ADMINISTRATIVE LAW SECTION

NEWSLETTER

Vol. IV, No. 1 APRIL-MAY 1982 THE FLORIDA BAR

Chairman's Notes

As chairman of the Administrative Law Section, it gives me great pleasure to introduce the first issue of the Administrative Law Section newsletter.

I hope that you will find the newsletter to be a valuable aid in staying abreast of important administrative law developments. Among the regular features of the newsletter will be a summary and discussion of important recent cases and regulatory developments. In addition, the newsletter will report on upcoming section activities, and will soon be providing a state agency directory.

On behalf of the membership of the section, I would like to thank all those whose efforts have made this project possible, particularly Dru Bell, the editor of the newsletter. I would also like to invite your participation in the newsletter and other Administrative Law Section activities, and I welcome your comments and suggestions.

Leonard A. Carson
Chairman, Administrative Law Section
February 1982

ANNOUNCEMENT:

The Florida Bar's Administrative Law Section has recently formed a Committee on Insurance. The committee's work will focus on the public regulation of insurance and in particular regulation by the Florida Department of Insurance. All members of The Florida Bar are invited to serve on this committee. The initial meeting of the committee will be held soon. Persons interested in actively participating in the committee's work should contact Mitchell B. Haigler, P.O. Box 1876, Suite 701 Lewis State Bank Building, Tallahassee, Florida 32302, 904/222-0720.

Administrative Trial Advocacy Seminar

On February 13, 1982, at the Tampa Marriott Hotel, Professors William Eleazer and Jonathon Alpert of Stetson University College of Law demonstrated the finer points of administrative trial skills to approximately 30 attorneys by critiquing the attorneys performing in the various administrative trial roles. Through the National Institute of Trial Advocacy's approach, specific instruction was provided in how to get objects and photos admitted into evidence and how to cross examine as well as when not to cross-examine. The participants were provided with three actual administrative law situations, and the attorneys' performances showed that they already possessed solid administrative trial advocacy skills. Through the instruction of the Stetson professors and the participation of experienced attorneys, this program was beneficial to all attorneys present, regardless of their level of administrative law experience.

Administrative Law Conference

In late April or early May, an Administrative Law Conference, modeled after the Administrative Conference of the United States, is planned for Florida, to be held in Tallahassee.

The purpose of the conference is to review the success or failure of the Administrative Procedures Act, review the administrative process in Florida and examine proposed changes to the APA. The goal is for a cross-section of those who work with the APA to constitute the group attending, including administrators, academicians and the general public.

This conference is a major project of the Administrative Law Section and it is hoped that this becomes an ongoing process of review of the APA. David Cardwell is coordinating this project for the section.

Recent Case Summary

compiled by Paul Watson Lambert

Licensing Application:

Standing of Competitor to Intervene in Licensing Application

Agrico Chemical Co. v. Dept. of Environmental Regulation, etc., ___ So.2d ___ (Fla. 2nd DCA 1981), 6 FLW 2203:

F.S. 120.52(10)(b) does not by itself give standing to a petitioner objecting to issuance of a license to another competitor in a license application proceeding. The protesting petitioner must demonstrate how the petitioner's substantial interests would be affected in the outcome of the proceeding by showing (1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a §120.57 hearing, and (2) that a substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury and the second with the nature of injury. In showing the nature of the injury, the protesting petitioner must show that the nature of the injury is one protected under the statute governing the license application.

Licensing — Application Denial — Deemed Granted for Failure to Meet Time Limits

World Bank, et al. v. Lewis, et al., ___ So.2d ___ (Fla. 1st DCA 1981); 6 FLW 2435:

The court overruled an order of the Department of Banking and Finance denying a bank charter application for failure to approve or deny the application within the 180-day time limit set forth in F.S. 120.60(4)(c).

The court also found that time limits for considering bank charter applications set forth in department rules were not complied with. The application was slightly complicated by requests for hearing on the application by the department itself and another bank objecting to the application, which requests were eventually withdrawn. It is important to note that the hearing officer could have extended the application time limits for good cause, but in this instance there was no request for such an extension and none was granted. It is also important to note that the department requested additional information from the applicant which was not found to be a waiver or a tolling of the running of the time limits prescribed in the department rules for consideration of such applications.

License Applications — Agency Consideration of Recommended Order— Stare Decisis

Hopwood & Knorr v. DER, ___ / ___ (1st 81) 6 FLW 1840:

DER application: DER indicated no modification possible to make an application proper, but endorsed certain modifications and gave notice of intent to deny; subsequent .57 hearing requested; hearing officer found project acceptable with certain modifications; DER adopted findings of fact but rejected conclusions of law and denied application.

Consideration of recommended order: DER took inconsistent position in rejecting recommended order in that DER changed its position of prehearing endorsement of certain modifications and ignored previous permit application grants where hearing officer had recommended modification similar in the manner in this case. Court found DER inconsistent position and ignoring of previous practice improper and reversed and remanded for entry of an order consistent with hearing officer.

Stare decisis: Agency reversed for failure to follow previous practice and orders. Agency action constituted abuse of discretion.

See "Cases", page 4

Nonperformers Eliminated

At the Executive Council meeting on February 13 in Tampa, Chairman Leonard Carson announced that committee chairmen and council members who have not shown an active interest in the section will be removed.

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

Leonard A. Carson ..... Chairman
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Michael I. Schwartz ..... Chairman-elect
Tallahassee

R. Y. Bob Patterson ..... Secretary
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Tallahassee

Betty Erekson ..... Section Coordinator
Tallahassee

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The Florida Bar Administrative Law Section Executive Council Meeting

February 13, 1982
Tampa Marriott, Tampa, Florida

Chairman Leonard A. Carson called the meeting to order at 12 noon, and welcomed special guest **President-elect James A. Rinaman, Jr.**

The treasurer reported that the Board of Governor's Budget Committee has recommended a 60-hour cap on CLE courses. **John Alpert** reported that this may not affect the Administrative Law Section in that attendance at section CLE courses remains about the same regardless of the number of courses presented. **David Cardwell** commented that the cap only applies to CLE courses and to workshop.

COMMITTEE REPORTS:

Ben Girtman - Regulated Utilities Committee: Chairman Ben Girtman stated that a report of his committee pertaining to the Administrative Code will be mailed out to all section members.

Chairman Mitch Haigler - Insurance Committee: Chairman Haigler reported that the seven members of his committee have been active and the committee is progressing though it is still in its organizational stage. The committee has been successful in obtaining a commitment from Department of Insurance attorney **Edward Kutter** to write an article pertaining to the rewrite of the Insurance Code for The Florida Bar *Journal*, Administrative Law Section. Chairman Carson observed that for the first time, every issue of the Bar *Journal* during the past year has had and will have an Administrative Law Section article published.

Environmental Law Liaison Committee: There was no report from this committee presented.

Chairman Paul Lambert - Legislation Committee: Chairman Paul Lambert presented a summary and status report of all bills pending in the legislature pertaining to Chapter 120. A copy of a written summary is available from Betty Ereckson, Section Coordinator. The council directed Chairman Lambert to express support for the concept of SB 613 pertaining to rule adoption time periods for agencies, but further directed Chairman Lambert to communicate the council's feelings that such a bill should be postponed until the next legislative session so that the bill language can be improved and strengthened.

Chairman Carson reinforced the council policy that committee chairmen who do not abide by Executive Council meeting attendance requirements will be removed. Betty Ereckson, Section Coordinator, was directed to keep Chairman Carson advised of unexcused attendances by committee chairmen.

Special Committee Projects:

Administrative Law Conference - Chairman David Cardwell requested and obtained approval for appointment of **Paul Lambert** as cochairman to assist Chairman Cardwell. Chairman Cardwell reported that the concept of the conference has been settled and progress for establishment of the conference and a two-day meeting planned for late April or early May is well underway. The conference will have as its theme a broad prospective view of how the APA is working with discussion of specific points pertaining to the APA. The conference meeting will be held in Tallahassee. The Executive Council approved reimbursement to Chairman Cardwell for travel expenses incurred in conjunction with the conference work.

Discussion next ensued pertaining to the newly adopted rules of admission to the U.S. Northern District Court which, generally, require a certain amount of trial experience or examination passage for continuance or eligibility to practice before the court. The new rules, which have a deadline for meeting the requirements of June 30, 1982, will have a substantial adverse impact on section members who have an active administrative hearing practice with little opportunity to meet the trial experience requirements in courts of record. In light of intentions by the Florida Government Bar Association to petition the Northern District Court chief judge to change the rule to allow for trial experience credits for administrative hearings, the Executive Council directed Chairman Carson to meet with the chief judge to ascertain its position on changing the admission rule to allow administrative hearing experience. Upon discerning the judge's position, Chairman Carson is to report to the Executive Council for further discussion and decision. Chairman Carson was directed to present the council's position to the Florida Government Bar Association at its meeting of February 18.

The Next Executive Council Meeting - The council moved and approved moving the next

See "Minutes", page 10

Statutory Interpretation:

Legislative Delegation of Authority to Agency — Statutory Construction

Simmons v. Division of Pari-Mutuel Wagering, etc., ___ So.2d ___ (Fla. 3d DCA 1981); 6 FLW 2612:

The Third DCA was called upon to rule upon a circuit court ruling on the validity of a statute generally prohibiting the racing of animals with any drug, medication, etc., *or any substance foreign to the natural horse or dog* and authorizing the divisin to adopt rules implementing and interpreting the statute. The statute was attacked on the basis of (1) constituting the taking of property without just compensation, (2) an invalid exercise of police power because not rationally related to the purpose of regulating racing, (3) an improper delegation of legislative authority to the division and (4) the statute is so vague as to invite arbitrary application. The trial court rejected the attacks and the appellate court affirmed in part and reversed in part.

The court found that the legislature has a great authority to regulate pari-mutuel wagering and found a valid exercise of state police powers in prohibiting racing under the influence of drugs. However, the court found that portion of the statute prohibiting racing with any substance foreign to the natural horse or dog to be arbitrary and unreasonable to the point that it could prohibit beneficial as well as detrimental substances. Accordingly, the court struck that portion of the statute as unconstitutional, the remaining portion as valid.

As to the improper delegation of legislative authority to the division to adopt rules, the court found that because of the nature of the gambling regulation, the legislature has a broader delegation of authority to the division to make rules and regulations for the control of pari-mutuel activities. Accordingly, the court did not find that the statute improperly delegated authority to the division. It is interesting to note that the court did not preclude challenges to rules adopted by the division implementing the statute which do not reasonably accomplish the purposes of the Act.

Gulf Stream Park Racing Association, Inc. v. Divisin of Pari-mutuel Wagering, etc., ___ So.2d ___ (Fla. 3d DCA 1981); 6 FLW 2608:

The Third DCA reversed the agency order denying Gulf Stream a permit to engage in quarter horse racing, which denial was based upon, in pertinent part, the agency's nonrule policy interpretation of the statute under which the permit was applied for.

The agency concedes that all statutory criteria for the permit had been met but asserts that the permit must be used within one year based upon the agency's interpretation of the permitting statute. The court disagreed. Though the court recognizes case authority allowing agencies to engage in nonrule policy interpretation of statutes, the court stated that this latitude does not permit an agency to interpret a statute in a manner which is not readily apparent from a reading of the statute.

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Harrison to Publish Hardbound Administrative Code

The Harrison Publishing Company will have available after March 31, 1982, the Florida Administrative Code Annotated in nine hardbound and three softbound volumes. The hardbound volumes will contain the rules, final orders, annotations and Attorney General opinions. The softbound volumes will contain the general index and tracing tables. Annual pocket part supplements will keep Code up to date between annual supplements.

In addition to annotations, the new code will provide editorial notes to list agency forms pertinent to rules, pending rulemaking and possible invalidity or unconstitutionality of specific rules. The General Index is a comprehensive index of the annotated Code. The new Code will also have a Historical Tracing Table volume which provides a list of all rules implemented or given statutory authority by each statute.

The cost of the initial Code set will be $495 and $149 will pay for annual supplement service consisting of annual and quarterly supplements to the Code and an annual revision of the General Index volumme. The price of the biennially revised tables volumes has not yet been determined.

(Information for this article was gathered by Ben Girtman and Randy Schwartz.)

The court did not find that the agency's nonrule interpretation was readily apparent from reading the statute and refused to give that interpretation effect.

The agency adopted a rule incorporating its nonrule policy interpretation but the court refused to allow the rule to be retroactively applied to Gulf Stream, especially when the rule did not appear to be supported by the statute.

Subseuqnetly, the legislature amended the statute to incorporate the agency's nonrule and rule interpretation that the permit must be used within one year of the date on which it is granted. However, the court failed to find a clear legislative intent that the statute, as amended, could be applied retroactively. Therefore, the court refused to allow the statute to be retroactively applied to Gulf Stream and reversed the permit denial and remanded the case to the agency to grant the permit under law existing at the time of application.

License Hearings:

Licensing — Disciplinary Hearings — Use of Evidence

Adams and Ward v. State of Florida, Professional Practices Council, ___ So.2d ___ (Fla. 1st DCA 1981); 6 FLW 2435:

While chasing a suspected vandal, a policeman cut through a backyard and stopped to inquire of two people seen in a greenhouse, the door of which was open. The two people were teachers Adams and Ward. While inquiring of the suspected vandal the policeman noticed 52 marijuana plants in the greenhouse and later seized them without a warrant.

The teachers were charged and found guilty of acts involving moral turpitude resulting in an order revoking their teaching certificates or licenses.

The court affirmed the revocation finding that the warrantless seizure of the plants clearly fell within the "plain view" exception to search warrant requirements allowing the marijuana evidence as properly admissible in administrative revocation proceedings. The court also rules that teachers are held to a different and higher standard of moral turpitude than other professional licensees because of teachers' leadership capacity which is traditionally held to a high moral standard in a community.

The court also found that evidence admitted in the record indicating that the teachers received widespread newspaper publicity in their county showing that many people were aware of the facts involved was substantial to show that the teachers had lost their effectiveness as teachers.

Licensing—Informal Hearings, Entitlement to Formal Hearing

Cohen v. Department of Professional Regulation, Board of Optometry, ___ So.2d ___ (Fla. 3d DCA); 6 FLW 2407:

Licensee requested an informal hearing on charges contained in an administrative complaint seeking to suspend or revoke his license. Board of Optometry conducted informal hearing and after finding licensee guilty as charged suspended his license for three months, imposed a $2,500 fine and placed licensee on probation for three years.

Licensee requested informal hearing by completing an "election of rights" form attached to the administrative complaint, which gave licensee a choice of disputing the alleged facts entitling a formal hearing or not disputing the alleged facts and requesting an informal hearing before the board. Licensee appealed the board action arguing that issues of fact were disputed during the informal hearing requiring the board under F.S. 455.225(4) [1979] to terminate the informal hearing and refer the matter to DOAH for a formal hearing.

The court upheld the board action finding that the licensee at no time withrew his "elections" form and presented matters in mitigation of the charges rather than disrupting the alleged facts.

License Discipline — Agency Burden of Proof To Show Scienter Of Violation — Hearing Officer's Authority

Golden Dolphin No. II, Inc., etc. v. State, Division of Alcoholic Beverages and Tobacco, ___ / ___ (Fla. 5th DCA 1981), Case No. 79-1611/T4-675, September 30, 1981; 6 FLW 2137:

Discipline against liquor licensee for obscene dancing: court found hearing officer correct in finding licensee's knowledge of obscene show, based upon customer testimony of witnessing alleged activity occurring on several previous occasions. Wheree shows a persistent or recurring activity, the factfinder may infer that licensee had knowledge.

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Court found, since charge involved one requiring application of community standards, that because a hearing officer does not have the community standard knowledge of a local trial jury, and since agency failed to present evidence on subject of community standards, the agency failed to prove activity was obscene; in other words, there was insufficient evidence to support finding of obscenity.

Court affirmed licensee's knowledge of activity, reversed finding of obscenity and remanded for resentencing in light of lesser number of violations.

License Penalties

License Revocation—Repeal of Requirement by Informal Conference Held Prior to Probable Cause Finding

Bruner v. Board of Real Estate and Department of Professional Regulation, ___ So.2d ___ (Fla. 5th DCA 1982); 7 FLW 301:

F.S. 120.60(6) [1979] required agencies to offer "informal conferences at which the licensee would be afforded the opportunity to demonstrate compliance with licensing requirements" prior to instituting an administrative complaint to discipline a licensee. See *Sheppherd v. Florida Dental Board,* 385 So.2d 143 (Fla. 1st DCA 1980). The Fifth DCA interpreted this provision further in *Pilcher v. Peeples,* 402 So.2d 1290 (Fla. 5th DCA 1981) to require the informal conference to be held before probable cause was found.

F.S. 120.60(6) was amended in 1981 to delete this requirement. The 5th DCA in this case interpreted that 1981 amendment as a statutory change which is procedural in nature and concluded it applied retroactively.

Therefore, instances in which an agency initiated license disciplinary proceedings without affording the informal conference prior to a probable cause finding no longer are effective.

Licensing — Revocation — Judicial Review of Penalty — Waived Challenges

Harnett v. Department of Insurance, ___ So.2d ___ (Fla. 1st DCA 1981); 6 FLW 2447:

A licensee of the Department of Insurance was charged with several violations of the Insurance Code and a formal hearing before DOAH ensued. The hearing officer entered an order sustaining two of several counts in the administrative complaint and recommending a license suspension for a period of six months. The Insurance Commissioner adopted the hearing officer's findings of fact and conclusions of law, but rejected the hearing officer's recommended penalty and instead ordered the license revoked. The licensee appealed and the court reversed and remanded the matter to the hearing officer to prepare an amended order in light of the court's.

The licensee argued that various reports demanded by the department were not required under the licensing statute. However, the court found that because the licensee had voluntarily complied with various department informal requests to file certain reports, the licensee waived any challenge to those particular reports that they were not statutorily required. As to other statutes with which the licensee was charged, the court, recognizing their penal nature, stated that they must be strictly construed and cannot be given a meaning beyond that suggested by the words used. Apparently, the department's final order did not clearly set out the factual premises and reasoning upon which its actions were based to facilitate judicial review of the final order.

The court concluded that the hearing officer's recommended penalty was based upon an erroneous interpretation of the statutes and the hearing officer failed to rule on the applicability of a statutory paragraph with which the licensee was charged. This constituted a basis for the court to reverse the final order and remand the matter to the hearing officer to submit an amended order in light of the judicial opinion.

Licensing — Requirement of Final Order Denying Reinstatement to Set Forth Appropriate Findings and Conclusions in Absence of Rule

Katz v. Florida State Board of Medical Examiners, ___ So.2d ___ (Fla. 1st DCA); 6 FLW 2253:

Court reversed and remanded order of Florida State Board of Medical Examiners denying petition for reinstatement of a revoked license, because order failed to set forth sufficient findings of fact or conclusions of law explicating agency reasons in absence of rules establishing guidelines for the reissuance of licenses.

Where an agency has opted not to establish guidelines for a particular proceeding, the agency is required to make specific findings of

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fact and state the policy reasons supporting the agency action. Court interpreted a common provision found in licensing statutes of professions within the Department of Professional Regulation requiring licensing boards to establish guidelines by rule for disposition of disciplinary cases, such as found at F.S. 458.331(4). The court found this requirement to be not mandatory but requires specific finding and conclusions setting forth policy reasons supporting the agency action in absence of such rules.

Licensing—Grounds for Revocation

Beck v. Insurance Commissioner and Treasurer, ___ So.2d ___ (Fla. 1st DCA 1981); 6 FLW 2254:

Agency revoked license where licensee was serving probation for a felony conviction. Agency interpreted licensing statute to require revocation; however, statute did not state that revocation for conviction of a felony is either automatic or mandatory. Court vacated the order of revocation and remanded to the agency for a redetermination of suspension or revocation since the court could not determine the extent to which the apparent erroneous interpretation of law constrained the agency's decision.

Licensing — Authorized Penalties

McFarlin v. State, Department of Business Regulation, etc., ___ So.2d ___ (Fla. 3d DCA 1981); 6 FLW 2332:

Court vacated a portion of agency order imposing a fine and other disciplinary action upon a licensee where agency statute did not authorize agency to levy such a fine or impose the other vacated penalty. Court relied upon Article I, §18, Fla. Constitution: no administrative agency shall impose a sentense of imprisonment, nor shall it impose any other penalty except as provided by law.

Injunctions:

Agency Injunction Against Unlicensed Entity

Adoption Hotline, Inc. v. HRS, ___ / ___ (3d 81) 6 FLW 1877:

An agency injunction against unlicensed entity must be as limited as possible to prevent a violation of licensing law unless showing that a more limited injunction would be ineffective to preserve governmental interests expressed in licensing law.

Circuit Court Authority to Enjoin Administrative Hearings

Department of Professional Regulation v. Fernandez-Lopez and Division of Administrative Hearings, ___ So.2d ___ (Fla. 3d DCA 1981); 6 FLW 2605:

DCA reversed circuit court preliminary injunction against State Board of Medical Examiners enjoining board from conducting a disciplinary hearing against a licensee for failure to provide notice prior to the institution of agency proceedings as required by F.S. 120.60(6) [1979].

Court reversed because:

(1) requisites for preliminary injunction were not properly pled,

(2) the licensee objected to the way in which the statute was applied rather than attacking the statute as facially unconstitutional,

(3) the licensee failed to timely raise the denial of compliance with the statute until 16 months after administrative action was initiated thereby waiving the challenge and

(4) the issues were such that they could be raised during the administrative hearings subject to judicial review.

The court states in a footnote its reliance on *Rice v. DHRS,* 386 So.2d 844 (Fla. 1st DCA 1980), that a licensee is free to develop and present to the district court any constitutional claim if he is ultimately aggrieved by agency action and the district court may consider and dispose of such on judicial review. The opinion does not mean to suggest that circuit court jurisdiction is unavailable to parties aggrieved by prospective or pending agency action where there is no adequate remedy at law or where the action is based upon facially unconstitutional rules or statutes.

Discovery — Hearing Officer Has No Authority to Impose Sanctions for Discovery Violations

Great American Bank, Inc. et al. v. Division of Administrative Hearings, etc., et al., ___ So.2d ___ (Fla. 1st DCA); 6 FLW 2514:

On review of a nonfinal DOAH hearing officer order requiring testimony of certain witnesses, requiring the production of documents and imposing sanctions for the failure to comply with the order, the court held that a hearing officer has no authority to impose sanctions to enforce a discovery order. The proper method of enforcement of a discovery order under F.S. 120.58(3) is by filing a petition for enforcement in circuit

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court pursuant to F.S. 120.69. The circuit court can make a determination of whether the testimony and documents are privileged, and if not, the sanctions to be imposed for the petitioner's failure to comply with the order.

Orders:

Agency Reversal Of Recommended Order

Kout et al. v. Department of Professional Regulation, Board of Real Estate, ___ So.2d ___ (Fla. 3d DCA 1981), Case No. 80-1927; 6 FLW 2176:

Court on judicial review reversed agency order, remanding with directions to dismiss proceedings, where hearing officer recommended dismissal of charges but where board reversed on grounds that findings of fact established violation of statute justifying suspension of license. On judicial review, court found agency determination completely incorrect and substituted conclusions of law unsupported.

The decision seems to place an increasing burden on the agency to justify in final orders reversal of hearing officer's conclusions of law.

Exceptions to Recommended Orders — Pleading Requirements

Adult World, Inc., etc. v. State of Florida, Division of Alcoholic Beverages & Tobacco, ___ So.2d ___ (Fla. 5th DCA) 6 FLW 2589:

A major point on appeal was the agency's failure to rule specifically on submitted exceptions to a hearing officer's recommended order. The court interpreted Model Rule of Procedure 28-5.405(3) and previous case law holding that an agency's omission to rule specifically on exceptions may impair the fairness and correctness of its action or may prevent judicial review of the matter or the failure to explicitly rule on proposed findings of fact may impair the fairness of the proceedings or the correctness of the action justifying remand on judicial review.

The court in this case, however, found that

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STATE AGENCY DIRECTORY INFORMATION

If you have not completed the state agency information request form or can provide the requested information on another state agency, please do so below.

YOUR NAME _____

AGENCY NAME _____

Service: Name Title Phone No.

Meetings: _____
Hearings: _____
Public Information: _____
Rulemaking: _____
Complaints: _____
Investigation: _____
Licensing & Certification: _____
Rate Approval: _____
Examination: _____

Return to:
Administrative Law Section
Attention: Betty Ereckson
The Florida Bar
Tallahassee, Florida 32301

the appellant did not suggest that the fairness or correctness of the proceedings may have been impaired by the agency's failure to rule explicitly on its exceptions nor was it factually demonstrated that the exceptions were relevant. The court stated that it is incumbent upon an appellant to demonstrate that the agency's conclusion that an exception is irrelevant is incorrect.

Agency Orders — Time to Appeal

Cagan v. Board of Real Estate, etc., ___ So.2d ___ (Fla. 5th DCA 1981); 7 FLW 84:

An agency order is rendered when filed with the clerk of the agency and time for filing notice of appeal or judicial review begins to run from filing date even though order by its own term states that it becomes effective after date of filing. Filing of exceptions to agency final order does not affect appeal time.

Public Records — Public Employees Grievance Records Not Protected By Right of Privacy Amendment

Mills & Schrimsher v. Doyle, ___ So.2d ___ (Fla. 4th DCA 1981); 7 FLW 69:

Grievance record pertaining to public employees are public records under Chapter 119, F.S., and not protected by "Right of Privacy" amendment to Florida Constitution [Article I, §23]. A contract between a public employee's bargaining unit and a governmental agency exempting grievance records from Chapter 119 is invalid.

Rules:

Agency Employee Discipline/Non-Rule Policy

Smith v. School Board of Leon County, ___ / ___ (1st 81) 6 FLW 1904:

Employee discipline charges: charge of misconduct in office or gross insubordination upheld by hearing officer based upon definition of terms in a rule inapplicable to defendant. Court found rules inapplicable but used them by analogy to show that even if applicable defendant was not guilty as charged.

Penal in nature: Court found loss of back pay of suspended employee penal as is a serious penalty; required high standard of proof to prove charges.

Discipline grounds: A single incident does not give rise to "gross insubordination" and probably can be used to argue that a single incident does not give rise to "gross anything."

Nonrule policy: Court recognizes that high standard of proof required in *Bowling v. Insurance*, 394 So.2d 165, applicable to adjudicative rather than legislative facts such as in nonrule policies, but recognizes that if such legislative facts are reasonably susceptible to some kind of proof the agency should offer evidence in support of them or an explanation why the missing legislative facts were not susceptible to conventional proof. Here agency made no effort to support either legislative or adjudicative facts or explain why they could not be proved and court found that agency could not establish a nonrule policy defining the vague terms of misconduct in office or gross insubordination by nonrule policy based upon the record.

Reversal of Agency Action Based On Invalid Rule

Department of Transportation v. James, ___ So.2d ___ (Fla. 4th DCA) Case No. 79-2247, 9-9-81; 6 FLW 2001:

The Fourth DCA reversed agency action based upon an agency rule which improperly enlarged the agency's authority beyond the authority delegated by statute, citing *Florida Grower's Coop Transport v. Department of Revenue*, 273 So.2d 142 (Fla. 1st DCA), *cert. den.* 279 So.2d 33 (Fla. 1973). The decision reinforces the doctrine that an agency may not enlarge its own jurisdiction or powers by rule.

Rulemaking — Invalidity — Economic Impact Statement Requirements

State, Department of Health and Rehabilitative Services v. Framat Realty, Inc., et al., ___ So.2d ___ (Fla. 1st DCA 1981); 6 FLW 2439:

Pursuant to a rule challenge under F.S. 120.56, a DOAH hearing officer found a DHRS rule invalid on two grounds: (1) the rule exceeded its statutory authority and (2) the supporting economic impact statement was inadequate.

The court reversed the hearing officer's finding that the rule exceeded statutory authority but affirmed the invalidity of the rule based upon an inadequate economic impact statement.

The rule, generally, defines the term "acre" for purposes of allowing permissible number of septic tanks per acre under a statute providing no more than four lots per acre with septic tanks. The rule defines the term "acre" as excluding lands devoted to common uses

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and bodies of water, which definition results in a "not useable acre" which is smaller than what is commonly known to be an "acre."

The court reasoned that the department's interpretation of the statute was one of several permissible interpretations resulting from public hearings during which affected persons had the opportunity to participate fully. The court's decision sets forth a summary of cases outlining when an agency is required to adopt rules as opposed to elucidating its policies and statutory interpretations through nonrule policy. The court explains that when an agency has responded to rulemaking incentives and has allowed affected parties to help shape the rules they know will regulate them in the future, the judiciary must not overly restrict the range of an agency's interpretative powers. Permissible interpretations of a statute must and will be sustained, though other interpretations are possible and may even seem preferable according to some views. If the rule binds too tightly to suit affected parties, then the affected parties have their proper remedy in the representative and politically responsive branches of government, the legislative or executive, but not in the judiciary nor by F.S. 120.56 rules challenges before hearing officers.

The court did uphold the hearing officer's finding that the economic impact statement required by F.S. 120.54(2) was inadequate justifying invalidation of the rule.

The affirmance of the invalidation of the rule based upon the economic impact statement was without prejudice to the department's reconsideration of the rule in an F.S. 120.54 proceeding.

The dissenting opinion points out a conflict as to the reversal of the hearing officer's invalidation of the rule based upon exceeding the scope of the substantive statute as found in *State, Department of HRS v. McTigue*, 387 So.2d 454 (Fla. 1st DCA 1980). In *McTigue*, the court addressed a situation where a statute used the ordinary word "physician," and the department, via a rule, added the requirement that the physician must be a *Florida* physician. The dissent points out that under *McTigue*, the department had no authority to redefine the word "physician" and in this case the department could not have the authority to redefine the word "acre."

Administrative Law Legislation

SENATE BILLS

738 - prohibits rule adoption except where legislature has passed a specific statute relating to the specific subject matter of the rule.

921 - provides that neither prisoners nor parolees are parties for the purpose of appellate review under F.S. 120.68.

613 - provides that agencies shall file rules for adoption at six-month intervals under schedules set out in the bill, with exception for emergency rulemaking.

219 - requires identification on proposed rule of person in agency who approves.

245 - requires Department of State to furnish state libraries with copies of Administrative Code.

HOUSE BILLS

155 - prohibits rule adoption which requires additional expenditure by local government unless sufficient funds are appropriated therefor by legislature.

981 - conforms APA to changes in parole and probation statutes relating to temporary revocation of parole or probation.

House Joint Resolution 3 - provides for amendment to constitution authorizing legislative rule veto.

MINUTES, cont'd.

council meeting from April 17 to March 19, at 3:30 p.m., Tallahassee.

FURTHEREST THE COUNCIL SAYETH NOT.

Respectfully submitted,
Paul Watson Lambert
Acting Secretary

Do you know someone who should be a section member?

Please give them the membership application on the next page.

Articles Sought For Newsletter

The section would like to make the newsletter an informative and useful document. In order to do this we need your help and assistance.

We like to publish in the newsletter significant and interesting cases decided at the administrative level or on appeal; however, we need your help to do this. Please complete the attached information form relating to any case(s) you have been involved with or know of which you think would be of benefit to other administrative lawyers and submit it to me.

Please let me know also if you have any information or articles that you would like to have published in the newsletter.

Style of Case: _____

Case Number, Date and Court: _____

Name and Addresses of Attorneys: _____

_____

Summary and Legal Significance of the Cae: _____

_____

_____

_____

_____

Please attach a copy of the final judgment or order and, if available, pertinent pleadings and memoranda.

I would be interested in writing an article for the newsletter on the following subject:

Name: _____

Address: _____

City/State/Zip: _____

Send all materials and information to:
Administrative Law Section
Ms. Betty Ereckson, Coordinator
The Florida Bar
Tallahassee, Florida 32301

MEMBERSHIP APPLICATION

Enclosed is my check in the amount of $15 for membership in the Administrative Law Section. (The $15 dues are nonrefundable if you should cancel your course registration.)
PLEASE USE A SEPARATE CHECK FOR SECTION DUES.

NAME _____ ATTORNEY NO. _____

ADDRESS _____ CITY _____

(YOUR MEMBERSHIP IN THIS SECTION EXPIRES JUNE 30, 1982.)

THE FLORIDA BAR

Tallahassee, Florida 32301

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