ADMINISTRATIVE LAW SECTION

NEWSLETTER

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First Annual Administrative Conference is a Big Success!

The Administrative Law Section sponsored First Annual Florida Administrative Conference was a tremendous success!

The conference, first proposed by Section member David Cardwell of Lakeland two and one-half years ago, brought together over thirty representatives from the judiciary, legislature, state agencies, local government, private bar and public to discuss important issues of administrative law from different perspectives.

The conference addressed the harmless error doctrine applied to agency actions on judicial review, non-rule policy, the Division of Administrative Hearings and judicialization of the administrative process.

After informative presentations by Stephen Babcock, Executive Director of the United States Administrative Conference, Stephen Marc Slepin and Jonathan Alpert on directions administrative law may be taking, the conference participants met in workshops and plenary sessions for vigorous debate over the next one and one-half days.

A conference report and transcript of proceedings will soon be available for distribution to law schools, libraries, the Legislature, agencies, administrative law section members and interested persons.

The success of the First Annual Administrative Conference insures future conferences at which important administrative law issues will be debated and aired.

The Second Annual Administrative Conference will be held again at the Florida State University Conference Center which provided an outstanding environment for intellectual and practical discussions.

The Public's Right to Know—Have They Found Its Price Too Dear?

by Deborah J. Miller*

Through its enactment and perpetuation of Chapters 119, the Public Records Act and 286, the "Sunshine Law", the public has long guarded its right to know the business which its government is about. Although these laws have likely achieved their underlying purpose—to render the governmental process more open and honest through the scrutiny of its citizenry—they have also constituted a mighty sword for the government's adversary in litigation. Potential or actual litigants have utilized these provisions to obtain materials which would otherwise be exempt from disclosure as falling within the attorney-client privilege or as constituting work product. The public body, on the other hand, must gather what it may through the civil rules pertaining to discovery—rules which preclude it from obtaining this same information from its adversary.

Our courts have sought to balance the policies underlying the open government laws with the needs of the public entity client to obtain meaningful legal advice, to protect the public coffers from excessive or unwarranted claims and to protect the interests of its citizenry. In so doing the courts have left an entangled mass of case authority, at least as it relates to the Sunshine Law, which has left most confused and few satisfied. Some who are seeking to untangle the web are now asking themselves: "Did the public signal to us in 1979 that they have found the price of their right to know too dear?" Because there was no sounding of horns to herald its occurrence, were the governmental entities unaware that our voters had in fact stripped its actual or potential liti-

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gation adversaries of a portion of their superior rights? Our district courts and, on the federal level, the eleventh circuit, stand poised to answer the first question. If that answer is in the affirmative, it appears that the public entities have indeed been largely unaware of one of the most important impacts upon their litigation-related conduct—the conferring upon them of an attorney-client privilege.

Our Supreme Court has steadfastly held that exceptions to the Public Records Act must arise from legislative enactments, not through judicial creation. Thus, in *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979), the court rejected an argued exception of records from Chapter 119 under the common law attorney-client and work product doctrines. Nine days after the Supreme Court's denial of rehearing in *Wait*, Chapter 90, Florida Statutes, The Florida Evidence Code became effective. Accordingly, the attorney-client privilege was statutorily embodied.[1]

Most significantly, section 90.502(1)(b), Florida Statutes, defines a "client" to include "any person, public officer . . . or other entity, either public or private." The question of whether this enactment conferred upon the public entity client an unqualified attorney-client privilege quietly arose in Leon County, Florida. On November 20, 1979, Circuit Judge Ben C. Willis ruled that materials sought from the Department of Education were privileged pursuant to Section 90.502, Florida Statutes, and thus exempt from the Public Records Act. The District Court of Appeal, First District, affirmed without opinion.[2] Circuit courts in Dade, Pinellas and Hillsborough counties have reached a contrary result based upon varying theories. The most used rationale is that Chapter 90 applies only to the admissibility of evidence in judicial proceedings and has no bearing upon the rights of the public under Chapter 119. Because these acts arguably serve different purposes, it cannot reasonably be said that the Evidence Code was intended to create an exception to the Public Records Act.

The simplest argument of the claimed exemption's proponents is that such a narrow view of Chapter 90 would render its attorney-client privilege meaningless. Of what value is this privilege if the governmental entity's communications with its attorney are protected only in the courtroom? If the adversary possesses knowledge of the government's authorized settlement figure, the potential for an unnecessary drain on the public coffers has been created. What does it matter that this information might be inadmissible under one or more of the Evidence Code's provisions? The proponents argue, instead, that Chapter 90 must be read in harmony with Chapter 119. Such reconciliation requires that the latest expression of the legislative will, that public entities possess an attorney-client privilege, be given effect. This conclusion is largely based upon the Supreme Court's decision in *Tribune Company v. School Board of Hillsborough County*, 367 So.2d 627 (Fla. 1979), where a special law enacted subsequent to the Sunshine Law permitting private teacher disciplinary proceedings was held to constitute an exception to Chapter 286. This was so, concluded the court, despite the absence of a specific reference to or amendment of Chapter 286 in the special law.[3]

Among our higher tribunals, the United States District Court for the Middle District has spoken first to the claimed exception to the Public Records Act. In *City of Tampa v. Titan Southeast Construction Corporation*, 535 F. Supp. 163 (M.D. Fla. 1982); *appeal docketed*, No. 82-5634 (11th Cir. May 21, 1982), the court simply concluded that Chapter 90's attorney-client privilege satisfied the *Wait* requirement of a legislatively-created exception to Chapter 119. For the same reason —the fact that the work product privilege is not statutorily codified—the district court rejected a contention that public entities also enjoy a work product protection. This decision is presently on appeal to the Eleventh Circuit.

The remaining cases dealing with the Public Records exception fall into two primary categories: those on remand from the Third District and those on a second appeal in the Third District following a remand by that tribunal.[4] In *Donner v. Edelstein*, 415 So.2d 830 (Fla. 3rd DCA 1980), the circuit court denied mandamus relief to an adversary seeking the city's litigation files and other records pertaining to her suit against the City of Miami. The lower court found that the attorney-client privilege constitutes an exemption from Chapter 119 and denied relief as to "those documents which are subject to the . . . privilege." The Third District reversed and remanded on June 22, 1982 for an in camera inspection to determine what documents fall within the privilege found. In so doing, the district court judicially expanded the in

camera inspection provisions of section 119.07(2), Florida Statutes, which requires such an inspection only of confidential law-enforcement and similar materials. The statute is silent with respect to other types of documents as to which a privilege is claimed.[5]

In *Tober v. Sanchez*, 417 So.2d 1053 (Fla. 3rd DCA 1982), decided on July 27, 1982, the district court expressly rejected a work product exception to the Public Records Act. The court declined to decide whether an attorney-client exception to Chapter 119 exists because the records sought would not be privileged in any event. The importance of this opinion, however, lies in the court's hint as to its view of the substantive argument which it has yet to decide:

> We would be less than candid if we did not acknowledge that, as the present case demonstrates, public agencies are placed at a disadvantage, compared to private persons, when faced with potential litigation claims. It is also pertinent to observe that the wisdom of such a policy resides exclusively within the province of the legislature.

Id. at 1055.

In *Miami Herald v. City of North Miami*, Case No. 81-2735, 7 F.L.W. 2240 (Fla. 3rd DCA, Oct. 19, 1982), the district court implicitly acknowledged its expansion of the scope of section 119.07(2)'s in camera inspection provision. In reversing and remanding the denial of mandamus relief without such an inspection, the district court noted that since the order was issued prior to the *Donner* decision and order on remand, "it understandably does not comply with the procedural requirements set out by those decisions for the determination of such issues in the trial court." *Id.* As it had in *Tober v. Sanchez, supra*, the *Herald* court rejected a work product exception.

Whether Chapter 90 has created an exception to the Sunshine Law is currently awaiting resolution by the Third District as well. Given the confusing body of case law regarding this issue, it is no wonder that it was necessary for attorney Tobias Simon to assume the task. While declining to open litigation files to public inspection, resulting in the *Miami Herald* case, Tobias also boldly announced a private meeting between himself and his city council client. The stated intention was to discuss pending litigation as to which the City was a party, with a focus on the parameters of proposed settlements. In conjunction with this proposed action, the City passed a resolution providing for a "watchdog" committee composed of media, state attorney and other representatives who would be required to keep confidential all matters discussed in the restricted meeting except for deviations from the published litigation agenda. The resolution further provided for the taping of the meeting, the contents of which would become public record upon resolution of the litigation.

In an action for declaratory and injunctive relief filed by Janet Reno with intervention by the Miami Herald, the circuit court concluded that these discussions and deliberations between the city and its attorney constitute preliminary discussions and not "official acts" or "formal action" which may occur only in a public meeting.[6] The court so ruled relying upon *Bassett v. Braddock*, 262 So.2d 425 (Fla. 1972). In light of both its predecessors as well as its progeny in the Supreme Court, it appears that *Bassett* merely stands for the proposition that the Sunshine Law may not apply to deny a Constitutional right. Thus, the *Bassett* court held chapter 286 inapplicable to discussions between a school board and its labor counsel because to do otherwise would deny the constitutional right to collectively bargain. This interpretation of *Bassett* is bolstered by the Supreme Court's decision two years later in *Town of Palm Beach v. Gradison*, 296 So.2d 472 (Fla. 1974). There, public meetings of a town Zoning Commission's advisory board were required to be in the sunshine "to prevent the crystallization of secret decisions short of ceremonial acceptance" at a later public meeting where formal action is taken. It surely will be argued in the pending appeal in the Third District that the settlement discussions in *Reno* involve just that crystallization. It is

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

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equally as certain that the city will argue that even if these are official acts under *Gradison,* they should fall within the narrow exception created by *Bassett;* that is, that the city council's constitutional right to effective assistance of counsel will be abridged absent private meetings with their attorney with respect to litigation matters. The volley continues, and it seems that the Third District Court of Appeal will call the play. It may simply resolve the Sunshine Law question—as it resolves the Public Records issue—through asking itself: "Did the public decide in 1979 that public entities should have the same status as other clients?" Certainly if their attorney-client communications are confidential they would retain that status whether written o verbal.

If the public has indeed decided that the price for its unfettered right to know was too dear, only the passage of time will reveal the impact that this change will have upon the integrity of the governmental process.

FOOTNOTES:

[1]There was no codification of the common law work product privilege. Although this privilege has been argued as an exception to Ch. 119 in each of the cases later discussed, it appears to lack viability due to the absence of statutory codification required by *Wait.*

[2]Aldredge v. Turlington, 378 So.2d 127 (Fla. 1st DCA 1980).

[3]Both Ch. 119 and Ch. 286 have been similarly construed due to their common underlying purpose. Krause v. Reno, 366 So.2d 1244 (Fla. 3rd DCA, 1979).

[4]A petition for common law writ of certiorari is pending in the District Court of Appeal, Second District, seeking review of a Hillsborough County circuit court discovery order. This order required the Hillsborough County Aviation Authority to release work product materials to a party opponent. However, the trial judge held that chapter 90 protected attorney-client privileged materials from discovery. *See* Hillsborough County Aviation Authority vs. Azzarelli Const. Co., Inc., *petition docketed,* No. 82-2519, (Fla. 2d DCA Nov. 8, 1982).

[5]In an order on Donner's motion following remand, the district court directed the circuit judge to segregate and seal both the documents which he finds fall within the privilege and those which do not. The circuit has not entered an order as of March 7, 1983.

[6]State ex rel. Janet Reno, et al. v. Howard Neu, et al., No. 82-10744 CA 30 (Dade Cty. Cir. Ct., Nov. 4, 1982).

Deborah J. Miller was an aide to Justice Alan C. Sundberg of the Supreme Court of Florida from 1977 to 1979. From 1979 to 1982 Ms. Miller was Assistant General Counsel to the Department of Professional Regulation, assigned to prosecute for the Board of Medical Examiners and Board of Dentistry. Ms. Miller acted as Counsel for the City of North Miami in Miami Herald v. City of North Miami *in the Third District Court of Appeal, on behalf of the law firm of Tobias Simon.*

Ms. Miller is currently in private practice in Coral Gables, Florida, specializing in appellate practice and administrative law relating to professional licensure matters.

Administrative Conference of the United States Plenary Session

by Jeffrey Lubbers,
Acting Research Director,
Administrative Conference

The twenty-fourth plenary session of the Administrative Conference of the United States, held on July 17-18, 1982, with Chairman Loren A. Smith presiding, was one of its most productive sessions ever.

The Conference approved five recommendations and one statement of views. The full texts are set forth in the *Federal Register,* volume 47, page 3701.

In Recommendation 82-1, the Conference approved, in slightly modified form, a proposal that was recommitted at its last session calling on Congress to amend exemption (b)(4) of the Freedom of Information Act, 5 U.S.C. §552(b)(4). The proposed amendments would (1) modify the definition of confidential business information to increase the scope of protection from disclosure afforded by the exemption; (2) eliminate agency discretion to disclose such information, except where the agency finds that withholding it would injure an overriding public interest; (3) strengthen agency obligations to notify submitters of requests prior to any disclosures; (4) provide improved informal agency procedures for resolving disputes between requesters and submitters; and (5) provide for judicial review of agency decisions to disclose material claimed to be within exemption (b)(4).

This recommendation is generally consistent with the recent resolution on the Freedom of

Information Act co-sponsored by the Section and adopted by the ABA House of Delegates last winter that was the subject of Thomas M. Susman's article in the *winter-spring* edition of this *Newsletter*.

The Conference next adopted Recommendation 82-2, a much-needed prescription for resolving disputes under federal grant programs. Based on a government-wide study by consultant Ann Steinberg, this recommendation emphasizes informal procedures for many disputes but also gives guidance as to when more formal procedures are appropriate.

On Friday morning the Conference engaged in a highly spirited debate over a proposed recommendation of its Committee on Judicial Review reacting to, and largely opposing, pending bills to amend the venue statutes applicable to suits against the government. In adopting Recommendation 82-3, the Conference approved the committee's position. The recommendation states that Congress should not amend the statutes governing venue in district court actions against the government, 28 U.S.C. §§1391(e), 1404(a), or the statute governing direct review of agency orders in the courts of appeals, 28 U.S.C. §2112(a), to make the extent of local impact determinative of proper venue. The recommendation does, however, urge Congress to amend such statutes to require notice to state attorneys general of actions having a particular impact on their states and to allow intervenors in actions to request transfers of venue. Finally, it urges that Congress review existing statutes providing for venue exclusively in the District of Columbia Circuit individually rather than enact a provision overriding all of them.

Several members of the Conference filed a formal dissent from this recommendation and expressed their support for pending legislation, S. 2419, that would establish "local impact" as the key determinant in venue decisions.

After disposing of the unusually controversial topic of venue, the Conference moved to the more soothing, but quite engaging topic of regulatory negotiation; the editor's separate article on this subject contains an extensive discussion of the substance of the Conference's Recommendation 82-4.

The fifth recommendation, "Federal Regulation of Cancer-causing Chemicals" was the culmination of a voluminous study by consultant Richard Merrill, and the Committee on Interagency Coordination, chaired by Owen Olpin. The lengthy Recommendation 82-5 suggests a comprehensive set of techniques and procedures for use by the several agencies involved in the regulation of carcinogens. The following subject areas are discussed: priority setting, interagency coordination, chemical selection and guidelines for testing and evaluation, advisory panels, generic rulemaking, quantitative assessment of risk, and public participation.

Finally the Conference adopted a statement of its views . . . on the proposals pending in Congress to amend the informal rulemaking provisions of the Administrative Procedure Act. The statement, drafted by the Committee on Rulemaking, carefully scrutinizes each of the specific changes in the informal rulemaking provisions of the APA that would be wrought by the two major pending omnibus regulatory reform bills, S. 1080, H.R. 746.

Further information on these matters is available from Sue Boley or Jeffrey Lubbers at the Conference, (202) 254-7020.

—Submitted by James Linn

Section Activities

The Florida Bar Annual Convention
Walt Disney World
The Contemporary Resort Hotel
June 15-18, 1983

Thursday, June 16

12 - 1:30 p.m.	Joint Luncheon with the Local Government and Environmental & Land Use Law Sections
2:00 - 5:00 p.m.	Executive Council Meeting
5:30 - 6:30 p.m.	Joint Reception with the Local Government and Environmental & Land Use Law Sections

Recent Case Comments

by Paul Watson Lambert

Agency Estoppel—Agency Modifications Of Hearing Officer's Recommended Order — Agency Signing of Final Orders

Westchester General Hospital v. DHRS, 419 So.2d 705 (Fla. 1st DCA 1982):

First DCA reversed HRS Order after HRS had modified a hearing officer's recommended findings of fact and conclusions of law and recommended disposition.

Agency Modification of Findings of Fact: An agency is bound by a hearing officer's recommended findings of fact where they are based on competent substantial evidence and susceptible to ordinary methods of proof. However, an agency may modify a hearing officer's proposed findings of fact without filing with itself exceptions to the hearing officer's recommended order.

Signing of Agency Final Order: This case seems to suggest that the person in an agency who signs an agency's final order must have statutorily delegated authority to do so.

Equitable Estoppel: The First DCA applied doctrine of equitable estoppel against HRS in reversing the HRS final order.

Exhaustion Of Administrative Remedies — Constitutional Challenges to Rules or Statutes—Inverse Condemnation Circuit Court Remedies

Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Improvement Trust Fund, et al., ___So.2d___ (Fla. 1982); 7 FLW 537:

This case is a review of the decision of the First DCA at 400 So.2d 66 (Fla. 1st DCA 1981) holding that an action in inverse condemnation, based on the denial of a dredge and fill permit by DER may not be taken in a circuit court until all remedies provided in Chapter 120, including an appeal to the appropriate DCA, have been exhausted. The Supreme Court approved in part and disapproved in part the decision of the First DCA and held that, under the facts of the case, Appellant Key Haven was required to exhaust all executive branch administrative remedies before instituting the circuit court action, but, under the specific circumstances of the case, would not have been required to seek direct review of the final executive branch action in the DCA. The decision should be reviewed for its complex factual situation. Generally, Key Haven decided not to seek a review of DER's Order denying a dredge and fill permit by appealing to the Board of Trustees of Internal Improvement Trust Fund pursuant to FS. 253.76 and by thereafter appealing to the DCA under F.S. 120.68. Instead, Key Haven filed suit in the circuit court alleging that the denial of the dredge and fill permit, although proper under the requirements of the applicable statute Chapter 253 and 403, constituted a taking of its property by inverse condemnation because the action totally denied the use of its property for any beneficial purpose and because the IIF trustees sold the submerged land in question to Key Haven's predecessor knowing the intent to dredge and fill the land. DER filed a motion to dismiss alleging the circuit court lacked subject matter jurisdiction, generally, for failure to exhaust administrative remedies.

The Supreme Court agreed with the First DCA that before Key Haven could use its permit denial as a basis for inverse condemnation claim, it was required to pursue a §253.76 appeal to the IIF. The Supreme Court disagreed with the DCA's conclusion that, upon an adverse ruling by the trustees, Key Haven's only option would be to exhaust administrative process delineated by Chapter 120 by seeking judicial review of the agency action in a DCA under 120.68. Court held that once an applicant has appealed the denial of a permit through all review procedures in the executive branch, the applicant may choose either to contest the validity of the agency action by petitioning for review in a DCA, or, by accepting the agency action as completely correct, seek a circuit court determination of whether that correct agency action constituted a total taking of a person's property without just compensation. The Court disagreed with Key Haven's contention that a party aggrieved by agency action is not in any way restricted in choosing a judicial forum in which to raise constitutional claims.

Constitutional Challenges To Administrative Action:

The Court recognizes three types of constitutional challenges in the context of the administrative decision making process of an executive agency. An affected party may seek

to challenge: (1) the facial constitutionality of a statute authorizing an agency action; (2) the facial constitutionality of an agency rule adopted to implement a constitutional provision or a statute, or (3) the unconstitutionality of an agency's action in implementing a constitutional statute or rule.

Facial Unconstitutionality Of A Statute: A circuit court may, in appropriate circumstances, entertain a declaratory action on a claim of facial unconstitutionality of a statute. However, that claim may be raised upon completion of the administrative process in a DCA on direct review of the agency action under F.S. 120.68. The Court rejected the view stated in Coulter v. Davin, 373 So.2d 423 (Fla. 2d DCa 1979), that a DCA does not have jurisdiction under F.S. 120.68 to overturn agency action because of the facial unconstitutionality of underlying statute because the court believes that it should approve a process that would allow all issues to be decided in the less expensive and time consuming manner. The court noted that once a party chooses one or the other alternative (circuit court or DCA), the party is foreclosed from proceeding with the alternative remedy.

Facial Unconstitutionality Of An Agency Rule: When challenging the facial unconstitutionality of an agency rule, the administrative proceedings must be exhausted and the claim presented to the District Court. The Circuit Court should not as a matter of policy entertain an action alleging the facial unconstitutionality of an agency rule because an adequate remedy remains available in the administrative process. [Previous judicial decisions have held that the facial unconstitutionality of proposed rules may be entertained by DOAH under F.S. 120.54 proposed rule challenges but facial unconstitutionality of an adopted rule may not be entertained by DOAH under F.S. 120.56. It is not clear whether the Supreme Court is saying that facial unconstitutionality of adopted rules may now be addressed in F.S. 120.56 hearings or whether the facial unconstitutionality of the adopted rule may be raised before DOAH and then entertained by the DCA upon judicial review under 120.68.]

Unconstitutional Application of a Rule or Agency Rule: A suit in circuit court requesting the court declare an agency's action improper because of an unconstitutional application of a statute or agency rule in the administrative process should not be allowed. The Supreme Court agreed with the District Court that the District Court sitting in their review capacity provide a proper forum to resolve this type of constitutional challenge because those courts have the power to declare the agency action improper and to require any modifications in the administrative decision making process necessary to render the final agency order constitutional. A party may, however, seek circuit court relief for injuries arising from an agency decision which the party accepts as intrinsically correct, as illustrated in this case.

The Court held that an aggrieved party must complete the administrative process through the executive branch and if the party does not wish to further contest the validity of the permitting or licensing denial in the administrative arena by seeking District Court review, the party may accept the agency action under the statute being implemented and subsequently file suit in circuit court on the basis that the permit or licensing denial was proper but resulted in an unconstitutional taking of the party's property.

LICENSING

License Application—Harmless Error Rule

World Bank et al. v. Lewis et al., ___So.2d ___(Fla. 1st DCA 82); 8 FLW 36:

Originally, World Bank applied to the Department of Banking & Finance for a license for a new bank, which application was not acted upon by the Department within the 180 day period set forth in F.S. 120.60(4), which provides, an application shall be deemed approved if not acted upon, properly, by the licensing agency. The First DCA at 406 So.2d 541 reviewed the application denial and held, as a result of the Department's inaction, the pending application was deemed approved by operation of F.S. 120.60(4)(c). The Court further stated that the Department may not technically approve an application and subsequently place insurmountable obstacles before the applicants which would keep the technical approval from having any practical relevance.

Harmless Error: The Court recognizes that there are cases holding that an agency's violation of mandatory statutory timeliness provisions does not necessarily require a reversal of agency action and summarize examples of such "harmless error" actions in footnote 3 of the opinion. However, the Court explained that those harmless error provisions are not analogous to the present case in that the

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statutes construed in those "harmless error cases" do not specify the consequences of a violation of mandatory statutory timeliness provisions. Whereas, F.S. 120.60(4)(c) makes clear that the consequence of a violation of the 180 day application provisions is that the application shall be deemed approved.

Professional License Suspension — Agency Reversal of Hearing Officer's Recommended Order

Bekiempis et al. v. Department of Professional Regulation, Board of Real Estate, ___So.2d ___(Fla. 2d DCA 1982); 7 FLW 2331:

Appellant was charged with violations of licensing statutes. Following a hearing, a hearing officer made findings of fact and conclusions of law that the administrative complaint containing the charges should be dismissed finding that either the evidence to support the charges was insufficient or that there was no intentional violation as alleged. The agency filed exceptions to the hearing officer's recommended order, accepting the hearing officer's recommended findings of fact but objecting to the recommended conclusions of law and recommendations of dismissal. The agency exceptions requested the agency to make supplemental findings of fact as to those areas in which the hearing officer did not make findings of fact and reject the recommended dismissals substituting a finding of guilt of the statutes as charged. The agency's final order rejected the hearing officer's recommended order to the extent that the findings of fact and conclusions of law were inconsistent with the agency's exceptions and adopted by reference the findings of fact and conclusions of law contained in the exceptions and rejected the recommended dismissals, imposing a finding of guilt of violation of the stated statutes as charged resulting in suspension of the professional license and a fine.

The Court had previously held in Lewis v. Department of Professional Regulation, 410 So.2d 593 (Fla. 2d DCA 1982) that an agency may not enter a conclusionary rejection of a hearing officer's findings without stating with particularity which findings are rejected and why. The Court went on to hold in this case that an agency may not avoid this requirement by adopting by reference supplemental findings which directly conflict with those of the hearing officer and then base the final order on the supplemental findings. The Court found that the agency below never stated with particularity which findings were not based on competent, substantial evidence but merely substituted its own findings by adopting exceptions, in effect taking another view of the evidence reargued by the agency. The Court vacated the agency's final order for violation of the particularity requirement of F.S. 120.57(1)(b)(9), and remanded with instructions to the agency to conduct further proceedings necessary to produce a final order consistent with the Court's opinion.

Repeal and Reenactment of Statute Effect on License Revocation Proceeding—Undefined Proscribed Conduct

Solloway v. Department of Professional Regulation & Board of Medical Examiners, ___2... (Fla. 3d DCA 1982); 7 FLW 2159:

Repeal and reenactment of statute: A statute that is simultaneously repealed and reenacted is regarded as continually in force where reenactment is substantially similar to repealed statute and both statutes proscribe the same implied conduct; only provisions omitted from reenactment are considered repealed. Court upheld revocation of medical license for violation of statute which had been repealed but substantially reenacted and charges brought after the reenactment of the statute.

Specifically Undefined Proscribed Conduct: Medical doctor was charged with sexual misconduct under repealed statute which was substantially reenacted. On appeal, medical doctor argued sexual misconduct was not clearly defined as proscribed conduct in repealed statute. Court stated that the alleged misconduct was supported by evidence in the record as being an obvious breach of conduct considered unprofessional in the medical professioin and contemplated by general language of the repealed statute. Decision seems to imply that in such instances a case by case determination of prevailing standards is permissible to be made by the agency in adjudicating charges alleging violation of generally worded statutes.

Agency Reversal of Hearing Officer's Recommended Conclusion of Law Which Is An Ultimate Finding

Smart v. Board of Real Estate, Department of Professional Regulation, ___So.2d___(Fla.

1st DCA 1982); 7 FLW 2195:

Smart petitioned for reinstatement of his previously revoked real estate broker's license. After a hearing, a hearing officer determined Smart rehabilitated and concluded that he had met his standard of proof set forth in the applicable statute for reinstatement. The agency head reversed the hearing officer's conclusion of law and found that sufficient time had not lapsed from the date of Smart's license revocation and petitioned for reinstatement. Agency head did not make a specific finding as to what constitutes a sufficient lapse of time.

Court reversed agency final order and remanded to the agency head for reconsideration of the hearing officer's order and rendition of a new final order setting out the agency's determinations and appropriately explaining them.

The Court explained that where ultimate facts include opinions infused with policy insights, the agency is required to explain its action. The Court found that the determination of whether sufficient time has lapsed since the license revocation is an ultimate finding which requires consideration of the underlying factual circumstances as gleaned from the transcript of the proceeding before the hearing officer and application of agency policy. Therefore, the agency could not have made its final determination without reviewing the record.

PUBLIC RECORDS

Computerized Public Records Access

Seigle etc. v. Barry etc., ___So.2d ___ (Fla. 4th DCA 1982); 7 FLW 2433:

This is a question of first impression. Appellees sought access to certain public records maintained on a computer under Chapter 119. The question involves whether there is a right under the Public Records Act to obtain information in a particular format when such information is maintained on a computer.

The information on a computer falls under Chapter 119 and, unless it is an exception to the Public Records Law, is as much a public record as a written agency document, available to the public for examination and copying in keeping with the Public Records Law.

As to pre-computer public records, the Court perceived that the public may not require information contained in public records to be made available for inspection and copying in a particular format. However, when confronted with computerized records the Court applies a different rule, accepting a cogent and telling argument for the proposition that within reasonable bounds information in a computer should be accessible through a program designed for a particular output format at the expense of the applicant. The information in a computer is analogous to information recorded in code. Where a public record is maintained in such a manner that it can only be interpreted by use of a code, then the code book must be furnished to the applicant.

The Court went on to adopt the following rule: access to computerized records shall be given through the use of programs currently in use by the public official responsible for maintaining the public records. Access by the use of a specially designed program prepared by or at the expense of the applicant may obviously be permitted in the discretion of the public official pursuant to §119.07(1). In the event or refusal of the public official to permit access in this manner, a circuit court may permit access pursuant to the same statutory restraints where:

1. Available programs do not access all of the public records stored in the computer's data banks; or
2. The information in the computer accessible by the use of available programs would include exempt information necessitating a special program to delete such exempt items; or
3. For any reason the form in which the information is proffered does not fairly and meaningfully represent the record; or
4. The Court determines other exceptional circumstances exists warranting this special remedy.

Declaratory Statements

San Souci v. Division of Florida Land Sales & Condominiums, etc., ___So.2d ___ (Fla. 1st DCA 1982); 7 FLW 2250:

Appellant sought review of a declaratory statement issued under F.S. 120.565 determining the rights of various condominium unit owners and appellant relating to exercise of a rent escalation clause. The Court found the agency with jurisdiction to interpret applicable statutes. The condominium unit owners requested the agency interpretation of the statutes as the statutes affected the issue and appellant was allowed to intervene.

continued . . .

Appellant contended the agency did not have authority to enter such a declaratory statement in that it effectively violated the constitutional prohibition against impairment of contractual obligations. The Court explained that it is well established that the mere assertion of a constitutional issue in the administrative arena should not excuse a failure to exhaust administrative remedies, finding that nothing in the record suggested that the court on judicial review would not be able to ultimately accord the appellant a determination of its constitutional rights. The Court found significant that Appellant had shown no reason for, nor even sought, circuit court intervention seeking a declaration of the agency's lack of jurisdiction to rule on the matter, or of the facial invalidity of the statute interpreted by the agency.

While the court upheld the agency's jurisdiction to issue the declaratory statement, the matter was remanded to the agency for further proceedings and clarification of matters underlying the agency determination.

Rulemaking — Standing To Challenge — Standing to Challenge School Board Rule-Making — Drawout Petitions — Rulemaking Workshop Notice — Judicial Review of Rulemaking Decision — Economic Impact Statements

Cortese, etc., et al. v. School Board of Palm Beach County, ___So.2d___ (Fla. 4th DCA 1982); 7 FLW 2517:

This case is a consolidated appeal from two orders of the School Board of Palm Beach County. The first closed an elementary school changing the boundaries for the children who had been attending it and the second denied appellants a formal hearing pursuant to F.S. 120.57(1). Appellants are two parents, individually as well as in behalf of their children and others similarly situated, the Mayor of the city in which the school is located and a resident of that city.

Standing to Challenge School Board Proposed Rulemaking:

The Court found the parents of the children attending the school to have standing administratively and judicially and found the non-parents/appellants not to have standing. The parents' standing was based upon School Board of Broward County v. Constant, 363 So.2d 859 (Fla. 4th DCA 1978), which should be compared and contrasted with School Board of Orange County v. Blackford, 369 So.2d 689 (Fla. 1st DCA 1979).

Entitlement To A Drawout Proceeding:

Appellants filed a petition for a formal hearing, but failed to file it timely and failed to plea the requirements set forth for entitlement of a "drawout hearing" in F.S. 120.54(16) and Chapters 28-3 and 28-5, F.A.C. Apparently, the Court considered failure to raise the statutory requirement to be a waiver of the requirements or a consideration that statutory requirements be moot. However, the School Board denied the petition, not on the untimely filing or the failure to plea the statutory requirements for such a hearing, but on lack of standing citing School Board of Orange County v. Blackford, supra, which the Court found to be the wrong issue to deny the petition for hearing in that the Court found the parents to have standing. Apparently, the proper ground to deny the petition was on the untimely filing and the failure to plea the statutory requirements. The Court found nothin record to have justified the granting of a "drawout hearing" even had the petition been timely filed or properly pled.

Effect Of Failure To Notice Workshop Meeting on Rulemaking:

The School Board failed to notice a workshop meeting during the proposed rulemaking process as required by F.S. 120.53(1)(d). Though there is a presumption of material error in proceedings for failure to comply with §120.53, the Court found that the presumption was overcome by the facts at hand and that the error did not occasion an unfair or incorrect decision in closing the schools and changing the boundaries. Apparently, important to the Court's reasoning is the wide publicity the proposed rulemaking action enjoyed and the "town meeting atmosphere" surrounding the rulemaking process.

Judicial Review of The Rulemaking Decision:

The Court was asked to review the merits of the decision of the School Board to adopt its rule in question. The Court refused to question the School Board's discretionary action in adopting the rulemaking action absent a showing of abuse of discretion.

Economic Impact Statements:

In footnote 12 of the opinion, the Court considered an absence of an economic impact

Minutes of Administrative Law Section Executive Council Meeting

January 27, 1983
Hyatt Regency, Miami

A meeting of the Administrative Law Section Executive Council was held Thursday, January 27, 1983 at the Hyatt Regency Hotel in Miami. Present were the following members: Michael I. Schwartz, Judy Brechner, Jonathan L. Alpert, J. Michael Huey, David E. Cardwell and William B. Barfield. Excused absent members were Paul W. Lambert, Leonard A. Carson, James W. Linn, Stephen Marc Slepin, George L. Waas and Ben E. Girtman. Committee Co-chairpersons present were Drucilla Bell, Deborah J. Miller and Cynthia S. Tunnicliff. Section Coordinator Betty Ereckson was present along with visiting member Robert D. Newell, Jr. and P. L. "Booter" Imhof.

OLD BUSINESS

1. **Chairman Mike Schwartz** reviewed his letter of December 15, 1982 to Michael J. McNerney of the Long Range Planning Committee. The letter conveyed the concerns expressed by consensus of the Executive Council at its November 15, 1982 meeting.

2. **Paul F. Hill's** response to the Section's apprehension regarding the publication cycle for its newsletter was reviewed. Mr. Hill stated his shared concern and related some success in tightening the traditional 60-day cycle. **Drucilla Bell** offered to communicate directly with Mr. Hill to see if any further measures might be undertaken to streamline the process.

3. A December 10, 1982 memorandum from **Stephen E. Nagin,** Chairman of the *Journal/News* Editorial Board, regarding *inter alia*, section columns was discussed. The Section is advised that it may submit a fifth article for publication if presented by April 20th. **Mr. Schwartz** noted that the Section has on hand a backlog of 7 or 8 unpublished articles which might readily lend themselves to update and resubmission. No shortage of salient and timely material was evidenced.

4. The Council discussed at considerable length the response of **President James C. Rinaman** to the Section's concern for Balkanization of its substantive law activities. **Mr. Alpert** obserbed that a broad misconception may have come about that the Section's sole interest is in the APA simply because that has, to some extent, been "where the action is." **Ms. Tunnicliff** noted that the emphasis of Section sponsored CLE programs can go far in demonstrating the breadth of Section interest and activity. A question was raised regarding the funding of *ad hoc* committee activities and the potential benefits that might enure to substantive law publication privileges through increased section membership. **Mr. Huey** and **Mr. Barfield** agreed to act as liaison to the Health Law and Communications Law Committees, respectively. **Mr. Schwartz** will continue his dialogue with **President Rinaman** and **David Kearns,** Section Liaison to the Board, as events warrant.

5. The Council deliberated the consequences of proposed *Florida Administrative Law Reports* rate restructuring and increases. Correspondence from the Florida Commission on Human Relations indicated that a proposed charge to agencies based upon the volume of orders published might cause that agency to cease publication of its actions in the FALR. The possibility that DOAH might face the same dilemma was raised. The continued relative value of FALR to the practitioner could be severely diminished and the ability of agencies to comply economically with the requirements of Section 120.53, F.S., could be jeopardized. The Executive Council takes no position on the need for restructured or increased publication rates. However, **Ms. Miller** offered to survey major agencies to determine which would continue to publish and index their actions through FALR. Mr. Alpert was invited to explore alternatives.

6. **Section Coordinator Betty Ereckson** distributed the December 31, 1982 Detail Statement of Operations of the Section. It was observed that the Section's expenditures to date are modest and leave the Section in sound position to sponsor the forthcoming "First Annual" Administrative Conference of Florida. **Special Project Co-chairperson David Cardwell** spoke to the projected expenses to be incurred. Two thousand dollars has been budgeted for the event, which is not sufficient to offer payment of travel expenses or honoraria to participants.

Further regarding the Administrative

continued . . .

RECENT CASES, cont'd.

statement in the rulemaking procedure to be harmless error since, apparently, the Court was of the opinion that the economics of the rulemaking decision was adequately considered in the rulemaking framework.

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MINUTES, cont'd.

Conference, **Mr. Cardwell** advised he expects the Chairman and the Executive Director of the Administrative Conference of the United States to attend. The dates are firm for February 18th and 19th in Tallahassee. Invitations have been extended. The tentative agenda was circulated. **Mr. Lambert** has made arrangements for a record to be composed of both the plenary sessions and the accompanying workshops. Preliminary discussion ensued regarding the "Second Annual" Conference.

7. The Council voted to express its support for reducing recently increased copy charges assessed by circuit courts, which charge includes preparation of the record for appellate review.

8. **CLE Committee Co-chairperson Ben Girtman** submitted a letter report. He wrote that by May 1, 1983 a list of program titles and subjects must be submitted. Committee members have been requested to submit their suggestions by February 14th. Views of the Executive Committee members and Section members were asked to be transmitted directly to **Mr. Girtman** by that same date.

Mr. Cardwell mentioned that the Section's CLE program for the Spring of 1984 remains untitled and will be dropped if not identified by May 1st. That program is to be hosted jointly with the Local Government Section.

The Council voted to postpone the 1983 Spring Seminar on Health Care Law from April 15 to May 13. Speakers for that program are now being scheduled.

The Council discussed the efficacy of increasing the CLE registration fee discount to Section members and whether a portion of the fee for non-members could be applied as a credit toward the annual Section membership fee. The Council concluded that a $10 discount would increase membership incentive and voted to commence whatever measures might be necessary to implement it.

Mr. Girtman's letter recommended the Section not sponsor independently a CLE seminar in conjunction with the Annual Meeting of The Florida Bar. Given the extension of the Spring program to May, and the numerous joint activities already planned, the Council agreed and so voted.

Finally, it was reported that the Budget Committee had proposed, and has now adopted, a change in Section retention of CLE proceeds from 10% of the gross receipts to a percentage of the net return. Purportedly, the measure is intended to encourage economy by the sponsoring section.

9. **Co-chairperson Cynthia Tunnicliff** advised that all Administrative Law Section activities at the Annual Meeting would be held on June 16th. A luncheon jointly sponsored with the Environmental Law Section will be set for 12:00, an Executive Council meeting at 2:00 p.m. and a reception at 6:00 p.m. The Council discussed means of better informing Section members of the location of the reception. Generally, the reception is held in the Chairperson's suite, which neither the hotel management nor The Florida Bar will commit to designate. However, if possible, the room number should be published in advance. In any event, a placard should be posted in the registration area.

10. **Co-chairperson Drucilla Bell** advised that the Section newsletter will be prepared for publication and release in early February. The newsletter will carry a State Agency Practice Committee article on the Florida Evidence Code's impact upon the Public Records Act and Sunshine Law.

The meeting was adjourned at 3:30 p.m.