case by case articulation of incipient poli-

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cies, would seemingly lead to more certainty for citizens. However, the advantages of that added degree of certainty must be weighed against the potential disadvantages: poor articulation of standards for the grant or denial of variance requests as those standards are generically applied to a variety of unrelated regulatory programs; uncertainty about the agency's policies resulting from case-by-case decisions on numerous variance requests; added cost of litigation where formal proceedings are requested on variance decisions; and added time delays, particularly where a variance must be sought after a decision on a related licensing issue has been rendered.

The greatest reason for concern, however, is that the amendments to the Administrative Procedure Act now being considered are unlikely to resolve the complaints of citizens that the existing process is too complicated, costly and time consuming. Will we simply see ourselves in the same circumstances next year?

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adequate standards to agencies in the exercise of their discretion.

The proposed statute was drafted with these considerations in mind. For example, the proposal makes clear that it is the policy of the *Legislature* (not executive branch agencies) that variances and waivers to rules are appropriate in certain circumstances. The proposal also states that it does not authorize agencies to grant variances or waivers to statutes. Additionally, the central consideration in an agency's decision whether to grant a variance or waiver is whether "the purpose of the underlying statute" can be or has been achieved by other means.

The most recent draft of the proposed statute defines both "variance" and "waiver." A variance is a decision by an agency to grant a modification to all or part of the literal requirements of an agency rule to a person who is subject to the rule. A waiver is a decision by an agency not to apply all or part of a rule to a person who is subject to the rule.

According to the current draft, variances and waivers are to be granted as a matter of right when a person subject to a particular regulation demonstrates that the purpose of the underlying statute can be or has been achieved by other means and that application of a rule would create a substantial hardship or would violate principles of fairness. A "substantial hardship" is defined as a demonstrated economic, technological, legal or other type of hardship to the person requesting the variance or waiver. "Principles of fairness" are violated when a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

These criteria were chosen after research and discussion into administrative exceptions both at the federal level and in other states.[3] The various types[4] of exceptions to administrative rules are categorized in the literature as follows:

1. Hardship exceptions. These are based on the premise that exceptions may be granted because compliance with the rule in question would create a substantial hardship. There are several subcategories of hardship exceptions, including economic hardship and technological hardship. The idea behind these exceptions is that a regulated entity or person should not be penalized or prejudiced when complying with a rule is too expensive or too technologically difficult unless the social benefits of compliance with the rule outweigh the costs to the particular entity or person.

2. Fairness exceptions. These are used when application of a rule would cost one entity or person substantially more than those similarly situated, when application of a rule would unintentionally penalize an entity's or person's recent good-faith activities, or when regulatory costs to an entity or person are simply not worth the minimal social benefits that compliance with the rule would produce.

3. Policy exceptions. These are geared to the overall goals of a regulatory program. For example, an exception to a rule may be granted if its desired results can be achieved by another means. Policy exceptions can allow an agency to implement a new or refined policy on an experimental basis.

The Commission worked from these general categories in drafting the proposed Florida statute, although modifications were made as appropriate to conform to Florida law.

One means of increasing agency flexibility that was considered early in the Commission's discussions was the approach taken in Minnesota. That state's Administrative Procedure Act includes a general provision authorizing agencies to grant variances to rules:

> Unless otherwise provided by law, an agency may grant a variance to a rule. Before an agency grants a variance, it shall adopt rules setting forth procedures and standards by which variances shall be granted and denied. An agency receiving a request for a variance shall set forth in writing its reasons for granting or denying the variance. This subdivision shall not constitute authority for an agency to grant variances to statutory standards.

Minn. St. Ann. § 14.05.

The Commission's research indicates that Minnesota is the only state that *authorizes* agencies to grant variances in this manner.[5] While some other states permit agencies to develop standards and guidelines for variances through rulemaking, the statutory directives usually are phrased as *prohibiting* variances unless such rules are adopted.[6] Significantly, although the variance provision has been in Minnesota law for more than 20 years, officials in both the executive and legislative branches of Minnesota's government say they cannot recall it ever being used.[7]

A recent study of the Minnesota APA recommends that agencies make better use of the statutory vari-

ance provision.[8] Legislators in Minnesota a few years ago reportedly attempted to develop some general variance standards for agencies to follow, but the proposal was dropped because of strong agency objections.

The Commission found it interesting that the Minnesota provision is not used, and in drafting the proposed statute now under consideration, sought to avoid a similar result in Florida. Thus, the guidelines for granting a variance or waiver are included in the proposed Florida statute, and agencies are required to grant the requests if the guidelines are satisfied. The proposed statute directs the Administration Commission to adopt model rules establishing procedures for granting or denying variance and waiver petitions.

While Minnesota so far appears to be the only state with a general variance provision in its APA, many states authorize variances to particular statutes or rules. Florida has several examples of such variance provisions.[9] Some Florida statutes only permit variances to be granted when alternative means can be shown to protect public health and safety. *See, e.g.*, §381.086(3), Fla. Stat. (relating to migrant housing). In other cases, variances may be granted if a particular project provides a significant regional benefit for wildlife and the environment. § 378.212(1)(f), Fla. Stat. (phosphate reclamation).

Commissioners considered the possibility of recommending the incorporation of variance or waiver provisions similar to those discussed above in all relevant substantive statutes. Several Commissioners expressed the view that combing though the statutes for each appropriate place for such a provision would be difficult. Additionally, the view was expressed that embarking on such a project would be unnecessary if the general policy concerning variances and waivers could be incorporated into chapter 120.

Commissioners also considered other means of amending chapter 120 to introduce flexibility. One provision in Florida's APA that once afforded more flexibility to agencies has been eliminated by the Legislature. The APA formerly contained a provision that was interpreted by Florida courts as authorizing agencies to grant exceptions to their rules so long as they explained those deviations. Section 120.68(12), Florida Statutes (1983), provided that a court should remand a case to an agency if it found the agency's exercise of discretion to be "inconsistent with an agency rule, an officially stated agency policy, or a prior agency practice *if deviation therefrom is not explained by the agency* . . . ." (Emphasis supplied). Florida courts began to develop an "explication" doctrine allowing an agency to deviate from its own rule so long as it explained the deviation.[10] The court cases discussing section 120.68(12) did not elaborate on what kind of explanation an agency must provide or under what standard the agency's explanation would be reviewed. In 1984, the Legislature amended section 120.68(12) to direct the remand of all cases in which a court finds that an agency's exercise of discretion is inconsistent with an agency rule.[11] Thus, the opportunity to deviate from an existing rule and explain that deviation was eliminated.

Commissioners considered the possibility of returning to the approach in section 120.68(12), but decided that a more detailed variance and waiver provision, including procedural safeguards for both the applicant and other parties, was preferable.

The current draft of the proposal states that a person subject to regulation by an agency rule may file a petition with that agency requesting a variance or waiver. Agencies may not initiate variances or waivers on their own motion. In addition to any requirements that may be mandated by model rules, each petition must specify the rule for which the variance or waiver is requested; the type of action requested; the specific facts that would justify a waiver or variance for the petitioner; and the reason why the variance or waiver requested would serve the purposes of the underlying statute.

Notice of variance or waiver petitions would be published in the Florida Administrative Weekly, and the model rules would provide a means for interested persons to comment on the petition. Agencies would be required to grant or deny the petition within 90 days of its receipt or the petition would be deemed approved.

The draft provides that an order granting or denying the petition must be in writing and contain a statement of the relevant facts and reasons supporting the agency's action. The agency's decision to grant or deny the petition is required to be supported by competent substantial evidence and is subject to section 120.57.

Orders granting or denying variance or waiver petitions would be subject to the indexing requirements of section 120.53(2). Additionally, the proposal specifically requires each agency to maintain a record of the type and disposition of each variance or waiver petition that is filed. Annual reports to the Governor and Legislature listing the number and disposition of petitions filed are required by the draft.

Through its proposal, the Commission has sought to introduce more flexibility into the application of agency rules while at the same time preserve the original goals of the Administrative Procedure Act.

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Endnotes

[1] This premise was developed after research into the law of administrative variances and waivers. *See generally* Flexibility Issues, November 16, 1995 (on file with Commission staff); *see also, e.g.*, Alfred C. Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 Duke L.J. 277.

[2] *See generally* Memorandum to Commission Members from Donna E. Blanton, *Florida's Nondelegation Doctrine and Agency Exceptions*, December 1, 1995 (on file with Commission staff).

[3] *See, e.g.*, Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 Duke L.J. 163; Aman *supra* note 1; Jim Rossi, *Making Policy Through the Waiver of Regulations at the Federal Energy Regulatory Commission*, 47 Admin. L. Rev. 255 (1995).

[4] Aman, *supra* note 1, at 291-322.

[5] A task force created by the Iowa State Bar Association currently is considering a new state Administrative Procedure Act that may include a waiver provision. An October 24, 1995, draft of the proposed Iowa APA includes

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a provision that would authorize a person to petition an agency for an exemption from a rule. If adopted, it would require agencies to adopt rules governing the form, contents, and filing of waiver petitions; specifying the procedural rights of persons in relation to such petitions; and providing for the disposition of those petitions. The proposed waiver provision states that an agency must grant a petition for an exemption from a rule "if application of the rule to petitioner on the basis of the facts specified in the petition would not serve any of the purposes of the rule and such an exemption for petitioner would be consistent with the public interest." The proposed statute also would allow an agency to waive application of one or more of its rules on its own motion if it found that the statutory criteria for waiver existed. *See Proposed Iowa Administrative Procedure Act*, Iowa State Bar Association Taskforce on Administrative Law Reform (Arthur Bonfield, Reporter) (October 24, 1995).

[6] *See* Flexibility Issues, *supra* note 1 (citing and discussing statutes.)

[7] The Commission staff interviewed several Minnesota public officials concerning the variance provision. ("That's an old provision that's been in there from the beginning," said George McCormick, counsel to the Minnesota Senate. "I really don't think anybody uses it." Elaine Hanson, commissioner of the Minnesota Department of Administration, agreed with McCormick. She said most agencies do not want to develop procedures and standards for granting variances because of concerns about undermining their rules.)

[8] **Minnesota Comm. on Reform and Efficiency, Reforming Minnesota's Administrative Rulemaking System, Summary Report** 15 (1993).

[9] *See, e.g.*, §§ 403.201 (pollution control), 403.854 (drinking water), 381.0086 (migrant housing), 378.212 (phosphate land reclamation), Fla. Stat. (1993).

[10] *E.g., General Tel. Co. v. Florida Pub. Serv. Comm'n*, 446 So. 2d 1063 (Fla. 1984); *Best Western Tivoli Inn v. Department of Transportation*, 435 So. 2d 321 (Fla. 1st DCA 1983). These cases and the development of this doctrine are discussed in detail in F. Scott Boyd, *How the Exception Makes the Rule: Agency Waiver of Statutes, Rules, and Precedent in Florida*, 7 St. Thomas L. Rev. 287 (1995).

[11] Ch. 84-173, § 4, at 524-25, Laws of Fla.

Minutes

Administrative Law Section Executive Council Meeting January 4, 1996, Tallahassee

I. Call to Order

The meeting was called to order by Section Chair Linda Rigot.

Members present: Bill Williams, Bill Hyde, John Newton, Michael Ruff, Carol Forthman, Cathy Lannon, Kathy Castor (by phone), Johnny Burris.

Others in attendance: Jackie Werndli

Members excused: Bob Rhodes, Vivian Garfein, Ralf Brookes, Steve Pfeiffer, Floyd Self, Dan Stengle, Betty Steffens

II. Minutes

No minutes were presented.

III. Proposed Budget

The proposed budget for 1996-1997 was approved.

IV. Consideration of Legislative Positions

A. Linda Rigot informed the Council that the Cabinet reform proposal has been approved by the Cabinet and forwarded to the Legislature. Three of those proposals were discussed and acted upon by the Executive Council. One of them is to move the responsibility and the authority from the Administration Commission (Governor and Cabinet) to the Department of Management Services for the Model Rules of Procedure. A second is to move the responsibility and authority from the Administration Commission to the Governor for appointment of a special hearing officer in those situations where D.O.A.H. is a party litigant in an administrative proceeding. The third proposal relates to the appointment of the Director of D.O.A.H. Currently, the Director is appointed by the Governor and Cabinet and confirmed by the Senate. She serves at the pleasure of the Governor and Cabinet. The proposal is to make the appointment one solely by the Governor and for a four-year term.

As to all three of these proposals, the Council voted, upon motion by Bill Hyde, to take a position to maintain the status quo and to seek Board of Governor's approval to lobby that position before the Legislature.

B. Three legislative lobbying positions proposed by the Government Lawyer Section were presented for comment and support by the Administrative Law Section.

1. Public records exemption for home addresses and telephone numbers of government employees. Upon motion by Bill Hyde, the Council voted to support this position, but not to take it on as an Administrative Law Section position.

2. Article V funding by the state, including a proposal that the legislature reimburse counties for the cost of operating the state court system. Carol Forthman moved that the Council take no position and the motion passed. Concerns were expressed about requiring reimbursement to counties without any control over the expenditures.

3. Reauthorization for state agencies to pay bar dues and CLE for government attorneys. Upon motion of Johnny Burris, the Council voted to support this position, but not to take it on as an Administrative Law Section position.

V. Miscellaneous Items

A. On April 25-26 the Section will have its Overview CLE course, an Executive Council meeting, and the Pat Dore Chair dedication and other festivities.

B. The current Legislative Committee members and terms of office are:

Betty Steffens—3 years
Bill Hyde—2 years
TBA—1 years

C. The First District Court of Appeal has proposed to the Florida Supreme Court that it be permitted to create a third division for the handling of criminal law matters. It is not clear how the creation of a third division will affect the rotation of judges through the division.

VI. APA Reform

The Council continued its review of last year's SB 536, beginning on page 59 (see attached).

A. The Council voted to recommend the deletion of proposed (6) on page 59 which provides that a "rule is not presumed to be valid or invalid," and sets procedural and appellate requirements.

B. The Council discussed 4., at the bottom of page 63, regarding whether the law needs to specify clearly that responses to exceptions are permitted. No action was taken.

C. The Council discussed the proposed change to 10. set forth on pages 65 and 66 relating to an agency's authority to reject or modify conclusions of law and interpretations of rules which are not within its substantive jurisdiction and the prohibition against a rejection or modification of a conclusion of law forming the basis for a rejection or modification of a finding of fact. No position was taken.

D. The Council also discussed, but took no action on, the proposed language on page 66 (in 10.) which authorizes attorneys fees if an agency "improperly" rejected or modified findings of fact.

E. The Council voted to recommend striking Section 18 on page 76 relating to termination of administrative law judges. Reasons asserted included the discrepancy in titles, and the fact that the career service laws and rules already set forth a procedure for this. In the absence of a clear statement that Section 18 is intended to supplant the other remedy, the new provision may add confusion and contradiction to the law.

F. The Council reaffirmed its prior position in favor of proposed 120.68(2)(b), p. 77, concerning consolidating appellate proceedings.

G. The Council discussed, but took no position on, (16) on page 78 relating to forbidding the appellate court from substituting its judgment for a hearing officer's finding of fact.

H. Upon motions of Johnny Burris the Council recommended deletion of Section 20 on page 78 on the basis that it was redundant in light of the Minor Violations Act passed last session. (Chapter 95-402).

I. As to Section 23 which begins on page 82, the Council voted to recommend deletion of this provision, but to support a legislative grant of variance authority to agencies which are set forth in substantive law and contain appropriate standards. This would allow agencies to avoid reaching unreasonable results.

J. On APA reform issues not addressed in SB 536, the Executive Council took the following actions.

1. Upon motion of John Newton, the Council voted to recommend that all existing exemptions to Chapter 120 expire on December 31, 1998, and that the legislature require that any new proposed exemptions must be set forth in a separate bill dealing only with that subject, as is required for public records exemptions.

2. Bid disputes. Bill Williams moved and the Council voted to recommend that the legislature should enact a standard of proof that is applicable to bid protests and asserted that the present standard as enunciated in *Grove-Watkins* makes the bid protest process ineffective. (120.53(5)(e)).

There was also discussion of the time frames for bid protests with the comment that there was no reason to expedite the hearing process and then let the agency take 90 days to enter its Final Order. Accordingly, the Council voted, upon Bill Williams' motion, to amend the law to require that exceptions must be filed within 10 days of the entry of the Recommended Order and the Final Order must be filed within 30 days of entry of the Recommended Order. In addition, the Council voted, upon motion by Michael Ruff, to change the requirement that the hearing be held within 15 days to 30 days, as in a rule challenge.

3. Hearing Officer title. The Council passed Bill Williams' motion that D.O.A.H. hearing officers be called Administrative Law Judges.

4. Default licensure. The Council voted to recommend that the "default" provision in 120.60(1) be amended to provide that if an agency has not ruled on an application within 90 days of its completion, the applicant may demand a decision by the agency and the agency must render a decision within a specified number of days thereafter. The Council members could not agree what the number of days should be.

VII.

The Section legislative positions previously proposed have been approved by the Board of Governors.

VIII.

The next meeting of the Executive Council will be April 25 or 26, 1996.

Minutes

Administrative Law Section Executive Council Meeting, December 13, 1995, Tallahassee

I. Call to Order

Section Chair Linda Rigot called the meeting to order.

Members present: Bill Williams, Cathy Lannon, Ralf Brookes (by phone), Johnny Burris, Kathy Castor (by phone), Carol Forthman, Bill Hyde, Steve Pfeiffer, Michael Ruff, Floyd Self, Mary Smallwood, Diane Tremor, David Watkins, John Newton.

Others in attendance: Jackie Werndli, Seann Frasier (by phone), Bob Downie (by phone).

Members excused: Bob Rhodes, Vivian Garfein, Betty Steffens, Dan Stengle.

II. Announcements

The Administrative Law in a Nutshell CLE course has been moved to May 20, 1996.

The Executive Council meeting scheduled to be held at the midyear

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meeting at The Florida Bar, will begin at 8:30 a.m., not in the afternoon.

III. Response to Governor's Administrative Procedure Act Review Commission

A letter was sent to the Administrative Law Section asking for the Executive Council's comments on a number of issues. Responses to the questions asked are as follows:

A. Johnny Burris moved, and the council unanimously voted, that the proposed APA simplification draft, with the Section's proposed amendments, is preferable to existing law.

B. In response to the question of whether Section 120.535 should be amended and, if so, how, the Council voted that by its previous actions, it had agreed that subsection 1 should be retained, but the rest should not be retained. The Council wanted to make clear that as to the other provisions, because of the diversity of opinions on the Council, the Council is unable to reach consensus on other issues.

C. As to the advisability of variance or waiver provision in the APA and, if advisable, any specific provisions the Section may recommend, Cathy Lannon moved, and it was passed, that the Council opposes variance or waiver provisions *in the APA*. It is the Council's position that if the Legislature wants to give authorization for variances, it should do so in the substantive law of the Agency.

D. The Governor's Administrative Procedure Act Review Commission also asked the Council concerning the advisability of the substantive changes recommended by Debbie Kearney's Committee (see attached).

1. As for the interaction between the timing for filing a challenge to a proposed rule and the time for the public hearing, the Executive Council agreed that the time for filing a rule challenge should be at a date after the public hearing date, but the Council was not in agreement as to when the challenge should be required. The Council further stated that the proposal in Senate Bill 536 for amending 120.54(4)(b) is a good start, but does not go far enough toward solving the problem.

2. With regard to *ex parte* communications, the Council agreed with the proposed repeal of 120.57(1)(b)12., which allows a Hearing Officer who is a member of an agency head to participate in the formulation of the final order if the Hearing Officer has completed all duties as a Hearing Officer. This position was in the Council's prior position statement. In addition, the Council moved to approve the recommendation of Debbie Kearney's group to amend Section 120.66(2) and (3) to apply to "presiding" officers, not just to DOAH "hearing" officers.

3. The Executive Council voted to reaffirm its prior position statement that the Model Rules adopted by the Administration Commission should preempt conflicting agency rules, unless the Administration Commission grants a specific exemption.

4. Bill Williams moved to approve position #4 which states, "Upon agreement of the parties or for good cause shown, a Hearing Officer should be permitted to extend the time for conducting a rule challenge hearing, not to exceed an additional 30 days. This should apply to challenges of both proposed and existing rules." Bill Williams' motion was to approve this recommendation with the deletion of the provision "not to exceed an additional 30 days." The motion was adopted.

5. Upon motion of Bill Williams, the Executive Council disapproved recommendation #5 relating to the APA setting out an explanation of the hierarchy of agency rules/model rules/rules of civil procedure.

6. The Executive Council asserted that it already has approved voluntary summary procedures, but deferred comment on alternative dispute resolution for later.

7. Upon motion by Cathy Lannon, the Council unanimously voted to approve the proposal that appellate courts be allowed to consolidate the review of cases which had been consolidated for final hearing regardless of whether they were filed in more than one District Court of Appeal.

8. Bill Williams moved, and the Council unanimously voted, to disapprove the recommendation that the many filings that must accompany the rulemaking process be consolidated.

9. Upon motion of Johnny Burris, the Council unanimously voted to disapprove entitling Chapter 120 "The Pat Dore Administrative Procedure Act."

10. As separate comments on the proposal regarding alternative dispute resolution, the Council voted to assert that mediation should be voluntary only, and that it would oppose any mandatory mediation. Furthermore, the Council moved to support voluntary mediation at any stage in a proceeding, and this was adopted unanimously. As to whether a provision for availability of mediation should be in the Administrative Procedure Act, Cathy Lannon moved and the Council unanimously voted to support such a position.

IV. Other APA Issues

A. The Council narrowly defeated a motion to repeal the requirement that Hearing Officers rule on each proposed finding of fact.

B. Senate Bill 536 (relevant pages attached)

1. John Newton moved, and the Council voted, to oppose the provision on page 32, lines 18 and 19 of Senate Bill 536, that the Agency has the burden to prove the validity of the rule as to the objections raised.

2. As to page 32, lines 12 - 14, which provides, "When any substantially affected person seeks determination of the invalidity of a proposed rule pursuant to this section, the rule is not presumed to be valid or invalid," Bill Williams moved, and the Council voted, to support the position that a proposed rule is not presumed to be valid or invalid. Johnny Burris clarified that this position related only to *proposed* rules.

3. John Newton moved, and the Council voted, to oppose the shifting of the burden of proof on existing rules to the agency. This proposal at issue is set forth on pages 59 at lines 8 and 9. Cathy Lannon moved to delete subsection (6) which is set forth on 59 at lines 3-5, and provides, "When any substantially affected

person seeks determination of the invalidity of a rule pursuant to this section, the rule is not presumed to be valid or invalid." This was unanimously adopted.

C. Bid Protest. The Council agreed that in the future it needs to discuss the provisions relating to bid protests.

V. Miscellaneous

A. Judge Kahn of the First District Court of Appeal will be invited to address the Council at the January 12, 1996, meeting.

B. The Board of Governors has approved the Section's legislative proposals.

Minutes

Administrative Law Section Executive Council Meeting November 13, 1995, Tallahassee

I. Call to Order

The meeting was called to order by Section Chair Linda M. Rigot.

Members present: Bill Williams, Cathy Lannon, Dan Stengle, Steve Pfeiffer, Johnny Burris, Ralf Brookes (by telephone), Dave Watkins (by telephone) Mary Smallwood (by telephone), Carol Forthman.

Others present: Jackie Werndli.

Members excused: Bill Hyde, John Newton, Floyd Self, Betty Steffens.

II. Chair's Report

Jim Rossi, the new Florida Administrative Law professor at FSU has applied to become this Section's first affiliate member. In addition, Bob Rhodes is working with the Dean's office at FSU to set a date for a joint reception for Professor Rossi to be held at the law school.

Recently approved lobbying positions have been forwarded to The Florida Bar for review. They will be considered by the Board of Governors at its December meeting.

The Citizen's Commission on Cabinet Reform has recommended to the Governor and Cabinet several changes of interest to the Section. Among these are placing responsibility for the Model Rules with the Department of Management Services, and authorizing the appointment of the DOAH Director by the Governor for a term of 4 years.

III. Review Of the Governor's Technical Working Group Revisions Of Chapter 120

A. The purpose of this revision of Chapter 120 was to "simplify" without making substantive changes. Some provisions are misplaced in the current law, and some reorganization is necessary because of the way legislative amendments occurred over the last several years. The draft of the Kearney Committee's effort was sent to the Section for review by Bob Rhodes, Chair of the Governor's Commission on APA Reform.

B. The Council recommends that the exception in proposed §120.50(3) at page 2 be returned to be included in the definition of "agency." This proposed exception would apply to the Governor in the exercise of executive powers derived from the Constitution.

C. At page 5, the Council recommends that the agency also be required to index all recommended orders as well as final orders.

D. At page 10, the Council recommends that the following language be added back to proposed Section 120.54(1)(f) ". . . and shall be preceded by a concise statement of the purpose of the rule and reference to the rules repealed or amended."

E. The Council recommends that on page 25, the provision relating to 120.56(1) be amended to clarify that it applies to rules *or* proposed rules. This should be done by adding to the title of (1) at the end "or proposed rule" and by adding to (a), "any person substantially affected by a rule *or a proposed rule* . . . ."

F. On page 27, the Council recommended that the provision relating to (4)(a) be amended so that instead of saying "shall show that the statement constitutes a rule under s. 120.52(15)," it would state "shall *state with particularity facts sufficient to* show that the statement constitutes a rule under s. 120.52(15) . . . ."

G. "As for the proposed revision to section 120.565 set forth on page 28, the Council voted to delete "statement" from the provisions of (1) and the words "agency statement" in (2). Insertion of a provision for "statement" greatly alters 120.565 and is, therefore, a substantive change. The Executive Council takes no position for or against the substantive change at this time, but opposes it being included as a procedural change.

H. Similarly, on page 29, there is another substantive change wherein the draft adds a time limit of 60 days; the Council so notes that it is a substantive change. The Council did vote to support the change if the time frame were changed to 90 days.

I. On page 30, the Council points out that the deletion of provision d. is a substantive change. On the merits, the Council recommends retaining the provision in d. with the exception that the lead-in language, "Except for any hearing before an unemployment compensation appeals referee" be deleted.

J. On page 33, the Council opposes the changes to (e) and recommends going back to the original language.

K. On page 34, the Council notes that the deletion of item 12. is a substantive change, but the Council does support that substantive change as good policy.

L. As to (1)(c) of 120.595 on page 37, the Council recommends a substantive change by amending the introductory language to state, "In proceedings pursuant to s. 120.57(1), *and upon motion* . . . ."

M. As to the proposed repeal of 120.63 on pages 41-42, the Council noted that the repeal is a substantive change. On the merits, due to a diversity of opinions, the Council took

continued...

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no position.

N. On page 43, the Council noted that the deletion of "full time" and "may be" in (4) and the deletion of (6) are substantive changes. However, the Council does support the substantive changes.

O. The Council recommends that the reference to a specific appellate rule be deleted, leaving the more general statement, "Subject to the Florida Rules of Appellate Procedure. . . ." Similarly, in (5) on page 46, the Council recommends deletion of the reference to a specific rule.

P. As for the change to subsection (7) on page 47, the Council recommends that the word "may" should be changed to "shall" in order to conform with current law.

Q. On page 50, there are significant changes to section 120.72. First of all as to the matters being deleted because of being obsolete, the Council recommends that the reviser put the language being deleted in a footnote or make a reference to Laws of Florida. As for the provisions in subsection (2), the Council supports the first sentence of that provision which states, "the intent of the legislature in enacting this comprehensive revision of chapter 120 is for greater clarity and readability." However, Council members had a problem with the wording of the second sentence. The Council could not at the time come to a decision as to what the wording should be, but suggested that further work be done on that language.

IV.

The next meeting of the Executive Council of the Administrative Law Section will be held from 8:30 to 11:30 a.m., on January 12, 1996, at the mid-year meeting in Orlando at the Hilton at Walt Disney World Village.

Minutes

Administrative Law Section Executive Council Meeting, October 18, 1995, Tallahassee

I. Call to Order

Section Chair Linda Rigot called the meeting to order.

Members present: Cathy Lannon, Carol Forthman, Bill Hyde, John Newton, Steve Pfeiffer, Michael Ruff, Betty Steffens, Diane Tremor, Dave Watkins, Ralf Brooks, Johnny Burris, Kathy Castor, Mary Smallwood

Others present: Richard Donelan, Bob Downie, Jackie Werndli

II. Minutes

No minutes were presented.

III. Announcements

The Governor's Administrative Procedure Revision Commission is scheduled to meet on November 16 and December 14 of 1995 and on January 11 and February 8 of 1996. Donna Blanton, who is on loan from a private law firm, will serve as staff to the Commission.

IV. Ideological and Legislative Position on APA "Reform"

Betty Steffens, John Newton, and Bill Hyde prepared a draft statement of positions on APA reform for consideration by the Executive Council. The Council reviewed and discussed the proposal line by line, word by word, and adopted the Administrative Law Section Ideological and Legislative Position on APA "Reform." The final text of that position is attached and incorporated by reference into these minutes.

The Council discussed The Florida Bar's process for approval of legislative lobbying positions and agreed to seek an expedited review by other Sections of our positions. The Sections and Divisions to be consulted are Appellate Practice; Environmental and Land Use Law; General Practice; Health Law; Government Lawyer; Labor and Employment Law; Local Government Law; Out-of-State Practitioners; Public Interest Law; Real Property, Probate, and Trust Law; Workers Compensation; Young Lawyers; and Trial Practice.

V. Miscellaneous

There is a problem finding a location for the scheduled Administrative Law in a Nutshell CLE. If there is a need to change the date, the steering committee will do so and report to the Executive Council.

Up and coming...

April 25, 1996	"Administrative Law Overview" Florida State Conference Center, Tallahassee
	Pat Dore Day Reception FSU College of Law, Tallahassee
April 26, 1996	Executive Council Meeting The Florida Bar, Tallahassee
May 20, 1996	"Administrative Law in a Nutshell" Florida State Conference Center, Tallahassee
June 21, 1996	Executive Council/ Section Annual Meeting Buena Vista Palace, Orlando

FROM THE CHAIR
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advisability of presumptions concerning the validity of proposed and existing rules and in whose favor the presumption should be cast. The Commission has also considered the controversial requirement of Section 120.535, Florida Statutes, that agencies adopt rules when feasible and practicable. At the Commission's request, the Executive Council also considered and made recommendations on specific amendments contained in Committee Substitute for Committee Substitute for Senate Bill 536 passed during the last legislative session but vetoed by the Governor. The Executive Council also recommended passage of the simplified version of the APA, prepared by the Governor's Technical Working Group on Chapter 120. The simplified version reorganizes the current APA, removes redundancies and obsolete language and provisions, and makes the language gender neutral and less legalistic.

At the January meeting, the Executive Council approved additional legislative positions in opposition to recommendations by the Citizens Commission on Cabinet Reform. The three additional positions oppose changes to the status quo and urge that the Director of the Division of Administrative Hearings (DOAH) continue to be appointed by the Administration Commission (Governor and Cabinet) and confirmed by the Senate, that the Administration Commission remain responsible for the Model Rules of Procedure, and that the Administration Commission continue to appoint the hearing officer to preside in any Chapter 120 proceedings in which DOAH is a party. The Citizens Commission on Cabinet Reform would give the appointing authority to the Governor and the responsibility for the Model Rules to the Department of Management Services. The Section's official lobbying positions that no changes be made in these three areas have now been approved by the Board of Governors of The Florida Bar.

Larry Sellers has agreed to fill the vacancy on the Section's legislation committee. He, Betty Steffens, and Bill Hyde certainly have a broad assignment during this year of extensive potential amendments to the APA.

The "Administrative Law in a Nutshell" program for the Section's affiliate members and other non-lawyers working with, or just interested in, the APA has been postponed to the afternoon of Monday, May 20, 1996, in Tallahassee. The program committee recommended the delay to be able to include in the presentations information on any changes made to the APA by this years legislature. Similarly, the Section will offer practitioners an additional CLE seminar this year, if necessary as a result of amendments to the APA during this legislative session.

The Section's "Administrative Law Overview" CLE seminar remains scheduled for the afternoon of April 25 in Tallahassee, to be followed by the ceremonies at F.S.U. Law School for the formal establishment of the Section's Pat Dore Endowed Professorship. On the following morning, the Executive Council will again meet.

Coincidental with the potential for substantial changes to the APA and in the way the executive branch of government engages in decision-making as a result of both legislative and executive branch forces, the Judicial Management Council of the Supreme Court of Florida has begun long-range/strategic planning for the purpose of generating ideas about what the state court system should look like in the next 20-25 years. Participants at the February 1-2 Workshop were divided into eight focus groups in the areas of family courts; organization and administration of the courts; criminal courts; probate, guardianship, and mental health law; the public; administrative law; appellate courts; and civil courts. I was honored to be in the focus group on administrative law, and Section Chair-elect Bill Williams was in the focus group on appellate courts. Any possible changes to the practice of administrative law flowing from the judicial branch are unpredictable at this time.

A listing of the Section's officers and Executive Council members, together with their addresses and telephone numbers, appears in this issue of the newsletter. (I know I told you it was in the last issue.) As a benefit of the delay, the names, addresses, and telephone numbers of Section committee chairs have been added. Please let us know if we need to focus additional efforts in any area to better meet your interests and needs.

The Florida Bar Administrative Law Section will present

ADMINISTRATIVE LAW IN A NUTSHELL

on Monday, May 20, 1996
at the
Center for Professional Development, Tallahassee

This seminar will address basic administrative law principles and practice and any recent legislative amendments to the APA.

The half-day seminar will also offer a question and answer session and background material.

Public officials, persons dealing with state and regional agencies and school boards, and attorneys will not want to miss this one.

For more information, contact:
Bob Rhodes: 904/222-2300
or
Jackie Werndli: 904/561-5623

Mark your calendars for May 20, 1996!

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

Administrative Law Overview

COURSE CLASSIFICATION: INTERMEDIATE

April 25, 1996
Florida State Conference Center,
555 W. Pensacola Street, Tallahassee, FL

Course No. 7567R

LECTURE PROGRAM

12:30 p.m. - 1:00 p.m.
Late Registration

1:00 p.m. - 1:05 p.m.
Opening Remarks

1:05 p.m. - 2:05 p.m.
1996 Legislative Issues in Administrative Law
Robert M. Rhodes, Tallahassee
Richard T. Donelan Jr., Tallahassee
William E. Williams, Tallahassee

2:05 p.m. - 2:45 p.m.
Governing Boards and Water Supply: Water Management District Administrative Law
Edward B. Helvenston, Brooksville

2:45 p.m. - 3:00 p.m. **Break**

3:00 p.m. - 3:30 p.m.
Effective Practice Before the Public Service Commission
Noreen S. Davis, Tallahassee

3:30 p.m. - 4:00 p.m.
Effective Practice Before the Department of Business and Professional Regulation
Lisa S. Nelson, Tallahassee

4:00 p.m. - 4:30 p.m.
Administrative Law for Environmental Litigators
Daniel H. Thompson, Tallahassee

4:30 p.m. - 5:00 p.m.
Public Interest Group Representation in Administrative Law Cases
Terrell K. Arline, Tallahassee

Please join us after the seminar for the

Pat Dore Day Reception

FSU College of Law — 5:30 - 7:30 p.m.

A special thanks to our reception sponsor

Radey, Hinkle, Thomas & McArthur

DESIGNATION PROGRAM
Sunsets 6/30/96
(627 So.2d 480)

CLER PROGRAM
(Maximum Credit: 4.5 hours)
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CERTIFICATION PROGRAM
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Appellate Practice: 2.5 hours
City, County, Local Government: 4.5 hours
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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 last course presentation. Registration fees are non-transferrable. A $15 service fee applies to refund requests.

Register me for "Administrative Law Overview" Seminar
April 25, 1996, Florida State Conference Center (053)

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